

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'SMC', BANGALORE**

BEFORE SHRI A.K.GARODIA, ACCOUNTANT MEMBER

**ITA No.1364(Bang) 2016
(Assessment year : 2004-05)**

The Sri Kannikaparameshwari Co-Op. Bank Ltd.,
P.J.Extension, entre Point,
Davaanagere
No.AADFV3065F

Appellant

Vs

The Income Tax Officer,
Ward-3,
Davanagere

Respondent

**Assessee by : Shri S. Ramasubramanian, CA
Revenue by : Shri G. Manoj Kumar, Addl. CIT**

**Date of hearing : 15-09-2016
Date of pronouncement : 23-09-2016**

ORDER

PER A. K. GARODIA, A. M.:

This is an assessee's appeal directed against the order of the ld. CIT(A), Davanagere dated 11-03-2016 for the assessment year : 2004-05.

2. Ground no.1 to 4 are as under;

"1.That the order of the ld.CIT(A) in so far it is prejudicial to the interest of the appellant, is bad and erroneous in law and against the facts and circumstances of the case.

2. That the notice u/s 148 I issued on mere change of opinion and without any tangible material to prove that the income has escaped assessment.

3. That the ld. CIT(A) erred in law and on facts in passing the order u/s 147 of the Act and such an order is without jurisdiction.

4. That the ld. CIT(A) erred in law and on facts in not disposing of the objections to the reasons recorded for re-opening of the assessment..

3. It was submitted by the ld. AR of the assessee that the reasons recorded by the AO for re-opening are available on page no.189 of the paper book. He also submitted that in the present case, the original assessment was completed by AO u/s 143(3) of the IT Act, 1961 and copy of this assessment order is available on page no.33 of the Appeal Memo. He also submitted that under these facts, re-opening is based on change of opinion and therefore, not valid. In support of this contention, he placed reliance on the following judicial pronouncements

- a) Sheo Nath Singh Vs Appellate Asst. Commissioner of IT 82 ITR 147(SC)*
- b) CIT Vs Orient Crafts Ltd., 354 ITR 536(Del.)*
- c) CIT Vs Ramakrishna Hegde 326 ITR 347(Kar.)*

4. The ld. DR of the revenue supported the orders of the authorities below.

5. I have considered the rivals submissions. First, I reproduce the reasons recorded by the AO for re-opening which are available on page-189 of the paper book.

F.No.AADTS3885J/ITO/W-3/DVG/09-10

The Office Of the ITO, Ward-3,
CR Buildings, Deveraj Urs L/out,
Davanagere, Date: 10-07-2009

To

The Secretary
Sri Kannikaparameshwari Co-Op. Bank Ltd.,
P J Extn. 3rd Main,
Davanagere

Sir,

Sub: Notice u/s 148 of the IT Act – reasons thereof –reg.

Ref: 1 Your letter dated 06-07-2009

Please refer to the above.

As required by you, vide your letter cited in the above reference I am hereby communicating the reasons for re-opening the assessment u/s 147 of the Act, in respect of Sri Kannikaparameshwari Co-Op. Bank Ltd., Davanagere for the AY: 2004-05 as under;

The deduction claimed by the assessee u/s 80P(2) of the Act to the tune of Rs.44,53,500/- being the profit on sale of Securities, is not allowable, as the same has to be charged under the head ‘Capital Gain’ and is not an income from banking business.

Yours faithfully,

Sd/-
(T.Mudalagiriappa)
Income Tax Officer, Ward-3,
Davanagere

6. Now, I examine the original assessment order framed by the AO u/s 143(3) of the Act and as per this order passed by the AO on 06-03-2006, this assessment order is very cryptic and as per the same and since no other tangible material brought on record in the form of paper book to show that any query was raised by the A.O. on this issue and reply was given to show that the A.O. formed an opinion, it has to be

accepted that the AO has not formed an opinion at the time of making the original assessment order passed u/s 143(3) of the Act and therefore, there is no merit in this contention that the re-opening is on the basis of change of opinion.

