आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"B JAIPUR

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवंश्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 349, 200 & 350/JP/2022
निर्धारण वर्ष/Assessment Year : 2016-17, 2017-18 & 2018-19

DCIT, Circle-6, Jaipur.	बनाम Vs.	Rajasthan Cooperative Dairy Federation Ltd. Saras Sankul, J.L.N. Marg, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAAAR 0278 A		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

राजस्व की ओर से/Revenue by: Shri Ajay Malik (CIT)
निर्धारिती की ओर से/Assessee by : Shri P. C. Parwal (C.A.)

सुनवाई की तारीख/Date of Hearing 31/01/2023
उदघोषणा की तारीख/Date of Pronouncement: 27/04/2023

आदेश/ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

These are three appeals filed by the assessee against the order of Nation Faceless Appeal Centre, Delhi (herein after referred to as 'NFAC") for the assessment years 2016-17 to 2018-19 all dated 23.03.2022 & 22.07.2022 respectively. As the issues involved in the present appeals are common and inextricably interlinked or in fact interwoven therefore, the parties argued them together and are disposed off by this common order.

2. As it is seen that for all these appeals grounds are similar, facts are similar and arguments were similar and were heard on the same day we consider the facts and ground taken in ITA No. 349/JPR/2022 for A. Y. 2016-17 and considering the said case as lead case.

3. For deciding these appeals, in ITA No. 349/JPR/2022 for the A.Y. 2016-17 following grounds have been raised by the assessee:

> *"1. Ground "whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition of Rs. 40,594/- on account of prior period expenses."*
>
> *3. . Ground "whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the disallowance of Rs. 2,65,591/- us 36(1)(va) r.w.s. 2/24(x) on account of delayed payment of employees contribution towards PF & ESI."*
>
> *3. Ground "whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition made by AO and holding that the come received from investments made with Cooperative Bank are eligible for deduction us 80P(2)(d) of the IT Act, 1961 and thereby allowing relief to the extent of Rs. 4,33,45,363/-.*
>
> *4. Ground the appellant craves its rights to add, amend or alter any of the grounds on or before the hearing."*

4. The brief facts of the case are that the return in this case was filed on 28.09.2016 declaring a total income of Rs. 15,59,720/-. The case was selected

under manual compulsory scrutiny. Notice U/s 143(2) was issued on 26.09.2017, which was duly served upon the assessee. In response to the statutory notices issued during the proceedings, details were submitted from time to time. The assessee is an apex body which is responsible for development of dairy business in Co-operative sector in the State of Rajasthan. The society is mainly performing the functions related to production, marketing and development of milk products.

5. In the aforesaid order, the AO issued notice to the assessee and re-adjudicated the matter. The relevant part of the assessment order is reproduced as under:-

Issue no.1

"According to accounting policy regularly followed, assessee is required to account for expenses in the year in which it is incurred. By following the accounting policy adopted by the assessee company, provisions for expenses were required to be made for respective years, but the assessee failed to do so thereby charging these expenses in current assessment year. In this regard the assessee company filed only vague reply and no such engagement letter, nature of work done, outcome of such work, proof of getting work completed during the relevant assessment year was produced for verification. Each year is a self-contained Period in regard to which profit or loss to be computed. Where the accounts are kept on mercantile basis, allowance must be granted in the year in which the liability is incurred, irrespective of the question whether the disbursement has been made or not.

(Madras Fertilizers Ltd. Vs CIT (Mad) 209 ITR 174.) Thus the simply bills has been approved in the year under consideration cannot be said to be expense crystallized during the year. The department has filed appeals on such issues in other cases. The issue has not attained finality. Hence, claim of prior period expenses of Rs. 40594/- is disallowed and added to the total income of the assessee."

Issue no. 2

The contribution of employees should have been deposited as per dates prescribed in ESI/PF Act. Thus, in terms of provisions of section 36(1)(va) read with section 2(24)(x) of the Income Tax Act, 1961 the above sum is liable to be disallowed and added back to the total income of the assessee. This will result in an addition of Rs. 2,65,591/-to the total income of the assessee."

Issue no. 3

"From the detailed discussion it is evident that the claim of deduction u/s 80P(2)(d) of the Act in the case of interest received on investments made with other cooperative bank is against the statutory provisions as well as the legal pronouncements on the said issue. In view of above discussion deduction u/s 80P claimed is hereby disallowed.

Addition Rs. 4,33,45,363/-"

6. Being aggrieved by the order of the ld. AO the assessee preferred an appeal before the ld. CIT(A) and the findings of the ld. CIT(A) are reproduced as under:-

> "Ground No. 1 on Issue NO. 1
> Considering the submissions made by the appellant in this regard and in view of the decision of the ld. CIT(A) in appeal No. 70/13-14 and 469/13-14 vide order dated 14.11.2014 in the appellant's own case for A.Y. 2010-11 & 2012-13 and the decision of Hon'ble ITAT in Appeal No. 79 to 81/JP/2015 wherein the Tribunal has upheld the deletion of disallowance of prior period expenses by the CIT(A) and also relying on the decisions of various judicial pronouncements relied upon, the addition made by the AO in respect of prior period expenses amounting to Rs. 40,594/- is hereby deleted. Thus ground No. 1 of the appeal is hereby allowed."
>
> Ground No. 2 on issue No. 2
>
> 4.5 In view of the above discussion, the judgments of Supreme Court and High Courts (supra) and the decision of the Hon'ble Delhi Tribunal in the case of Raj Kumar & Ors, the AO is directed to delete the disallowance of Rs. 2,65,591/- made U/s 36(1)(va) r.w.s 2(24)(x) of the Act.
> 4.6 According, the ground of appeal No. 2 is allowed."
>
> Ground No. 3 on issue no. 3
>
> 5.7 In view of the above discussion and deliberations, it becomes abundantly clear that the reliance of the AO on the judgment of Hon'ble Apex Court in the case of Totagar's Co-operative Sale Society Ltd. (Supra) is misplaced as the facts of the present case under consideration are distinguishable. It is also pertinent to mention here that the decisions of the Hon'ble Jurisdictional ITAT in the above referred cases are binding in the case of the appellant in respect to the claim of deduction u/s. 80P(2)(d) of the Act. Respectfully following the decisions of Hon'ble Jurisdictional ITAT, Jaipur (supra) and above referred judgments of various High Courts, the benefit of deduction claimed u/s.80P(2) (d) of the Act in respect of interest income earned from deposits with Co-operative Banks is allowed and the disallowance made by the AO is hereby deleted. Hence, the appellant is eligible for deduction u/s. 80P(2)(d) of the Act.

> 5.8 In view of the above facts and circumstances of the case, ground of appeal 3 is hereby allowed."

7. The ld. DR representing the Revenue's appeal relied upon the finding of the Assessing Officer so far as its relate to the ground No. 1 and 2 and as regards ground No. 3. He has submitted that there is amendment of law in various decision it is held that Co-operative society acting as a bank is a bank and not a co-operative society and therefore, the deduction of interest received by the assessee from a co-operative society is not entitle to the deduction u/s 80P(2)(d) of the Act. In addition to the above arguments, the ld. DR as relied upon the following case law:-

- Totgars, Co-operative Sale Society Ltd. vs. ITO (2010) 188 Taxman 282 (SC)
- Circular 19/2015 F.No. 142/14/2015-TPL, Central Board of Direct Taxes, dated, 27th November, 2015
- Principal Commission of Income Tax vs. Totagars Co-operative Sale Society (2017) 83 taxmann.com 140 (Karnataka H.C.)
- Katlary Kariyana Merchant Sahkari Sarafi Mandali Ltd. vs. ACIT (2022) 140 taxmann.com 602 (Gujarat H.C.)
- Krishnarajapet Taluk Agri Pro Co-op Marketing Society Ltd. vs. PCIT (2022) taxmann.com 121 (Bangalore- Trib.)
- Principal Commissioner of Income Tax vs. Peroorkada Service Co-operative Bank Ltd. (2022) 442 ITR 0141 (Ker H.C.)

8. Per contra, the ld. AR for assessee submitted a detailed written submissions which is reiterated here in below:

1. The assessee is an apex body involved in development of dairy activities in cooperative sector in the state of Rajasthan. TheAO observed that the assessee has claimed prior period expenses of Rs.40,594/-.The assessee filed the explanation for allowing this claim as reproduced at Pg2-3 of the assessment order. The AO however rejected the assessee's explanation by holding that according to accounting policy regularly followed, assessee is required to account for expenses in the year in which it is incurred. By following the accounting policy adopted by the assessee company, provisions for expenses were required to be made for respective years but the assessee failed to do so thereby charging these expenses in current assessment year. Where the accounts are kept on mercantile basis, allowance must be granted in the year in which the liability is incurred irrespective of the question whether the disbursement has been made or not. Thus simply bills has been approved in the year under consideration cannot be said to be expense crystallized during the year. The department has filed appeals on such issues in other cases but the issue has not attained finality. Accordingly, he disallowed the claim of prior period expenses of Rs.40,594/- and added it to the total income of assessee.

2. The Ld. CIT(A) at Para 3.6, Pg33 of the order deleted the disallowance made by AO after relying on the decision of Ld. CIT(A) and Hon'ble ITAT in assessee's own case for AY 2010-11 to 2012-13.

