

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR
BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER**

I.T.A. No. 64/Asr/2023
Assessment Year: 2015-16

The Jhingran Coop. Multipurpose Service Society Ltd. VPO: Jhingran, Tehsil- Banga Dist: Nawanshahr, Doaba	Vs.	The ITO (TDS) Jalandhar
PAN: AAATT4076F		
APPELLANT		RESPONDENT

Assessee by : Shri Rakesh Joshi, Advocate
Revenue by : Shri Pardeep Kumar, Sr. DR

Date of Hearing: 13/06/2023
Date of Pronouncement: 20/06/2023

ORDER

Per Dr. M. L. Meena, AM:

This appeal is filed by the Assessee against the order of the Ld. CIT(A)/NFAC, Delhi dt. 28/12/2022 for the Assessment Year 2015-16.

2. In the present appeal Assessee has raised the following grounds:

1. *That the order of Ld. Commissioner of Income Tax (Appeals)-NFSC Delhi, is against law & facts of the case.*
2. *That the Ld. Commissioner of Income Tax (Appeals)-NFAC, Delhi has erred in law & facts of the case in confirming the action of the Id. AO in treating the assessee in default for TDS to the tune of Rs.41,89,719/-.*
3. *That the Ld. Commissioner of Income Tax (Appeals) NFAC, Delhi Further also erred in law & facts of the case in overlooking the principle of Res-judicata.*
4. *That the Ld. CIT(A) NFSC Delhi further also erred in law and facts of the case in confirming the action of the Id. AO in charging of interest u/s.201 (IA).*
5. *That the impugned order under appeal is arbitrary and contrary to law & facts of the case, hence deserves to be cancelled.*

6. *That the appellant craves leave to add/alter or forgo any of the grounds of appeal before or at the time of hearing of appeal.*

3. The sole and common issue raised by way of multiple grounds of appeals pertains to treating the assessee in default for TDS to the tune of Rs.41,89,719/- in contravention to the principle of Res-judicata. Accordingly, the appeal has been adjudicated in the following paras.

4. Facts as per records are that the appellant has paid interest exceeding Rs. 5,000/- to non-members/nominal member without deducting TDS. The Ld. CIT(A) confirmed the action of the AO by observing that it is very clear in this regard under Section 194A(3)(v) of the Income Tax Act, 1961, that exemption of TDS provision is allowed only to a member of a co-operative society. He further noted that the CBDT has clearly defined 'member' for the purpose of this section vide Circular No. 9 of 2022 dated 11.09.2022. The Assessing Officer has clearly dealt with this issue and for sake of brevity needs no reiteration. Thus, the appellant does not get any benefit from the order of the Jurisdictional High Court in CIT vs Punjab State Cooperative Bank Ltd, 2008 which is given in a totally different context of section 80P of the Act. First of all when specific provision is there (CBDT Circular as mentioned above) then general provision can not be resorted to. Even otherwise the referred case law does not apply to the circumstances of this case. The TDS provision has been brought, inter alia, to keep a tab upon illegal money transactions/tax evasion instruments and any liberal interpretation allowing exemption from TDS to nonmember/ nominal members will have country wide and huge ramification of creating a loophole in the legislation which is otherwise not desired. Accordingly, CIT(A) dismissed appellant's appeal.

5. The Ld. AR submitted that Ld. Commissioner of Income Tax (Appeals)-NFSC Delhi, order is against law & facts of the case, as he has erred in confirming the action of the Id. AO in treating the assessee in default for TDS to the tune of Rs.41,89,719/-, by overlooking the principle of Res-judicata. He further submitted that the Ld. CIT(A) NFSC Delhi also erred in law and facts of the case in confirming the action of the Id. AO in charging of interest u/s.201 (IA) by passing the impugned order arbitrary and contrary to law & facts of the case. In support, He filed a brief synopsis which reads as under:

This has reference to appeal no.: ITA 64//ASR/2023 for the asstt. year 2015-16, It is respectfully submitted as under:—

That the Worthy CIT(Appeal) NFAC, Delhi erred in law and facts of the case in upholding the Assessment Order of the Ld. A.O, to the effect that interest paid by the society to nominal member exceeding Rs.5000/- during the F.Y: 2014-15, is liable for deduction of TDS, as such the assessee is in default on non deduction of tax u/s 201 (1) on this interest payment made to nominal members.

In this regards, It is humbly submitted that the said action of the worthy CIT(A) Delhi in confirming the Asstt. Order u/s. 201 (1)/201 (1 A) is contrary to the provisions of section 194A(3)(v). which restricts the implementation of TDS on the amount paid by a co-operative society to its member. The said section is reproduced hereunder:-

“Section 194A (1) Any person not being an individual
ded
 uct income tax thereon at the rates in force.