7. In the light of these facts, now I examine the applicability of various judgments cited by the Id. AR of the assessee. First judgment cited by him is the judgment of the Hon'ble Apex Court rendered in the case of Sheo Nath Singh Vs Appellate ACIT (Supra). In that case, it is held by the Hon'ble Apex Court that there is no material or fact which has been stated in the reasons for starting proceedings of re-opening. But in the present case, as per the reasons reported by the AO as reproduced above, it is stated that deduction u/s 80P is not allowable on an income of Rs.44,53,500/- being the profit on sale of securities which is to be charged under the head 'Capital Gain' and is not an income from banking business. It was submitted before us by the Id. AR of the assessee that there is no basis as per which the AO can show that this income is taxable under the head "Capital Gain", but even if that be so, the assessee will not get any help, because deduction u/s 80P is allowable only in respect of business of banking and this cannot be said that purchase and sale of securities is business of banking and therefore, in my considered opinion, this judgment of the Hon'ble Apex Court rendering no help to the assessee in the facts of the present case.

8. The second judgment on which reliance has been placed by the Id. AR of the assessee is the judgment of the Hon'ble Delhi High Court

rendered in the case of CIT Vs Orient Crafts Ltd.(Supra). In that case, the substantial question of law framed by the Hon'ble Delhi High Court was this as to whether the Tribunal was right in law in holding that in the absence of any tangible material available with the AO to form the requisite belief regarding escapement of income, the re-opening of the assessment made u/s 143(1) is bad in law. In that case, in para-18 of the judgment, it is observed by the Hon'ble Delhi High Court that in that case, the reasons disclosed that the AO reached the belief that there was escapement of income on going through the return of income filed by the assessee after he accepted the return under section 143(1) without scrutiny and nothing more. Under these facts, it was held by the Hon'ble Delhi High Court that this is nothing but a review of the earlier proceedings and an abuse of power by the AO. But in the present case, sufficient reasons has been given by the AO and material has been indicated on the basis of which the AO was of the belief that there is escapement of income by saying that the deduction claimed by the assessee u/s 80P(2) of the IT Act in respect of income of Rs.44,53,500/- on sale of securities is not allowable because this is not an income from banking business. Hence, I feel that this judgment of the Hon'ble Delhi High Court is also not rendering any help to the assessee in the present case.

9. The third judgment on which the ld. AR of the assessee placed reliance was the judgment of the Hon'ble Karnataka High Court rendered in the case of Ramkrishna Hegde (Supra). In that case, the ITO found

certain fixed deposit receipt in the name of the assessee were found in the course of recovery proceedings and he re-opened the assessment of the assessee for the year 2000-01 being of the view that the source of investment for issue of the fixed deposit receipts was required to be explained properly. In that case, the Tribunal found that the FDRs figured in the course of the assessments of the assessee in the earlier years and the interest earned from the FDs having already been offered to tax. Under these facts, it was held by the tribunal that the re-opening of the assessment was bad in law and thereafter, it was held by the Hon'ble Karnataka High Court that mere detection of the FDR would not in any way constitute information for re-opening of the order for under assessment. Therefore, the assessment proceedings were held to be invalid. In the present case, the facts are totally different and therefore, this judgment of the Hon'ble Karnataka High Court is also not rendering any help to the assessee in the present case.

10. As per the above discussion, I have seen that none of the judgment cited by the ld. AR of the assessee is rendering any help to the assessee in the present case and I also found that there is no merit in the contention of assessee that re-opening is on the basis of change of opinion and accordingly, all these grounds being Ground no.1 to 4 are rejected.

11. Ground no.5 & 6 are as under;

“5. That the ld. CIT(A) could not have recorded the reason that the profit on sale of securities is taxable

under the head "Capital Gains" and not an income from banking business since it is contrary to the decision of the Hon'ble Supreme Court which was in force on the date of which the reasons were recorded.

6. That the ld. CIT(A) ought to have followed the circular No.18/2015 dated 02-11-2015 which is binding on the income tax authorities".