Submission:-

1. At the outset it is submitted that in AY 2018-19, AO issued show cause notice dt. 09.03.2021 for disallowance of prior period expenditure of Rs.53,50,444/- but after considering the reply of assessee dt. 12.03.2021 **(copy enclosed)** that against the similar disallowance made in AY 2014-15, the CIT(A) allowed the relief against which no further appeal is filed & since AO in AY 2015-16 has not made any disallowance, the AO in AY 2018-19 has also not made any disallowance. Thus, when in earlier years and subsequent years disallowance of prior period expenditure is not made or otherwise deleted by CIT(A), the addition made in the year under consideration has rightly been deleted by Ld. CIT(A).

2. It may be noted that similar disallowance of prior period expenses was made by the AO in assessee's own case in AY 2010-11 to AY 2012-13 which was deleted by the Ld. CIT(A). Against the same, the department had preferred an appeal before the Hon'ble ITAT. The Hon'ble ITAT vide order dt. 06.05.2016 in ITA No.79, 80 & 81/JP/2015 dismissed the appeal filed by the department by holding as under:-

   "4.3. We have heard the rival contentions and perused the material available onrecord. We find that the issue of prior period expenses has earlier decided by the ld.CIT (A) in assessee's own case for the A.Ys. 2007-08 to A.Y. 2009-10 in appeal nos.444/09-10, 268/10-11 and 380/11-12 vide order dated 24.09.2012 whereby thedisallowance was deleted by the ld. CIT(A) and no appeal against the same waspreferred by the revenue. Considering that the issue involved in the years underconsideration is same and also in view of the judicial precedents, we find no infirmity in the order of ld. CIT (A) and the same is confirmed. The ground of the revenue for all the three assessment years is dismissed."

3. Otherwise also, it is submitted that assessee has a regular system of accounting whereby all the expenses are accounted for after getting approval from concerned higher authorities. Each item of expenses is properly supported with evidence and after sanction & approval at appropriate authority level expenses is accounted. Since all these prior period expenses has been accounted after obtaining all the supporting documents, vouchers and obtaining approval of concerned higher authority during the year under consideration, the same has been crystallized during the year and allowable as current year expenses.

4. Further the rate of tax being same, it does not matter whether it is allowed as deduction in the year in which the expenditure is booked or in earlier year. The **Hon'ble Supreme Court in case of CIT Vs. Excel Industries Ltd. 358 ITR 295** has held that when the rate of tax remained the same in present assessment year as well as in the subsequent AY, the dispute raised by the revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with the litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers. This principle laid down by the Supreme Court equally applies to the prior period expenditure.

   In view of above, Ld. CIT(A) has rightly deleted the disallowance and thus the ground of the department be dismissed.

Ground No.2 (AY 2016-17)

Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the disallowance of Rs.2,65,591/- u/s 36(1)(va) r.w.s. 2(24) on account of delayed payment of employees contribution towards PF & ESI.

AO Pg 3-5
CIT(A) Pg33-37

Facts& Submission:-

1. The AO observed that assessee has deposited the amount of employee's contribution towards PF amounting to Rs.2,64,292/- and ESI amounting to Rs.1,299/- after the due date prescribed under the relevant Acts. Hon'ble Rajasthan High Court in case of Rajasthan Renewable Energy Corp has decided this issue in favour of department. Accordingly, he made addition of Rs.2,65,591/- (2,64,292+1,299/-) u/s 36(1)(va) of Income Tax Act.

2. The Ld. CIT(A) after relying on the decision of Hon'ble ITAT, Delhi Bench in case of Raj Kumar & Others ITA No.1392/Del/2021 order dt. 28.02.2022 deleted the addition made by AO.

3. At the outset it is submitted that various High Courts including the jurisdictional Rajasthan High Court has held that if employees contribution towards PF & ESI is deposited before the due date of filing of the return, the same is allowable. In the present case the due date of filling of return was 17.10.2016. The assessee has deposited the contribution towards PF & ESI before the due date of filing return of income as evident from the tables reproduced at Pg 3 & 4 of the assessment order. Reliance in this connection is placed on the following cases:-

    CIT Vs. Rajasthan State Beverages Corporation Ltd. (2017) 250 Taxman 16 (SC)
    CIT Vs. State Bank of Bikaner & Jaipur [2014] 99 DTR 131 (Raj.)(HC)
    CIT Vs. Jaipur VidyutVitran Nigam Ltd. [2014] 98 DTR 105 (Raj.) (HC)
    CIT Vs. Udaipur DugdhUtpadakSahakariSangh Ltd. (2013) 98 DTR 109 (Raj.)(HC)

4. Amendment brought by FA, 2021 by way of Explanation 2 to section 36(1)(va) and Explanation 5 to section 43B which provides that the definition of due dates as per section 43B is deemed never to have been applied for the purpose of employees contribution is applicable from 01.04.2021, i.e. AY 2021-22 and thus, not applicable for the year under consideration. For this purpose reliance is placed on the following cases:-

    M/s Hotel Gaudavan Pvt. Ltd. Vs. CPC, Bengaluru/ACIT/DCIT, Circle-6, Jaipur ITA No.83 & 84/JP/22 order dt.19.04.2022 (Jaipur) (Trib.)

    Sanjay Porwal Vs. CPC, Bengaluru/ ITO, Ward-6(4), Jaipur ITA No.63/JP/22 order dt.06.04.2022 (Jaipur) (Trib.)

    In view of above, Ld. CIT(A) has rightly deleted the addition and thus the ground of the department be dismissed.

Ground No.3 (AY 2016-17 & 2018-19)

Whether on the facts and circumstances of the case and in law, the CIT(A) was justified in deleting the addition made by AO and holding that income received from investment made with cooperative banks are eligible for deduction u/s 80(P)(2)(d) of the IT Act, 1961 and thereby allowing relief to the extent of Rs.4,33,45,363/-for AY 2016-17 and Rs.4,89,87,627/- for AY 2018-19.

AO Pg5-9, CIT(A) Pg37-61 (AY 2016-17)
AO Pg2-7, CIT(A) Pg 16-27 (AY 2018-19)

Facts:-

1. During the years under consideration assessee received interest of Rs.4,33,45,363/- for AY 2016-17 and Rs.4,89,87,627/- for AY 2018-19 on FDRs made with Jaipur Central Cooperative Bank on which deduction u/s 80P(2)(d) was claimed.

2. The AO held that deduction u/s 80P(2)(d) is available only in case of investment with any co-operative society and not with co-operative bank in view of section 80P(4).He further relied on the judgement of Hon'ble Supreme Court in case of Totgar's Cooperative Sales Society Ltd. Vs. ITO (2010) wherein it is held that if a society is regularly earning interest on funds (not required immediately for business purposes), such interest income is taxable u/s 56 under the head 'Income from other sources' and not eligible for deduction u/s 80P. He also relied on the judgement of Hon'ble Karnataka High Court in case of PCIT vs. Totgars Cooperative Sale Society (2017) 395 ITR 611 where it is held that interest earned by assessee, a cooperative society, marketing members' agriculture product, from surplus deposits kept with aco-operative bank, was not eligible for deduction under section 80P(2)(d).Accordingly, AO disallowed the claim of deduction u/s 80P at Rs.4,33,45,363/-for AY 2016-17 and Rs.4,89,87,627/- for AY 2018-19.

3. The Ld. CIT(A) after distinguishing the judgement of Hon'ble Supreme Court at Para 5.4& 5.5, Pg56-57 of the order and after relying on the various case laws at Para 5.6, Pg57-60, at Para 5.7, Pg60 of the order held that the benefit of deduction claimed u/s80P(2)(d) of the Act in respect of interest income earned from deposits with co-operative banks is allowable and thus, deleted the addition made by AO.

Submission:-

1. The relevant provisions of section 80P reads as under:-

   "80P (1) *Where, in the case of an assessee being a co-operative society, <u>the gross total income includes</u> 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) In the case of a co-operative society engaged in ……
   (b) In case of a co-operative society being ….
   (c)In case of a co-operative society engaged in activities …..
   (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;
   (e)……
   (f) ……

   (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."*

From the above provision it can be noted that deduction u/s 80P is allowable from the gross total income of the assessee and not from the specific head of income under which the same is chargeable to tax. Therefore, a cooperative society is eligible for deduction u/s 80P(2) even when any income is assessable under the head income from other sources. Further in view of section80P(4), a cooperative society engaged in carrying on banking business, i.e. a cooperative bank is not eligible to claim deduction under this section. However, there is no restriction that if a cooperative society earned any interest income from the investment made in a co-operative bank which are registered under the Co-operative Societies Act, deduction u/s 80P(2)(d) will not be allowed to such cooperative society.

2. The fact that cooperative bank are not eligible for deduction u/s 80P(2)(d) is also clarified by CBDT in Circular No.14/2006 dated 28.12.2006 as under:-

*"**22. Withdrawal of tax benefits available to certain co-operative banks***

22.1 Section 80P, inter alia, provides for a deduction from the total income of the Co-operative societies engaged in the business of banking or providing credit facilities to its members, or business of a cottage industry, or of marketing of agricultural produce of its members, or processing, without the aid of power, of the agricultural produce of its members, etc.

22.2 The co-operative banks are functioning at par with other commercial banks, which do not enjoy any tax benefit. Therefore, section 80P has been amended and a new sub-section (4) has been inserted to provide that the provisions of the said 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. The expressions "co-operative bank", "primary agricultural credit society" and "primary co-operative agricultural and rural development bank" have also been defined to lend clarity to them."

The language of the circular makes it clear that section 80P(4) has been inserted to restrict co-operative banks from availing deduction u/s 80P. The heading also implies that benefits available to co-operative banks are being withdrawn. There is no intention of the legislature to deny the benefit of deduction u/s 80P(2)(d) when a co-operative society makes investment in a co-operative bank constituted under the provisions of Co-operative Societies Act on the interest earned on such investment.