Provided that an individual or a Hindu Undivid.....

(2) (Omitted by the finance Act,1992 w.e.f.1-6-1992)

(3) The provisions of sub-section (1) shall not apply—

(i) (a) (b)(c)(d) (iv).

(v) to such income credited or paid by a co-operative society (other than a co-operative bank) to a member thereof or to such income credited or paid by a cooperative society to any other co-operative society.”

Thus as per the said provision the provisions of section 194A are not applicable in the case of payment of interest paid by the co-operative Society to its members.

It is respectfully submitted that as per “The Punjab Co Operative Societies Act,1961” definition of Member as defined in section 2(g) is as under:

Member: Member means a person joining in the application for the registration of a co-operative society and a person admitted to membership after such registration in accordance with this act, the rules and the bye-laws, and **includes a nominal member, and an associate member and the Government when it subscribed to the share capital of a society.**

And section 2(ggg) 'Nominal member' means a person admitted to membership as such after registration in accordance with the bye laws.

The jurisdictional High Court has also held that a nominal member is a member of a co-operative society in **CIT Vs Punjab State Co-operative bank Ltd; 2008 300 ITR 24 Punjab & Haryana High court [ANNEXURE A]**

2.(g) 'member' means a person joining in the application for the registration of a cooperative society and a person admitted to membership after such registration in accordance with this Act, the rules and the bye-laws, and includes a nominal and an associate member and the Government when it subscribes to the share capital of a society.

16. According to this definition, the member also includes a nominal and an associate member. The "nominal member" and "associate member" have also been defined as under:

2.(ggg) 'nominal member*' means a person admitted to membership as such after registration in accordance with the bye-laws;

(a) 'associate members means a member who holds jointly a share of a co-operative society with others but whose name does not stand first in the share certificate.

17. Learned Counsel for the appellant raised the contention that as per the definition of "member", it includes a nominal and an associate member and the Government "when it subscribes to the share capital of a society". His contention is that if a nominal member does not subscribe to the share capital of a society, he cannot become a member of the society. This contention of learned Counsel for the appellant is not acceptable because the words "when it subscribes to the share capital of a society" are relating to the Government and not to the nominal and associate members. The associate members have been clearly defined as member who jointly hold a share of a co-operative society with others but whose name does **not stand first in the share certificate, whereas nominal members means the person** admitted to membership as such after registration in accordance with the bye laws. A person can become the nominal member of a co-operative society even according to the bye laws of the society by paying the membership fees. It is not necessary for becoming the nominal member that he has to subscribe for the share capital. On the other hand, the Government cannot become a nominal member. It can become a member of the society when it subscribes to the share capital of the society. Thus, it is not necessary for a nominal member to subscribe to the share capital. The whole thrust of the Revenue is that the loan advanced to the nominal members, who are not holding the share capital, cannot be termed to be the loan advanced to the

members and any income derived from such loanees would not be deductible for exemption under Section 80P(2)(a)(i) of the Act because the said income is not derived by the cooperative bank from the credit facilities provided to its members. In our view, a nominal member who has become a member of the society after its registration on payment of the prescribed fees as per the bye laws of the society, will also be considered as a member of the society as per the definition given under the Societies Act.

Therefore, in the facts and circumstances of the case, it makes no difference whether the income is derived from the loan advanced to the nominal members or members or otherwise to a third party because every income of interest derived by a co-operative banking society from the banking business activity is to exempt under Section SOP (a)(i) of the Act.

Thus as per the law laid down by the jurisdictional High Court, a Nominal Member is also an member of the Society. As such interest paid to a member as well as nominal member is just interest paid to members only. As such as per the proviso 3(v) of section 194A, the said section is not applicable on the assessee as such the assessee/appellant cannot be treated in default under section 201 (1) & 201 (1 A) of the I.T. Act,1961.

Following the said judgment of the Hon'ble jurisdictional High Court, this hon'ble Bench {ITAT Amritsar Bench} in the case of The Rurkee Co op Agri M/P Society Ltd; VPO: Rurkee Vs Jt CIT(OSD) Phagwara circle, Phagwara [ITAT No 459(ASR)/2012/A.Y 2009-10] has also held as under:-

We are of the view that nominal members are to be considered as members in view of the decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Punjab State Co-operative Bank Ltd. (supra). Accordingly, the assessee was not required to deduct tax at source on interest payments to the nominal members, who are members as per the decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Punjab State Co-operative Bank Ltd.'{**ANNEXURE3**}