12. The ld. AR of the assessee submitted that the CBDT Circular No.18/2015 dated 02-11-2015 is available on page 188 of the paper book and as per the same, the judgment of the Hon'ble Apex Court rendered in the case of CIT Vs Nawanshahar Central Co-op. Bank Ltd.,(2007) 160 Taxman 48(SC) was referred in which it was held by the Hon'ble Apex Court that the investments made by a banking concern are part of the business of banking. Therefore, the income arising from such investments is attributable to the business of banking falling under the head "Profits and Gains of Business and Profession". He submitted that as per this Board Circular and this judgment of the Hon'ble Apex Court, it should be accepted that the activity of the assessee of purchasing and selling of securities and earning capital gain there from is business activity and therefore, this income is eligible for deduction u/s 80P of the IT Act, 1961. He also placed reliance on the judgment of the Hon'ble Karnataka High Court rendered in the case of Karnataka Bank Ltd., Vs ACIT 356 ITR 549. He also placed reliance on the judgment of the Hon'ble Apex Court rendered in the case of CIT Vs Cocanada

Radhaswami Bank Ltd., 57 ITR 306(SC). Reliance was also placed on the judgment of the Hon'ble Gujarat High Court rendered in the case of CIT Vs Baroda Peoples Co-Op. Bank Ltd., 280 ITR 282 (Guj.)

13. The ld. DR of the revenue supported the orders of the authorities below.

14. I have considered the rival submissions. I find that the dispute in the present case is regarding the allowability of deduction u/s 80P of the Act in respect of income earned by the assessee of Rs.44,53,500/- on account of its activities of purchase and sale of securities. The AO held that this income is taxable under the head "Income from short term capital gains" and therefore, the assessee is not eligible for deduction u/s 80P of the Act in respect of this income.

15. There is no dispute regarding the facts. On page -17 of his order, the ld. CIT(A) has reproduced the date wise details of purchase and sale of securities and from the same, it is seen that the investments are sold within two months of purchase for profit. In the light of these facts, in the present case, I examine the applicability of various judgments and the Boards Circular cited by the ld. AR of the assessee. As per the Board Circular No.18/2015 dated 02-11-2015, the judgment of the Hon'ble Apex Court rendered in the case of CIT Vs Cocanada Radhaswami Bank Ltd.(Supra) was referred and it was stated that although this judgment is in the context of co-operative society/banks claiming deduction u/s 80P of the Act but the principle is equally applicable to all commercial banks to which Banking Regulation Act,

1949 applies. Hence, as per this Circular, the Board has stated that this judgment is applicable to commercial banks also. Therefore, this Board Circular in itself has not laid down any new guide line it has only extended the operation of the judgment to commercial banks also. Hence, I consider the applicability of the judgment of Hon'ble Apex Court. In that case, it was held by the Hon'ble Apex Court that where the co-operative bank carrying on the business of banking is statutorily required to place a part of its funds in approved securities, the income arising from such investments is attributable to the business of banking and deductible u/s 80P(2) of the Act, 1961. It is also stated by the Hon'ble Apex Court in this judgment that it has been so held in the case of CIT Vs Karnataka State Co-Op. Apex Bank 169 CTR 486(SC). In this case, it is held by the Hon'ble Apex Court that the assessee cooperative bank is required to place a part of its funds with SBI or RBI to enable it to carry on its banking business and that being so, any income derived from funds so placed arises from business carried on by it and the assessee has not by reason of sec.80p(2)(i) of the Act, to pay income tax thereon. Hence, it is seen that as per these judgments of the Hon'ble Apex Court, if the co-operative bank is statutorily required to make certain investments then the income derived from such investment will be eligible for deduction u/s 80P of the Act but in the present case, this is not the claim of the assessee that the impugned income of Rs.44,53,500/- is in respect of these investments which the assessee was statutorily required to make and therefore, in my considered

opinion, neither the Board Circular nor the judgments of the Hon'ble Apex Court is rendering any help to the assessee in the present case.