3. The assessee has received interest on FDR's from Jaipur Central Co-operative Bank Ltd. It is a bank registered under 'The Rajasthan Co-operative Society Act, 2001.' Thus, it is a co-operative society which is engaged in carrying on the business of banking. Therefore, though the income of Jaipur Central Co-operative Bank Ltd. is not eligible for deduction u/s 80P, the interest received on investment made by any other cooperative society with this bank is eligible for deduction u/s 80P(2)(d). Reliance in this connection is placed on the following decisions:-

M/s Jaipur ZilaDugdhUtpadakSahakariSangh Ltd. Vs. DCIT ITA No.512 & 513/JP/2019 order dt. 02.09.2019
The relevant Para 14 to 17 reads as under:-

14. Therefore, in light of the aforesaid decision, in the instant case, for the purposes of section 80P(2)(d) of the Act, Jaipur Central Cooperative Bank Ltd shall be treated as a co-operative society. Therefore, interest on FDRs placed by the assessee society with such cooperative society shall be eligible for deduction u/s 80P(2)(d) of the Act.

15. Now, coming to a related issue as to whether by virtue of provisions of Section 80P(4) of the Act, the claim of the assessee under section 80(P)(2)(d) can be denied to the assessee society. The relevant provisions of section 80P(4) reads as under:

> *"(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."*

16. The Coordinate Bench in case of KaliandasUdyogBhavan Premises Co-op Society Ltd. vs Income-tax Officer-21(2)(1), Mumbai [2018] 94 Taxmann.com 15 had an occasion to examine similar contention and it was held 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, 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 co-operative societies, therefore, the interest income derived by a cooperative 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. We see no reason to deviate from the same and agree with the aforesaid view taken by the Co-ordinate Bench and. The relevant findings of the Co-ordinate Bench read as under:-

....

17. In light of above, by virtue of provisions of Section 80P(4) of the Act, the claim of the assessee under section 80(P)(2)(d) cannot be denied to the assessee society.

ITO Vs. Shree KeshoraiPatanSahakari Sugar Mill ITA No. 418 & 419/JP/2017 order dated 31.01.2018 (Jaipur) (Trib.)
In this case assessee is a co-operative sugar mill. It claimed deduction u/s 80P(2) & 80P(2)(d) in respect of interest of Rs.2,65,43,870/- on fixed deposits with co-operative banks. AO disallowed the deductions holding that assessee is not carrying out banking business nor the income is derived from providing any credit facilities to its members. The Ld. CIT(A) allowed claim of deduction u/s 80P in respect of entire amount. The Ld. D/R submitted that assessee has earned income on account of interest on FDR with co-operative bank and not on the amount deposited with other co-operative societies and therefore, deduction u/s 80P(2)(d) is not available. It was held that the only condition for availing

deduction u/s 80P(2)(d) is that income is by way of interest or dividend derived by co-operative society from its investment with any other co-operative society. Co-operative bank is to be treated as co-operative society for the purpose of interest income on investment in such co-operative bank. Hence, assessee is eligible for deduction u/s 80P(2)(d) in respect of the interest income from investment made with the co-operative bank which is a co-operative society constituted under the provisions of Jaipur Co-operative Societies Act, 1943. Therefore the interest received by the assessee from the said co-operative bank is covered by the provisions of Section 80P(2)(d).

GraminSewaSahakariSamitiMaryadit&Anr.Vs. ITO &Ors.(2022) 215 DTR 193/ 195 ITD 244 (Raipur) (Trib.)
A co-operative bank falls within the realm of the definition of "co-operative society" as contemplated in sec. 2(19) and therefore, dividend income received by the assessee from a co-operative bank is eligible for deduction u/s80P(2)(d).

4. So far as decision of Hon'ble Supreme Court in case of Totgars Co-operative Sale Society Ltd. Vs. ITO reported at 322 ITR 0283 and relied by the AO is concerned, it is submitted that this case was in context of section 80P(2)(a)(i). Section 80P(2)(a)(i) of the Act provides deduction of an amount equal to the profits and gains of business of the co-operative society engaged in the business of banking or providing credit facilities to its members. Hon'ble Supreme Court has held that interest income received from bank deposits with scheduled bank and government securities is liable for tax as income from other sources and not as income from business or profession, hence same is not eligible for deduction u/s 80P(2)(a)(i) of the Act. It has not decided the issue as to whether such interest is eligible for deduction u/s 80P(2)(d) or not. Thus decision of Hon'ble Supreme Court in the case of Totgars Co-operative Sale Society Ltd. is not applicable in the present case.

5. The AO denied the claim of deduction u/s 80P(2)(d) by referring and extensively quoting the various paras of the decision of Hon'ble Karnataka High Court in case of CIT Vs. Totagars Cooperative Sales Society dt. 16.06.2017 reported at 395 ITR 611. It is submitted that the **Hon'ble Karnataka High Court in the same case vide order dt. 05.01.2017 reported at 392 ITR 74** has held that cooperative banks is a cooperative society and therefore, the interest earned from investment made is FDR of cooperative banks is eligible for deduction u/s 80P(2)(d). The relevant Para 8-11 of this order is reproduced as under:-

"8. 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 Tribunal itself in different cases. Moreover the word "Co-operative Society" are the words of a large extent, and denotes a genus, whereas the word "Co-operative Bank" is a word of limited extent, which merely demarcates and identifies a particular species of the genus Co-operative Societies. Co-operative society can be of different nature, and can be involved in different activities; the Co-operative Society Bank is merely a variety of the Co-operative Societies. Thus the co-operative bank which is a species of the genus would necessarily be covered by the word "co-operative society".

9. Furthermore, even according to s. 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'.

10. Admittedly, the interest which the assessee respondent had earned was from a Co-operative Society Bank. Therefore, according to s. 80P(2)(d) of the IT Act, the said amount of interest earned from a Co-operative Society Bank would be deductable from the gross income of the Co-operative Society in order to assess its total income. Therefore, the AO was not justified in denying the said deduction to the assessee respondent.

11. The learned counsel has relied on the case of the Totgars Co-operative Sale Society Ltd. vs. ITO (supra). However, the said case dealt with the interpretation, and the deduction, which would be applicable under s. 80P(2)(a)(i) of the IT Act. For, in the present case the interpretation that is required is of s. 80P(2)(d) of the IT Act and not s. 80P(2)(a)(i) of the IT Act. Therefore, the said judgment is inapplicable to the present case. Thus, neither of the two substantial questions of law canvassed by the learned counsel for the Revenue even arise in the present case."

6. The said decision of Karnataka High Court by the divisional bench has been distinguished in the subsequent decision of Karnataka High Court of equal strength without referring to the Full Bench. Therefore, in view of the decision of **Hon'ble Bombay High Court in case of K. Subramanian &Anr. Vs. Siemen's India Ltd. & Anr. (1985) 156 ITR 11**where there is conflict between the decisions of non jurisdictional High Courts, then a view which is in favour of the assessee is to be preferred as against that taken against him. The **Hon'ble Supreme Court in case of CIT Vs. Vegetable Products Ltd. 88 ITR 192** has held that where two reasonable constructions of a taxing provision are possible, then the construction which favours the assessee must be adopted. The effect of both the decision of Karnataka High Court as well as the various issues raised by your goodself in the show cause notice has been considered by **Hon'ble ITAT Mumbai Bench in case of Kaliandas Udyog Bhavan Premises Cooperative Society Ltd. Vs. ITO ITA No.6547/Mum/2017 dt. 25.04.2018**where in Para 6 to 9 it is held as under:-

"6. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence in the present appeal has been sought to adjudicate as to whether the claim of the assessee for deduction under section 80P(2)(d), in respect of interest income earned from the investments made with the co-operative banks is in order or not. We find that the issue involved in the present appeal hinges around the adjudication of the scope and gamut of sub-section (4) of Sec. 80P, as had been made available on the statute by the legislature vide the Finance Act 2006, with effect from 01.04.2007. We find that the lower authorities had taken a view that pursuant to insertion of sub-section (4) of Sec. 80P, the assessee would no more be entitled for claim of deduction under Sec. 80P(2)(d) of the interest income earned on the amounts parked as investments with co-operative banks, other than a Primary Agricultural Credit Society or a Primary Co-operative Agricultural and Rural Development Bank. We find that

the lower authorities had observed that as the co-operative bank with which the surplus funds of the assessee were parked as investments, were neither Primary Agricultural Credit Society nor a Primary Co-operative Agricultural and Rural Development Bank, therefore, the interest income earned on such investments would not be entitled for claim of deduction under Sec. 80P(2)(d) of the Act.

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 <u>any other co-operative society</u>, 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 52 (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) MarvwanjeeCama Park Cooperative Housing Society Ltd. Vs. ITORange-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. 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), 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 ld. 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 ld. 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 ld. 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 ld. 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 Sec. 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 cooperative 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)."