Similar are the views of the hon'ble ITAT Bangalore Bench as held in a case titled as "M/S* Vasavi Credit Co-Operative ... vs Income Tax Officer (Tds), Ward- ... on 18 January, 2021 [ITA No.412 & 413/Bang/2020] [In para 13 at page 6] as under:-

"This view combined with the decision of Hon'ble Supreme Court holding that the term "members" should be construed as defined in the respective cooperative societies Act would lead us to the conclusion that the associate members should be considered as included in the term "members" used in sec.194A(3)(v) of the Act. We notice that paragraph 3 of CBDT Circular (referred supra) has been quashed by Hon'ble Bombay High Court in the case of Jalagaon District Central Co-operative Bank Ltd. Vs. Union of India (265 ITR 423). Accordingly, we hold that the assessee is not liable to deduct tax at source from the interest payments made to Associate members as per sec.194A(3)(v) of the Act." [ANNEXURE C]

Also by the Hon able High Court of Bombay in the case of The Jalgon District Central Bank Vs union of India and Ore. 05/09/2003184 CTR 343. \ANNEXUREDJ

That We are concerned with as to whether the exemption granted to the co-operative society under Section 194A(3)(v) can be taken away by creating a distinction between duly registered member and a nominal member, which is unknown to the exemption clause contained in Section 194A(3)(v) of the IT Act, 1961.

23. The impugned Notification issued by CBDT, which is in the form of clarification with regard to rights and privileges of a duly registered member and nominal member is outside the scope of Section 119 of the IT Act, 1961. No doubt, Section 119 of the IT Act, 1961 generates some power in CBDT, But the power so generated by virtue of Section 119 is required to be utilized in a prescribed manner. CBDT is empowered to issue only administrative instructions to the subordinate authorities for the purpose of proper administration and enforcement of the provisions of the IT Act, 1961. Under the garb of Section 119 of the IT Act, 1961, CBDT has crossed its authority. What is not contemplated in exemption clause under Section 194A(3)(v) of the IT Act, 1961, cannot be imported to deprive the exemption granted to co-operative society by issuing the impugned circular. By impugned circular, the co-operative society cannot be deprived of its right of exemption given under IT Act, 1961. The CBDT has overstepped its authority and has issued the impugned circular directly in conflict with the provisions contained in Section 194A(3)(v) of the IT Act, 1961. Section 119 of the IT Act, 1961, does not at all support the action of CBDT.

24. The Division Bench of this Court, in the case of Banque Nationale De Paris (cited supra), has ruled out that CBDT 'cannot issue a circular under Section 119 of the Act, which would override or detract from the provisions of the IT Act, 1961. CBDT can legitimately issue administrative instructions or orders by exercising powers under Section 119 of the IT Act, 1961. However, by virtue of Section 119 of the Act, the CBDT is not at all permitted to override or withdraw the exemption clause under Section 194A(3)(v) of the IT Act, 1961. Assumption of such powers in CBDT by virtue of Section 119 of the IT Act, 1961 would really amount to bestowing powers on delegated authority even to amend the provisions of the IT Act, 1961 enacted by the Parliament.

25. Having examined the validity of the impugned circular from all angles, we are of the clear opinion that CBDT has no authority to make a crack in the exemption clause contained in Section 194A(3)(v) of the IT Act, 1961, by issuing the impugned circular,

the CBDT cannot usurp the powers of Parliament by virtue of Section 119 of the IT Act, 1961. The CBDT, under the garb of Section 119 of the IT Act, 1961, cannot exercise wider powers than the powers bestowed on it.

The CBDT has no power to introduce a substantial change or alteration in the provisions of the IT Act, 1961, by importing the ideas unknown to the IT Act, 1961. The impugned circular, therefore, does not stand to the legal test

26. In the result, both the writ petitions are allowed. The impugned Circular No. 9 of 2002 dt. 11th Sept., 2002 [F. No. 275/106/2000/IT(B)--Annexure*A] is quashed and set aside. Similarly, the letter issued by the ITO, Jalgaon, Ward No. 2(3) [No. JAL/ITO/2(3)/TDS/194/2000-03 dt. 9th Oct., 2002—Annexure B] is also quashed and set aside. Rule made absolute in the above terms. Thus the reliance of the Worthy CIT(A) NFAC, Delhi on this circular is against law.