16. The next judgment on which reliance has been placed by the ld. AR of the assessee is the judgment of the Hon'ble Karnataka High Court rendered in the case of Karnataka Bank Ltd., Vs ACIT (Supra). In this case, the issue in dispute before the Hon'ble High Court was regarding the valuation of investments shown as stock in trade. In the present case, the dispute is entirely different and therefore, this judgment of the Hon'ble Karnataka High Court is not relevant in the present case.

17. The next judgment on which reliance has been placed by the assessee is the judgment of the Hon'ble Ape Court rendered in the case of CIT Vs Cocanada Radhaswami Bank Ltd., (Supra). In this case, the dispute was this as to whether the securities held as part of the trading asset and losses incurred under the head "Business" can be carried forward and set off against income from securities. In fact, in this case, the dispute was regarding set off of brought forward business loss against income under the head " income from securities". It was held by the Hon'ble Apex Court that business income is broken-up under different heads only for the purpose of computation of total income and by that break-up, the income does not loose the character of the income of the business.

18. In my considered opinion, this judgment is not relevant in the present case because. I have already stated above that even if the

impugned income of Rs.44,53,500/- is held to be business income, this income is not an income from banking business because the regular purchase and sale of securities cannot be said to be banking business and hence, such income is not eligible for deduction u/s 80P. Case may be different if the investment in securities is primarily for earning interest income and some incidental income is earned on its sale when the investment is sold to switch over to some other investment giving better yield or to advance loans etc. but when the investments are being sold in such a short time without any reason such as switching over to some other investment for better yield or for advancing of loan etc., such purchase and sale of securities may be a business of the assessee but this cannot be a banking business eligible for deduction u/s 80P. Therefore, I hold that this judgment of the Hon'ble Apex Court is not rendering any help to the assessee in the present case.

19. The next judgment cited by the ld. AR of the assessee is the judgment of the Hon'ble Gujarat High Court rendered in the case of CIT Vs Baroda Peoples Co-Op. Bank Ltd., (Supra). In that case, the facts were that the assessee, a co-operative bank earned interest from investments in i) IDBI Bonds, ii) SBI Bonds, iii) Sardar Sarovar Narmada Bonds and iv) Kisan Vikas Patra. The AO disallowed the claim of the assessee for deduction u/s 80P in respect of such interest income but the Tribunal held that such income is eligible for deduction u/s 80P and on further appeal by the revenue before the Hon'ble Gujarat High Court, it had approved the Tribunal order in that case. Hence, it is seen that in

that case, the issue in dispute was regarding interest income on investments whereas in the present case, the issue in dispute is for income arising on purchase and sale of securities and not interest income and therefore, in my considered opinion, this judgment is also not relevant in the present case.

As per the above discussion, none of the judgments cited by the Id. AR of the assessee is rendering any help to the assessee in the present case and I have also seen that as per the provisions of sec.80P of the Act, deduction is allowable to the assessee being a co-operative bank in respect of income from banking business and the income from purchase and sale of securities without any intention to earn interest income from such investment and without any legal obligation to have such investment to run banking business, it cannot be considered as income from banking business and therefore, in respect of this income, the assessee is not eligible for deduction u/s 80P of the IT Act, 1961. I hold accordingly. These grounds are also rejected.

20. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on the date mentioned on the caption page.

(A.K. GARODIA)
ACCOUNTANT MEMBER

Bangalore:
Dated: .09.2016
am*

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)-II Bangalore
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

By order,
AR, ITAT, Bangalore

1.	Date of Dictation
2.	Date on which the typed draft is placed before the dictating Member
3.	Date on which the approved draft comes to the Sr. P. S.
4	Date on which the order is placed before the dictating Member for pronouncement
5.	Date on which the order comes back to the Sr. P.S.
6.	Date of uploading the order on website
7.	If not uploaded, furnish the reason for doing so.....
8.	Date on which the file goes to the Bench Clerk
9.	Date on which order does for Xerox & endorsement
10.	Date on which the file goes to the Head Clerk.....
11	The date on which the file goes to the Assistant Registrar for signature on the order.....
12	The date on which the file goes to the dispatch section for dispatch of the Tribunal order.....
13	Date of dispatch of order.....