7. It is submitted that by following the decision of Hon'ble Karnataka High Court reported in 395 ITR 611, the Hon'ble Gujarat High Court in case of Katlary Kariyana Merchant Sahkari Sarafi Mandali Ltd. Vs. ACIT (2022) 327 CTR 138has at para 13 after extracting para 16 & 17 of the decision of Gujarat High Court in case of State Bank of India Vs. CIT 389 ITR 578 and at para 14 referring to the amendment made in section 194A(3)(v) of the Act held that deduction of income derived by way of interest from the investment in the form of FDRs with other bank is not correct. In this connection it may be noted that even the Gujarat

High Court in case of State Bank of India Vs. CIT 389 ITR 578 in last 3 lines of Para 16 has held that *'if the appellant wants to avail the benefit of deduction of such interest income, it is always open for it to deposit the surplus funds with a cooperative bank and avail of deduction u/s 80P(2)(d) of the Act.'*Thus, the decision of Hon'ble Gujarat High Court in 327 CTR 138 without referring the matter to the Full Bench is directly in conflict with that given in 389 ITR 578 and thus has no precedent value. Otherwise also, where there is conflict between the decisions of non jurisdictional High Courts, then a view which is in favour of the assessee is to be preferred. So far as amendment to section 194A(3)(v) requiring the cooperative bank to deduct income tax at source on income credited or paid to any other cooperative society is concerned, this amendment nowhere states that cooperative bank are not cooperative society.

8. The **Hon'ble ITAT, Jaipur Bench in assessee's own case in ITA No.23/JP/2021 for AY 2015-16 vide order dt. 09.11.2021**has quashed the order passed by Ld. CIT u/s 263 of the Act and uphold the order of AO allowing deduction u/s 80P(2)(d) as per the discussion made in Para 12 to 15 of its order after considering the decision of Hon'ble Karnataka High Court in reported at 392 ITR 74& 395 ITR 611.

9. It is submitted that **Hon'ble Kerala High Court in case of PCIT Vs. Peroorkada Service Cooperative Bank Ltd. (2022) 442 ITR 141** has after considering the entire section 80P and the decision of Supreme Court in case of Totgars Co-operative Sale Society Ltd. Vs. ITO in Para 8.3 held as under:-

8.3 Further, clause (d) deals with interest in respect of any income by way of interest or dividends derived by the Co-operative Societies from its investments with any other Co-operative Society, the whole of such interest income is eligible for deduction. It is upon plain construction inferable that clause (d) deals with income derived by a Co-operative Society, other than the income covered by clauses (a) to (c) of Section 80P(2). Clause (d) deals with yet another type of income earned by the Co-operative Society which is deducted while computing the total income of the assessee. However, to merit acceptance of deduction under clause (d) of Section 80P(2) of the Act, the clause referring to interest or dividend derived from investments with any other Co-operative Society is satisfied. In the case on hand, the argument of assessee is that the interest earned by the assessee is from Co-operative Banks/Treasury. The Co-operative Banks are registered under the Kerala Co-operative Societies Act. Therefore, the interest earned could be treated as meriting consideration under clause (d) of Section 80P(2) of the Act. It is not in dispute that the District/State Co-operative Banks have licence from the Reserve Bank of India under the Banking Regulation Act and are registered Co-operative Societies under the Act. Suffice to observe that by being a Society doing banking business such society will stand on par with a Co-operative Society registered under the Kerala Co-operative Societies Act would come within the purview of clause (d) of Section 80P(2).

In view of above, Ld. CIT(A) has rightly deleted the addition and thus the ground of the department be dismissed."

9. The ld. AR of the assessee in support of disallowance for ESI & PF also filed additional written submission and same is reiterated in here in below:

Further Submission:-

1. *It is submitted that section 36(1) which provides for 'other deduction', states that deduction provided for in the specified clauses shall be allowed in respect of matters dealt with therein, in computing the income referred to in section 28. Clause (va) of said section reads as under:-*

any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.

Explanation.—For the purposes of this clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise.

From the plain reading of the section it can be noted that due date has been defined in the Explanation to mean the date by which assessee is required to credit the employees contribution in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise. The section nowhere provides that the due date means the date by which the amount is to be deposited under the relevant Statue. For this reason Hon'ble Karnataka High Court in case of CIT Vs. Sabari Enterprises (2008) 298 ITR 141 at para 12 & 13 of its order held as under:-

12. After hearing learned counsel for the parties, we have carefully examined the above statutory provisions of the Act including the definition of sections 2(24)(x) and s. 36(1)(va) and 43B(b), which read thus :

"2.(24) 'income' includes,— . . .

(x) any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees."

"43(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity or any other fund for the welfare of employees, or"."36.(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in s. 28—. . .

(va) any sum received by the assessee from any of his employees to which the provisions sub-clause (x) of clause (24) of s. 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.

Explanation.—Fur the purposes of this clause, 'due date' means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise."
13. This clause is inserted by the Finance Act with effect from 1st April, 1988. The Explanation to this clause is read very carefully. "Due date" has been explained stating that : means the date by which the assessee is required as an employer to credit contribution to the employees' account in the relevant fund under any Act, rule or order or notification issued thereunder or under any standing order, award, contract of service or otherwise." Prior to the above clause was inserted to s. 36 giving statutory deductions of payment of tax under the provisions of the Act, s. 43B(b) was inserted by the Finance Act, 1983, which came into force with effect from 1st April, 1984. Therefore, again the provision of s. 43B(b) clearly provides that notwithstanding anything contained in the other provisions of the Act including s. 36(1) clause (va) of the Act, even prior to the insertion of that clause the assessee is entitled to get statutory benefit of deduction of payment of tax from the Revenue. If that provision is read along with the first proviso of the said section which was inserted by the Finance Act, 1987, which came into effect from 1st April, 1988, the letters numbered as clause (a), or cl. (c) or cl. (d) or cl. (e) or cl. (f) are omitted from the above proviso and therefore deduction towards the employees contribution paid can be claimed by the assessee. The Explanation to clause (va) of s. 36(1) of the Income-tax Act further makes it very clear that the amount actually paid by the assessee on or before the due date applicable in this case at the time of submitting returns of income under s. 139 of the Act to the Revenue in respect of the previous year can be claimed by the assessees for deduction out of their gross income. The above said statutory provisions of the Income-tax Act abundantly makes it clear that, the contention urged on behalf of the Revenue that deduction from out of gross income for payment of tax at the time of submission of returns under s. 139 is permissible only if the statutory liability of payment of provident fund or other contribution funds referred to in cl. (b) are paid within the due date under the respective statutory enactments

by the assessees as contended by learned counsel for the Revenue is not tenable in law and therefore the same cannot be accepted by us.

2. *However, Hon'ble Supreme Court in case of Checkmate Services Pvt. Ltd. Vs. CIT (2022) 218 DTR 401 while deciding this issue has observed at Para 51 to 54 held as under:-*

51. The analysis of the various judgments cited on behalf of the assessee i.e., CIT vs. AIMIL Ltd. & Ors. (2010) 229 CTR (Del) 418 : (2010) 35 DTR (Del) 68 : (2010) 321 ITR 508 (Del) , (Delhi High Court); CIT vs. Sabari Enterprises (2007) 213 CTR (Kar) 269 : (2008) 2 DTR (Kar) 394 : (2008) 298 ITR 141 (Kar) (Karnataka High Court).; CIT vs. Pamwi Tissues Ltd. (2008) 215 CTR (Bom) 150 : (2008) 3 DTR (Bom) 66 : (2009) 313 ITR 137 (Bom) (Bombay High Court); CIT vs. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. (2014) 265 CTR (Raj) 59 : (2014) 98 DTR (Raj) 109 : (2013) 35 taxmann.com 616 (Raj) [Rajasthan High Court] and Nipso Polyfabriks (supra) would reveal that in all these cases, the High Courts principally relied upon omission of second proviso to s. 43B(b). No doubt, many of these decisions also dealt with s. 36(va) with its Explanation. However, the primary consideration in all the judgments, cited by the assessee, was that they adopted the approach indicated in the ruling in Alom Extrusions. As noticed previously, Alom Extrutions did not consider the fact of the introduction of s. 2(24)(x) or in fact the other provisions of the Act.

52. When Parliament introduced s. 43B, what was on the statute book, was only employer's contribution [s. 36(1)(iv)]. At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting s. 36(1)(va) and simultaneously inserting the second proviso of s. 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions–especially second proviso to s. 43B-was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Sec. 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income-it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time – by way of contribution of the employees' share to their

credit with the relevant fund is to be treated as deduction [s. 36(1)(va)]. The other important feature is that this distinction between the employers' contribution [s. 36(1)(iv)] and employees' contribution required to be deposited by the employer [s. 36(1)(va)] was maintained - and continues to be maintained. On the other hand, s. 43B covers all deductions that are permissible as expenditures, or outgoings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of s. 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary precondition for allowing the expenditure.

53. The distinction between an employer's contribution which is its primary liability under law–in terms of s. 36(1)(iv), and its liability to deposit amounts received by it or deducted by it [s. 36(1)(va)] is, thus crucial. The former forms part of the employers' income, and the latter retains its character as an income (albeit deemed), by virtue of s. 2(24)(x) - unless the conditions spelt by Explanation to s. 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under s. 43B.

54. In the opinion of this Court, the reasoning in the impugned judgment that the non obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non obstante clause has to be understood in the context of the entire provision of s. 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited

in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non obstante clause under s. 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

With utmost regard to the decision of Hon'ble Supreme Court, it is submitted that it failed to take into consideration that Explanation to section 36(1)(va) nowhere provides that due date means the date by which employees contribution is to be deposited in the relevant fund under relevant statute but only provides that the amount is to be deposited under the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise. Therefore, this decision of Hon'ble Supreme Court vis-à-vis the amendment made in section 36(1)(va) by introducing Explanation 2 by FA, 2021 be made applicable from AY 2021-22 and not for earlier AYs.