Moreover now the Hon'ble Supreme Court in the case of "Mavilayi Service Co-operative Bank Ltd: Vs. Commissioner of Income Tax, Calicut, [2021] 123 taxmann.com 161 (SC) has also held that the expression " member" is not defined in the Act. Since a cooperative society has to be established under the provisions of the law made by the State Legislature in that regard, the expression "member" in section 80-P(2)(a)(i) must therefore, be construed in the context of the provisions of the law enacted by the state Legislature under which the cooperative society claiming exemption has been formed" [ANNEXURE E]

In this regards, it is further humbly submitted that the worthy CIT(A) NFAC, Delhi in the case of the assessee itself for the proceeding Asstt. Year i.e for 2014-15, has held that nominal members are members and interest paid to them is not liable for TDS u/s. 194 of the I.Tax. Act,1961 [Copy of Order attached herewith][ANNEXURE also similar view taken in appeal no NFAC/2014-15/10109750 & Appeal No. N FAC/2013-14/10010485 [Copies attached herewith] [ANNEXURE G&H respectively]

Thus in view of the above said submission, keeping in view the above stated facts as well as legal position, it is requested before the hon'ble Bench that the appeal of the appellant may kindly be allowed and impugned order under appeal, which is arbitrary and illegal being against law and facts of the case may kindly be cancelled/ annulled and/or such other relief may kindly be granted to the appellant which may be deemed fit and proper by the hon'ble Bench, under the circumstances and facts of the case.

6. Per contra, the Ld DR although supported the impugned order. however, he has failed to rebut the contention of the counsel.

7. We have heard the rival contentions, perused the material on record, impugned order, written submission and case law cited. Now, the law is settled on the issue of nominal members are to be considered as members of the cooperative society. Meaning thereby, the assessee was not required to deduct tax at source on interest payments to the nominal members.

8. On parity of facts, following the judgment of the Hon'ble jurisdictional High Court, in the case of "CIT vs. Punjab State Co-operative Bank Ltd" (Supra), the ITAT Amritsar Bench in the case of "The Rurkee Coop Agri M/P Society Ltd; VPO: Rurkee Vs Jt CIT(OSD) Phagwara circle, Phagwara in ITAT No 459(ASR)/2012/Assessment Year 2009-10] has also held that the assessee was not required to deduct tax at source on interest payments to the nominal members, who are members of the society.

9. The Hon'ble High Court of Bombay in the case of 'The Jalgon District Central Bank Vs Union of India and Ore.', (Supra) have adjudicated upon the question of whether the exemption granted to the co-operative society under Section 194A(3)(v) can be taken away by creating a distinction between duly registered member and a nominal member, which is unknown to the exemption clause contained in Section 194A(3)(v) of the IT Act, 1961. Having examined the validity of the impugned circular from all angles, the Hon'ble High Court has given clear opinion that CBDT has no authority to make a crack in the exemption clause contained in Section 194A(3)(v) of the IT Act, 1961, by issuing the impugned circular and that the CBDT cannot usurp the powers of Parliament by virtue of Section 119 of the IT Act, 1961. Meaning thereby that the CBDT, under the garb of Section 119 of the IT Act, 1961, cannot exercise wider powers than the powers bestowed on it. Thus, the CBDT has no power to introduce a substantial change or alteration in the provisions of the IT Act, 1961, by importing the ideas unknown to the IT Act, 1961. The impugned circular, therefore, does not stand to the legal test. Accordingly, the impugned Circular No. 9 of 2002 dt. 11th Sept., 2002 [F. No. 275/106/2000/IT(B)--Annexure*A] was quashed and set aside. Thus, in our view, the reliance of the Worthy CIT(A) NFAC, Delhi on this circular is against law.

10. Further, the Hon'ble Supreme Court in the case of "Mavilayi Service Co-operative Bank Ltd: Vs. Commissioner of Income Tax, Calicut, [2021] 123 taxmann.com 161 (SC) has also observed that the expression "member" is not defined in the Act. Since a cooperative society has been established under the provisions of the law made by the State Legislature in that regard, the expression "member" in section 80-P(2)(a)(i) must therefore, be construed in the context of the provisions of the law enacted by the state Legislature under which the cooperative society claiming exemption has been formed.

11. It is further noted that the CIT(A) NFAC, Delhi in the assessee's own case for the proceeding in respect of the Assessment Year 2014-15, has accepted nominal members as members and held that interest paid to them is not liable for TDS u/s. 194 of the Income Tax Act, 1961 (Copy of Order filed on record). In view of the matter, we hold that the CIT/NFAC has acted against Res Judicata.

12. In the above view, we accept the grievance of the assessee genuine. The order of the Ld. CIT/NFAC is held to be infirm and against law. Accordingly, the impugned order is quashed.

Order pronounced in the open court on 20/06/2023

Sd/-
(Anikesh Banerjee)
Judicial Member

Sd/-
(Dr. M. L. Meena)
Accountant Member

A.G/DOC*

Copy of the order forwarded to:

- (1) The Appellant
- (2) The Respondent
- (3) The CIT
- (4) The DR, I.T.A.T.

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By Order