3. *Without prejudice to above, it is submitted that if it is held that in view of the decision of Hon'ble Supreme Court (supra), the employees contribution to PF/ ESI if not deposited by the due date under the relevant statute, the same is deemed income u/s 2(24)(x) of the Act, then the same ought to be allowed on its actual payment u/s 37 of the Act which provides for allowance of any expenditure not being expenditure of the nature described in section 30 to 36 laid out or expended wholly or exclusively for the purpose of business. As stated above, employees contribution received by the assessee is deemed to be an income u/s 2(24)(x) and thus, it is not an expenditure of the nature described u/s 36 and therefore, such amount when paid needs to be allowed as deduction u/s 37 of the Act. For this proposition reliance is placed on the following decisions:-*

M/s BBG Metal Syndicate Pvt. Ltd. Vs. DCIT in ITA No.112/CTK/2022 order dt. 17.11.2022 (Cuttack) (Trib.)

The Hon'ble ITAT after considering the decision of Hon'ble Supreme Court in case of Checkmate Services Pvt. Ltd. Vs. CIT 218 DTR 401, Hon'ble ITAT at Para 6 & 7 of the order held as under:-

6. In the case of Nirakar Security & Consultancy Services Pvt Ltd vs ITO in ITA No.98/CTK/2022 for Assessment Year 2016-17, order dated 17.10.2022, the Co-ordinate Bench of this Tribunal after considering the arguments of ld AR, has restored the issue to the file of the Assessing officer with the following directions:

"6. Liberty is granted to the ld AR to make all submissions in respect of allowability of disallowed contribution of the employees to PF and ESI under other relevant provisions in the interest of justice. This direction is being given because ld AR has submitted that as the amount is not allowable under section 36(1)(va) of the Act and same is also not covered under section 43B of the Act, the amount of delayed contribution to PF and ESI in respect of employees contribution would be treated as income in the hands of the assessee u/s 2(24)(x) and on subsequent payment of the same, it would be a business expenditure, which can be claimed u/s.37(1) of the Act. We are not expressing any opinion in regard to his arguments as it has not been examined by the lower authorities. Liberty is also granted to the assessee to raise all arguments as are found necessary by him before the lower authorities."

7. As the issue in the present appeal is also identical to the issue in the case of Nirakar Security & Consultancy Services Pvt Ltd.,(supra), on identical findings the issue in this appeal is restored to the file of the AO for re-adjudication after granting the assessee adequate opportunity of being heard.

ACIT Vs. Sunila Sahu MA No.23/CTK/2022 (Arising out of ITA No.07/CTK/2022) order dt. 13.01.2023 (Cuttack) (Trib.)
The Hon'ble ITAT by following the decision of Nirakar Security & Consultancy Services Pvt Ltd vs ITO in ITA No.98/CTK/2022 for Assessment Year 2016-17 order dated 17.10.2022, restored the issue to the file of AO to consider the allowability u/s 37(1) of the Act on the payment of employees contribution to PF & ESI.

In view of above, even if addition is confirmed u/s 36(1)(va) in view of the decision of Hon'ble Supreme Court, amount paid by the assessee during the relevant AYs be directed to be allowed u/s 37(1) of the Act."

10. In addition to the above written submission, the ld. AR argued before us for ground No. 1 that in the prior period in respect of the earlier year the similar disallowances were made and was deleted by the ld. CIT(A) and the department has not preferred any appeal, therefore, ground No. 1 required to be dismissed.

11. As regards ground No. 2, the ld. AR of the assessee argued before us that provisions for considering the deeming income is not related to the year under consideration and therefore, the assessee may be allowed to take deduction u/s 37(1) of the Act in respect of the employees contribution to PF & ESI disallowances made by the department.

12. As regards ground No. 3, the ld. AR of the assessee submitted that the assessee is a co-operative society and has received an interest from another co-operative society i.e. Jaipur Central Co-operative bank on FDR made with the said co-operative society though for the purposes of paying income tax that the said bank is not considered for a co-operative bank but for all other purposes, the said co-operative bank being registered under Co-operative Society Act the benefit claimed by the assessee cannot be denied. To support this contention, the ld. AR of the assessee has relied upon the various case law as reproduced in the written submission hereinabove:-

- M/s Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. vs. DCIT in ITA No. 512& 513/JP/2019 dated 02.09.2019.
- ITO vs. Shree Keshorai Patan Sahakari Sugar Mill in ITA No. 418 & 419/JP/2017 dated 31.01.2018.
- Gramin Sewa Sahakari Samiti Maryadit & Anr. Vs. ITO & Ors. (2022) 215 DTR 193/195ITD 244 (Raipur Trib.)

- ITAT, Jaipur Bench in assessee's own case in ITA No. 23/JP/2021 for AY 2015-16 vide order dated 09.11.2021.
- PCIT vs. Peroorkada Service Cooperative Bank Ltd (2022) 442 ITR 141 (Kerala H.C.)

13. We have heard the rival contentions and perused the material on record. The Bench noted that so far as ground No. 1, the Revenue has not challenged the finding of the ld. CIT(A) in earlier year as pointed out by the ld. CIT(A) in his order at page No. 4 that wherein it has been stated that similar disallowance of prior period expenses was made in assessee's own case for assessment year 2014-15 which was deleted by the ld. CIT(A) and as the Revenue has not filed any appeal against such disallowances Revenue should remain consistent on their stand as they have not challenged the decision the view finalized earlier shall be binding to the revenue. The Bench also noted that the assessee as a regular system of accounting accounted the expenses and same are accounted for after getting approval, each item of expenses supported with evidences and sanction of appropriate authorities for booking the expenses in the accounts. Since, the assessee submitted that prior period expense has been accounted after obtaining approval and undergoing procedure of sanctioning and paying expenses and since the same has been crystallized during the under consideration the same is allowable in the year under consideration. The Revenue has not pointed out any

submission to contradict the averments so made by the ld. AR of the assessee and therefore, we do not find any reason to deviate the detail finding of the ld. CIT(A) and therefore, the ground No. 1 raised by the Revenue is dismissed.

13.1 As regard ground No. 2, dealing with disallowances of PF & ESI. We have persuaded the arguments of both the parties and also gone through the finding of the lower authorities. The ld. AR of the assessee has not raised any specific ground by filing any separate Cross Objection the arguments of the ld. AR of the assessee to allow the deduction u/s 37(1) of the Act cannot be entertained at this stage as the assessee has not filed any appeal or cross objection. For the merits of the case of the Revenue in disallowance of Rs. 2,65,591/- on account of delayed payment of employees contribution towards PF and ESI. The Bench has observed that recently the Hon'ble Supreme Court in case of Court in the case of Checkmate Services (P) Ltd. vs CIT, 143 taxmann.com 178 (SC) held that the provision of Section 43B of the Act shall not apply to employee's contribution to PF/ESI and the due date specified u/s 36(1)(va) of the Act shall apply for determination of deductibility of employee's contribution to PF/ESI. The relevant portion of the Judgment of Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. vs CIT-1 (supra) is reproduced as under:-

''53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted,

the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed.''

The Bench also noted that various Benches after the decision of Hon'ble Supreme Court has held this issue in favour of the Revenue and the decision in the case of Salveen Kaur Vs Income Tax Office vide its order darted 9th January 2023 (in IT Appeal Nos. 2197,2249, 2250 and 2293 (Delhi) of 2022 – A.Y. 2017-18 to 2019-20 [2023] 147 taxmann.co. 402 (Delhi-Trib) by observing as under:-

''4. The undisputed fact in the captioned appeals is that there was a delay in depositing the employees' contribution and the contribution has been deposited beyond the date stipulated under the relevantFund Act.

5. Though the quarrel is no more res integra, as it has been settledby the decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd 143 Taxmann.com 178. But, before us, the decision ofthe co-ordinate bench at Mumbai has been placed in the case of PRPackaging Service in ITA No. 2376/MUM/2022 and it has been seriouslyargued that the co-ordinate bench has considered the decision of theHon'ble Supreme Court and yet decided the quarrel in favour of theassessee and against the Revenue.

6. Another argument taken before us is that the disallowance made by the CPC Bengaluru while processing the return u/s 143(1) of the Act is beyond the scope of provisions of section 143(1(a) of the Act and,therefore, cannot be sustained.

7. We have carefully perused the decision of the co-ordinate bench in the case of M/s P R Packaging Services [supra]. We find that the co-

ordinate bench has not given any independent finding but has simply relied upon another decision of the co-ordinate bench in the case of Kalpesh Synthetics Pvt Ltd 195 ITD 142 wherein the co-ordinate bench has based its decision on the interpretation and binding decision of the Hon'ble Jurisdictional High Court. In the case of Kalpesh Synthetics Pvt Ltd [supra], the Tribunal has held that the CPC Bengaluru cannot override the binding decision of the Hon'ble Bombay High Court while making the impugned disallowance on account of delay in the deposit of employees' contribution to PF/ESI.

8. It would be apt to refer to the relevant part of the decision of the Tribunal in the case of Kalpesh Synthetics [supra] followed in P R Packaging Service [supra] wherein it has been held as under:-

> *"8. When the law enacted by the legislature has beenconstrued in a particular manner by the Hon'ble jurisdictional High Court, it cannot be open to anyone in the jurisdiction of that Hon'ble High Court to read any other manner than as read by the Hon'ble jurisdictional High Court. The views expressed by the tax auditor in sucha situation, cannot be reason enough to disregard the binding views of the Hon'ble jurisdictional Court. To that extent, the provisions of section 143(1)(a)(iv) must be read down. What essentially follows is the adjustments under section 143(1)(a) in respect of" disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return" is to be read as, for example, subject to the rider "except in a situation in which the audit report has taken a stand contrary to the law laid down by Hon'ble Courts above". That is where the quasi judicial exercise of dealing with the objections of the assessee against proposed adjustments under section 143(1), assumes critical importance in the processing of returns, also important to bear in mind the fact that what constitutes jurisdictionalHigh Court will essentially depend upon the location of the jurisdictional Assessing Officer. While dealing with jurisdiction for the appeals, rule 11(1) of the Central Processing of Returns Scheme, 2011 states that "Where a return is processed at the Centre, the appeal proceedings relating to the processing of the return shall lie with Commissioner of Income Tax (Appeals) [CIT(A)] having jurisdiction over the jurisdictional Assessing Officer" Thensitus of the CPC or the Assessing Office CPC is thus irrelevant for the purpose of ascertaining the jurisdictional High Court. Therefore, in the present case, whether theCPC is within the jurisdiction of Hon'ble Bombay*

High Court or not, as for the regular Assessing Officer of the assesseeand the assessee are located in the jurisdiction of Hon'bleBombay High Court, the jurisdictional High Court, for all matters pertaining to the assessee, will be Hon'ble Bombay High Court. In our considered view, it cannot be open tothe Assessing Officer CPC to take a view contrary to the view taken by the Hon'ble jurisdictional High Court- moreso when his attention was specifically invited to bindingjudicial precedents in this regard. For this reason also, the inputs in question in the tax audit report cannot be reason enough to make the impugned disallowance. The assesseemust succeed for this reason as well."

9. With our utmost respect to the findings of the co-ordinate bench [supra], we are of the considered view that the co-ordinate bench has ignored the binding ratio decidendi of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd [supra]. It would be pertinent to refer to the most relevant observations of the Hon'ble Supreme Court on the impugned quarrel which read as under:-

"32. The scheme of the provisions relating to deductions, such as Sections 32 - 37, on the other hand, deal primarily with business, commercial or professional expenditure, under various heads (including depreciation). Each of these deductions, has its contours, depending upon the expressions used, and the conditions that are to be met. It is therefore necessary to bear in mind that specific enumeration of deductions, dependent upon fulfillment of particular conditions, would qualify as allowable deductions: failure by the assessee to comply with those conditions, would render the claim vulnerable to rejection.

In this scheme the deduction made by employers to approved provident fund schemes, is the subject matter of Section 36 (iv). It is noteworthy, that this provision was part of the original IT Act; it has largely remained unaltered. On the other hand, Section 36(1)(va) was specifically inserted by the Finance Act,1987, w.e.f. 01-04-1988. Through the same amendment, by Section 3(b), Section 2(24) – which defines various kinds of "income" – inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, - whether in the form of deductions,or otherwise, as receipts, were to be treated as income. The inclusion of a class of receipt, i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee's income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, Section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date. The last expression "due date" was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (i.e.,

depositing the amount on or before the due date) has not been enacted in relation to the employer's contribution (i.e., Section 36(1)(iv)).

33. The significance of this is that Parliament treated contributions under Section 36(1)(va) differently from those under Section 36(1)(iv). The latter (hereinafter, "employers'contribution") is described as "sum paid by the assessee as an employer by way of contribution towards a recognized provident fund". However, the phraseology of Section 36(1)(va) differs from Section 36(1)(iv). It enacts that "any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date." The essential character of an employees' contribution, i.e., that it is part of the employees' income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date.

34. It is therefore, manifest that the definition of contribution in Section 2 (c) is used in entirely different senses, in the relevant deduction clauses. The differentiation is also evident from the fact that each of these contributions is separately dealt with in different clauses of Section 36 (1). All these establish
that Parliament, while introducing Section 36(1)(va) along with Section 2(24)(x), was aware of the distinction between the two types of contributions. There was a statutory classification under the IT Act, between the two.

35. It is instructive in this context to note that the Finance Act,1987, introduced to Section 2(24), the definition clause (x), with effect from 1 April 1988; it also brought in Section 36(1)(va). The memorandum explaining these provisions, in the Finance Bill,1987, presented to the Parliament, is extracted below:

"Measures of penalising employers mis-utilising contributions to the provident fund or any funds set upunder the provisions of the Employees State Insurance Act, 1948, or any other fund for the welfare of employees

12.1. The existing provisions provide for a deduction in respect of any payment by way of contribution to the provident fund or a superannuation fund or any other fund for welfare of employees in the year in which the liabilities are actually discharged (Section 43B).The effect of the amendment brought about by the Finance act, is that no deduction will be allowed in the assessment of the employer, unless such contribution is paid into the fund on or before the due date. "Due date"means the date by which an employer is required to credit the contribution to the employees account in the relevant fund or under the relevant provisions of any law or term of the contract of service or otherwise.

(Explanation to Section 36 (1) of the Finance Act)

12.2. In addition, contribution of the employees to the various funds which are deducted by the employer from the salaries and wages of the employees will be taxed as income within brackets insertion of new [clause (x) in clause (24) of Section 2] of the employer, if such contribution is not credited by the employer in the account of the employee in the relevant fund by the due date. Where such income is not chargeable to tax under the head "profits

and gains of business or profession" it will be assessed under the head "income from other sources."
XXXXXX

44. There is no doubt that in Alom Extrusions, this court did consider the impact of deletion of second proviso to Section 43B,which mandated that unless the amount of employers'contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. This court was of the opinion that the omission was curative, and that as long as the employer deposited the dues, before filing the return of income tax, the deduction was available.

45. A reading of the judgment in Alom Extrusions, would reveal that this court, did not consider Sections 2(24)(x) and 36(1)(va).Furthermore, the separate provisions in Section 36(1) foremployers' contribution and employees' contribution, too went unnoticed. The court observed inter alia, that:

"15. …It is important to note once again that, by Finance Act, 2003, not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one
hand vis-a-vis contributions to welfare fundsof employee(s) on the other. This is one more reason whywe hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgement in Allied Motors (P)Limited (supra) is delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that Finance Act, 2003 will operate retrospectively with effectfrom 1st April, 1988 [when the first proviso stoodinserted]. Lastly, we may point out the hardship and the invidious discrimination which would be caused to theassessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, 2003, to the above extent, operated prospectively. Take an example - in the present case, the respondents have deposited the contributions with the R.P.F.C. after 31st March [end of accounting year] but before filing of the Returns under the Income Tax Act and the date of payment falls after the due date under the Employees' Provident Fund Act,they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be
entitled to deduction under Section 43B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right upto 1st April,2004, and who pays the contribution after 1st April, 2004, would get the benefit of deduction under Section 43B of the Act. In our view, therefore, Finance Act, 2003,to the extent indicated above, should be read as retrospective. It would, therefore, operate from 1st April, 1988, when the first proviso was introduced. It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate with effect from 1st April,2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003".
XXXX
48. One of the rules of interpretation of a tax statute is that if a deduction or exemption is available on compliance with certain conditions, the conditions are to be strictly complied with. Eagle Flask Industries Ltd Vs. Commissioner of Central Exercise 2004Supp (4) SCR

35. This rule is in line with the general principle that taxing statutes are to be construed strictly, and that there is no room for equitable considerations.

49. That deductions are to be granted only when the conditions which govern them are strictly complied with. This has been laid down in State of Jharkhand v Ambay Cements as follows:
"23…. In our view, the provisions of exemption clause should be strictly construed and if the condition under which the exemption was granted stood changed onaccount of any subsequent event the exemption would not operate.

24. In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the court to ignore the conditions prescribed in the industrial policy and the exemption notifications.

25. In our view, the failure to comply with the requirements renders the writ petition filed by the respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.

26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein."

XXXX

53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer.

54. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions-which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income,monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law.

They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income,is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date."

10. In our understanding, the aforementioned binding observations of the Hon'ble Supreme Court cannot be brushed aside simply because the decision was rendered in the context where the assessment was framed u/s 143(3) and not u/s 143(1)(a) of the Act. In our considered opinion, the decision of the Hon'ble Supreme Court is in the context of allowability of deposit of PF/ESI after due date specified in the relevant Act.

11. The Hon'ble Supreme Court has categorically held that the employees' contribution deposited after respective due date cannot be allowed as deduction, and, therefore, it would be incorrect to say that the decision of the Hon'ble Supreme Court is applicable only in the case of an assessment farmed u/s 143(3) of the Act. In our considered view, the ratio decidendi is equally applicable for the intimation framed u/s 143(1) of the Act.

12. Now coming to the challenge that the impugned adjustment is beyond the powers of the CPC Bengaluru u/s 143(1) of the Act is also not correct. In light of the aforementioned decision of the Hon'ble Supreme Court [supra], as mentioned elsewhere, it cannot be stated that the impugned adjustment u/s 143(1) of the Act is beyond the powers of the CPC, Bengaluru.

13. The provisions of section 143(1)(a) read as under:-

"143(1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of Section143, such return shall be processed in the following manner, namely;-
(a) The total income or loss shall be computed after making the following adjustments, namely;-
(i) Any arithmetical error in the return;
(ii) An incorrect claim, if such incorrect claim is apparent from any information in the return;
(iii) Disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139;

(iv) Disallowance of expenditure [or increase in income]indicated in the audit report but not taken into account in computing the total income in the return;

(v) Disallowance of deduction claimed under [section 10AA or under any of the provisions of Chapter VI-A under the heading "C.-Deductions in respect of certain income", if] the return is furnished beyond the due date specified under sub-section (1) of section 139; or

(vi) Addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return;"

13.1 A perusal of the afore-stated provisions show that at every stage in sub-section (1) of the Act, the return submitted by the assessee forms the foundation, with respect to which, if any of the inconsistencies referred to in various sub-clauses are found,appropriate adjustments are to be made. It is an open secret that hardly 3 to 5% of the returns are selected for scrutiny assessment, out of which, more than 50% are because of AIR Information under CASS and the Assessing Officer cannot go beyond the reasons for scrutiny selection and such cases are called Limited Scrutiny cases and only the remaining returns are taken up for complete scrutiny u/s 143(3) of the Act.

13.2 Meaning thereby, that exercise of power under sub-section (2) of section 143 of the Act leading to the passing of an order under sub-section (3) thereof, is to be undertaken where it is considered necessary or expedient to ensure that the assessee has not understated income or has not computed excessive loss, or has not under paid the tax in any manner.

14. If any narrow interpretation is given to the decisions of the Hon'ble Supreme Court in the case of Checkmate Services Pvt Ltd [supra], it would not only defeat the very purpose of the enactment of the provisions of section 143(1) of the Act but also defeat the very purpose of the Legislators and the decision of the Hon'ble Supreme Court would be made redundant because there would be discrimination and chaos, in as much as, those returns which are processed by the CPC would go free even if the employees' contribution is deposited after the due date and in some cases the employer may not even deposit the employees' contribution and those whose returns have been scrutinized and assessed u/s 143(3) of the Act would have to face the disallowance.

15. This can neither be the intention of the Legislators nor the decision of the Hon'ble Supreme Court has to be interpreted in such a way

so as to create such discrimination amongst the tax payers. Such interpretation amounts to creation of class [tax payer] within the class [tax payer] meaning thereby that those tax payers who are assessed u/s 143(3) of the Act would have to face disallowance because of the delay in deposit of contribution and those tax payers who have been processed and intimated u/s 143(1) of the Act would go scot- free even if there is delay in deposit of contribution and even if they do not deposit the contribution.

16. We are of the considered view that the ratio decidendi of the Hon'ble Supreme Court is equally applicable to the intimation u/s 143(1) of the Act and, therefore, the decision of the co-ordinate bench relied upon by the assessee is distinguishable. Therefore, respectfully following the binding decision of the Hon'ble Supreme Court [supra], all the three appeals of the assessee are dismissed and that of the revenue is allow

17. In the result, all the three appeals of the assessee in ITA No. 249/DEL/2022, 2250/DEL/2022 and 2197/DEL/2022 are dismissed whereas the appeal of the Revenue in ITA No. 2293/DEL/2022 is allowed.''

In view of the above deliberations and the decision taken by the Hon'ble Supreme Court in the case of Checkmate Services (P) Ltd. vs CIT-1(supra), and also the decision of ITAT Delhi Bench in the case of Savleen Kaur (supra), the Bench sustains the addition made by the ld. AO and we do not find any merits of the ld. CIT (A) once the decision of the Hon'ble Supreme Court clarifying the position of law and therefore, the ground No. 2 raised by the Revenue is allowed.

13.3 As regards ground No. 3, the Bench noted that there are various decisions of Coordinate Bench wherein it has been held that the interest income derived by Co-operative society by way of investment made with the Co-operative Bank would be

entitled to claim of Section 80P(2)(d) of the Act. For this proposition there are various case law has been decided by the coordinate bench of the tribunal and the latest one is in the case of Palm Court M Premises Co-operative Society Ltd. vs. PCIT (2022) 145 taxmann.com 415 (Mumbai-Trib.). The relevant portion of the Judgment of Coordinate Bench in the case of Palm Court M Premises Co-operative Society Ltd. vs. PCIT (supra) is reproduced as under:-

> "**8.** We have heard the rival submissions and perused the materials on record. It is evident that the assessee is a co-operative housing society registered under the Co-operative Housing Societies' Act and that the assessee has earned interest income of Rs. 12,90,210/- which was claimed as deduction under section 80P(2)(*d*). It is observed that the assessee has invested the surplus funds with co-operative banks and non co-operative banks for which the assessee has received interest income of Rs. 10,39,909/- from non co-operative banks and Rs. 12,90,210/- from co-operative banks, respectively. The Ld. PCIT revised the assessment order passed under section 143(3) of the I.T. Act dated 15-12-2017 on the ground that interest income received by the assessee by way of investment in co-operative banks is not eligible for deduction under section 80P(2)(*d*) on the ground that the co-operative banks will not be classified under 'Co-operative Societies' and that the interest earned from co-operative banks are not eligible for deduction under the provisions of section 80P(2)(*d*). The Ld. PCIT placed his reliance on the decision of *Totagars Co-operative Sale Society's* case (*supra*) wherein the Hon'ble High Court held that the amendment to section 194A(3)(*v*) of the Act excludes co-operative banks from the definition of co-operative society by Finance Act, 2015 thereby intending to deduct tax at source under 194A that the said co-operative banks are not speci of genus of co-operative society excluding them from exemption or deduction under the provisions of Chapter VIA by virtue of section 80P of the Act. Following the interpretation of the Hon'ble Karnataka High Court in the above said decision, the Ld. PCIT held that the assessee was not entitled to deduction under 80P(2)(*d*) thereby directing the Assessing Officer to frame assessment de novo. We would like to place our reliance on the decisions relied upon by the Ld. AR in the cases mentioned below:—

1. *Petit Towers Co-op. Housing Society Ltd.* v. *ITO* [IT Appeal No. 549/MUM/2021]
2. *Solitaire CHS Ltd.* v. *Pr. CIT* [IT Appeal No. 3155/Mum/2019, dated 29-11-2019]

3. *Jai Hind Co-operative Housing Society Ltd.* v. *ACIT* [IT Appeal Nos. 1762 & 1763/Mum/2020]

4. *Vadasinor Pragati Samaj Co-operative Credit Society Ltd.* v. *Pr. CIT* [IT Appeal No. 2539/Mum/2019]

5. *Doshi Palace Co-operative Housing Society Ltd.* v. *ACIT* [IT Appeal No. 2510/MUM/2019]

6. *Salsette Catholic Co-operative Housing Ltd.* v. *ACIT* [IT Appeal Nos. 3870 & 3871/Mum/2019]

These decisions of the co-ordinate benches have reiterated the principle that the interest income derived by a co-operative society by way of investment made with a co-operative bank would be entitled to claim of deduction under section 80P(2)(*d*) of the Act. For this proposition, we would like to place our reliance on the decision of *Petit Towers Co-op. Housing Society Ltd.'s* case (*supra*) wherein the co-ordinate bench has observed as under:—

'8. We have given a thoughtful consideration to the contentions advanced by the ld. Authorized representatives for both the parties in context of the aforesaid issue under consideration. As stated by the ld. A.R, and rightly so, the issue that interest received by a co-operative society on its deposits with co-operative banks would be eligible for deduction u/s 80P(2)(*d*) of the Act is covered in assessee's favour by orders of the various coordinate benches of the Tribunal in the following cases :

(*i*) *M/s Solitaire CHS Ltd.* v. *Pr. CIT*-26, Mumbai, ITA No. 3155/Mum/2019, dated 29-11-2019

(*ii*) *Land and Cooperative Housing Society Ltd.* v. *ITO* (2017) 46 CCH 52 (Mum.)

(*iii*) M/s. *C. Green Cooperative Housing and Society Ltd.* v. *ITO*-21(3)(2), Mumbai (ITA No. 1343/Mum/2017, dated 31-3-2017.

(*iv*) *Marvwanjee Cama Park Cooperative Housing Society Ltd.* v. *ITO-Range* 20(2)(2), Mumbai (ITA NO. 6139/Mum/2014, dated 27-9-2017.

(*v*) *Kaliandas Udyog Bhavan Pemises Co-op. Society Ltd.* v. *ITO*, 21(2)(1), Mumbai.

In the aforesaid orders, it has been held by the Tribunal that though the cooperative banks pursuant to the insertion of sub-section (4) to Sec. 80P of the Act would no more be entitled for claim of deduction u/s 80P of the Act, but 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 in force in any State for the registration of co-operative 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 u/s 80P(2)(*d*) of the Act. We find that the aforesaid issue had exhaustively been looked into by the ITAT, „G? bench, Mumbai in the case of M/s *Solitaire CHS Ltd.* v. *Pr. CIT*-26, Mumbai ITA No. 3155/Mum/2019, dated 29-11-2019, wherein the Tribunal had observed as under :

"6. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. Our indulgence in the present appeal has been sought, for adjudicating, as to whether the claim of the assessee for deduction under section 80P(2)(*d*) in respect of interest income earned from the investments/deposits made with the co-operative banks is in order, or not. In our considered view, the issue involved in the present appeal revolves around the adjudication of the scope and gamut of sub-section (4) of Sec. 80P as had been made available on the statute, *vide* the Finance Act 2006, with effect from 1-4-2007. On a perusal of the order passed by the Pr. CIT under Sec. 263 of the Act, we find, that he was of the view that pursuant to insertion of sub-section (4) of Sec. 80P, the assessee would no more be entitled for claim of deduction under Sec. 80P(2)(*d*) in respect of the interest income that was earned on the amounts which were parked as investments/deposits with co-operative banks, other than a Primary Agricultural Credit Society or a Primary Co-operative Agricultural and Rural Development Bank. Observing, that the co-operative banks from where the assessee was in receipt of interest income were not co-operative societies, the Pr. CIT was of the view that the interest income earned on such investments/deposits would not be eligible for deduction under Sec. 80P(2)(*d*) of the Act.

7. After necessary deliberations, we are unable to persuade ourselves to be in agreement with the view taken by the Pr. CIT. Before proceeding any further, we may herein reproduce the relevant extract of the aforesaid 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*) to (*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;"

On a perusal of sec. 80P(2)(*d*), it can safely be gathered that interest income derived by an assessee co-operative society from its investments held with any other co-operative society shall be deducted in computing its total income. 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 co-operative society. We are in agreement with the view taken by the Pr. CIT, that with the insertion of sub-section (4) of sec. 80P, *vide* the Finance Act, 2006, with effect from 1-4-2007, 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. However, at the same time, we are unable to subscribe to his view that the aforesaid amendment would jeopardise the claim of deduction of a co-operative society under sec. 80P(2)(*d*) in respect of its interest income on investments/deposits parked with a co-operative bank. In our considered view, 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 find that the term 'cooperative society' had been defined under sec. 2(19) of the Act, as under:—

"(19) "Co-operative society" means a cooperative society registered under the Cooperative 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;"

We are of the considered view, that though the co-operative banks pursuant to the insertion of sub-section (4) to sec. 80P would no more be entitled for claim of deduction under Sec. 80P of the Act, but 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 in force in any State for the registration of co-operative 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 have been relied upon by the ld. A.R. We find that the issue that a co-operative society would be entitled for claim of deduction under Sec. 80P(2)(*d*) on the interest income derived from its investments held with a co-operative bank is covered in favour of the assessee in the following cases:

(*i*) *Land and Cooperative Housing Society Ltd.* v. *ITO* (2017) 46 CCH 52 (Mum)

(*ii*) M/s *C. Green Cooperative Housing and Society Ltd.* v. *ITO*-21(3)(2), Mumbai (ITA

No. 1343/Mum/2017, dated 31-3-2017

(*iii*) *Marvwanjee Cama Park Cooperative Housing Society Ltd.* v. *ITO-Range*-20(2)(2), Mumbai (ITA No. 6139/Mum/2014, dated 27-9-2017.

(*iv*) *Kaliandas Udyog Bhavan Pemises Co-op. Society Ltd.* v. *ITO*, 21(2)(1), Mumbai.

We further find that the Hon'ble High Court of Karnataka in the case of *Pr. Commissioner of Income-tax and Anr.* v. *Totagars Cooperative Sale Society* (2017) 392 ITR 74 (Karn) and Hon'ble High Court of Gujarat in the case of *State Bank Of India* v. *CIT* (2016) 389 ITR 578 (Guj), had held, that the interest income earned by the assessee on its investments 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, also makes it clear beyond any scope of doubt that the purpose behind enactment of sub-section (4) of Sec. 80P was that the co-operative banks which were functioning at par with other banks would no more be entitled for claim of deduction under Sec. 80P(4) of the Act. Insofar the reliance placed by the Pr. CIT on the judgment of the Hon'ble Supreme Court in the case of *Totgars Co-operative Sale Society Ltd.* v. *ITO* (2010) 322 ITR 283 (SC) is concerned, we are of the considered view that the same being distinguishable on facts 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/deposits parked with a co-operative bank. Although, in all fairness, we may herein observe that the Hon'ble High Court of Karnataka in the case of *Pr. CIT* v. *Totagars co-operative Sale Society* (2017) 395 ITR 611 (Karn), had concluded that a co-operative society would not be entitled to claim of deduction under sec. 80P(2)(*d*). At the same time, we find, that the Hon'ble High Court of Karnataka in the case of *Pr. Commissioner of Income-tax and Anr.* v. *Totagars Cooperative Sale Society* (2017) 392 ITR 74 (Karn) and Hon'ble High Court of Gujarat in the case of *State Bank of India* v. *CIT* (2016) 389 ITR 578 (Guj), had observed, that the interest income earned by a co-operative society on its investments held with a cooperative bank would be eligible for claim of deduction under sec. 80P(2)(*d*) of the Act. We find that as held by the Hon'ble High Court of Bombay in the case of *K. Subramanian and Anr.* v. *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. Accordingly, 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.* v. *Totagars Cooperative Sale Society* (2017) 392 ITR 74 (Karn) and Hon'ble High Court of Gujarat in the case of *State Bank Of India* v. *CIT* (2016) 389 ITR 578 (Guj), wherein it was observed that the interest income earned by a cooperative society on

its investments held with a cooperative bank would be eligible for claim of deduction under sec.80P(2)(*d*) of the Act. 9. Be that as it may, in our considered view, as the A.O while framing the assessment had taken a possible view, and therein concluded that the assessee would be entitled for claim of deduction under sec. 80P(2)(*d*) on the interest income earned on its investments/deposits with co-operative banks, therefore, the Pr. CIT was in error in exercising his revisional jurisdiction u/s 263 for dislodging the same. In fact, as observed by us hereinabove, the aforesaid view taken by the A.O at the time of framing of the assessment was clearly supported by the order of the jurisdictional Tribunal in the case of *Land and Cooperative Housing Society Ltd.* v. *ITO* (2017) 46 CCH 52 (Mum). Accordingly, finding no justification on the part of the Pr. CIT, who in exercise of his powers under sec. 263, had dislodged the view that was taken by the A.O as regards the eligibility of the assessee towards claim of deduction under sec. 80P(2)(*d*), we "set aside" his order and restore the order passed by the A.O under sec. 143(3), date 14-9-2016."

As the facts and the issue involved in the present case before us remains the same as were there before the Tribunal in the case of M/s *Solitaire CHS Ltd.* (*supra*), wherein the order passed by the Pr. CIT u/s 263 of the Act was quashed, we, thus, respectfully follow the same. Backed by our aforesaid deliberations, we are unable to uphold the view taken by the Pr. CIT that the failure on the part of the A.O to be disallow the assessee's claim for deduction u/s 80P(2)(*d*) had rendered the assessment order passed by him u/s 143(3) of the Act, dated 31-8-2017 as erroneous in so far it was prejudicial to the interest of the revenue.

9. Accordingly, on the basis of our aforesaid observations, we herein not finding favor with the view taken by the Pr. CIT that the order passed by the A.O u/s 143(3), dated 31-8-2017 was erroneous in so far it was prejudicial to the interest of the revenue within the meaning of Sec. 263 of the Act set-aside the same and restore the order passed by the A.O u/s 143(3) of the Act, dated 31-8-2017.'

9. From the above observation, we are of the view that the facts of the present case are similar to the decisions that have been cited above and by respectfully following the said decisions, we hold that the Ld. PCIT has erred in concluding that the assessment order passed by the Assessing Officer under section 143(3) dated 19-4-2021 was erroneous insofar as it is prejudicial to the interest of the revenue as per the provisions of section 263 of the I.T. Act, 1961, we *set aside* the order of the Ld. PCIT and restore the order passed by the Assessing Officer *vide* order dated 15-12-2017 passed under section 143(3) of the I.T. Act.

10. In the result, the appeal filed by the assessee is allowed."

In view of the above deliberations, we are of the view that ground No. 3 raised by the Revenue is not maintainable and the same is dismissed.

14. In the result appeal of the revenue in ITA NO. 349/JPR/2022 is partly allowed.

15. The bench feels that the ground no. 1 taken by the revenue in ITA No. 200/JPR/2022 is similar to the ground taken by the revenue in ITA No. 349/JPR/2022 in ground no. 1 therefore, the bench feels that it is not imperative to repeat all the facts and finding of the bench and therefore, the decision taken by the bench in Ground no. 1 in ITA No. 349/JPR/2022 shall apply mutatis mutandis to ground no. 1 ITA No. 200/JPR/2022. So far as the ground no. 2 raised by the revenue ITA No. 200 is similar to the ground taken by the revenue in ITA No. 349/JPR/2022 in ground no. 3 therefore, the bench feels that it is not imperative to repeat all the facts and finding of the bench and therefore, the decision taken by the bench in Ground no. 3 in ITA No. 349/JPR/2022 shall apply mutatis mutandis to the ground no. 2 in ITA No. 200/JPR/2022.

16. In the result the appeal of the revenue in ITA No. 200/JPR/2022 shall stands dismissed.

17. The bench feels that the ground no. 1 taken by the revenue in ITA No. 350/JPR/2022 is similar to the ground taken by the revenue in ITA No. 349/JPR/2022 in ground no. 3 therefore, the bench feels that it is not imperative to repeat all the facts and finding of the bench and therefore, the decision taken by the bench in Ground no. 3 in ITA No. 349/JPR/2022 shall apply mutatis mutandis to ground no. 1 ITA No. 350/JPR/2022.

18. In the result the appeal of the revenue stands dismissed in ITA NO. 350/JPR/2022.

Order pronounced in the open court on 27/04/2023

Sd/-

(राठोड कमलेश जयन्तभाई)
(RATHOD KAMLESH JAYANTBHAI)
लेखा सदस्य /Accountant Member

Sd/-

(डॉ.एस.सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिक सदस्य/Judicial Member

जयपुर/Jaipur
दिनांक/Dated:- 27/04/2023
*Santosh
आदेश की प्रतिलिपि अग्रेशित/Copy of the order forwarded to:
1. The Appellant- DCIT, Circle-6, Jaipur. r.
2. प्रत्यर्थी/ The Respondent- Sh. Satya Dev Arya, Bharatpur.
3. आयकर आयुक्त/ The ld CIT
4. आयकर आयुक्त(अपील)/The ld CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. 200, 349 & 350/JP/2022)

आदेशानुसार/ By order,

सहायक पंजीकार/Asstt. Registrar