

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND SHRI LALIET KUMAR, JUDICIAL MEMBER

ITA No.827/Bang/2017
Assessment year : 2013-14

The Income Tax Officer, Ward 1, Bagalkot.	Vs.	Shri Bapooji Pattin Souhard Sahakari Niyamit, Bagalkot Dist., Bagalkot. PAN: AAAAB 6930F
APPELLANT		RESPONDENT

Appellant by	:	Shri B.R. Ramesh, Jt. CIT(DR)(ITAT) Bengaluru
Respondent by	:	Shri Madhukar G. Hegde, CA

Date of hearing	:	12.10.2017
Date of Pronouncement	:	31.10.2017

ORDER

Per Inturi Rama Rao, Accountant Member

This appeal is filed by the revenue against the order of the Id. CIT(Appeals), Belagavi dated 30.01.2017 for the assessment year 2013-14.

2. The revenue has raised the following grounds:-

“(1) The learned CIT(Appeals) erred in law and on facts in not appreciating the fact that the assessee is a Co-operative Society which fulfills all the three conditions of being a Primary Co-

operative Bank as provided in section 5(ccv) of the Banking Regulation Act, 1949.

(2) The learned CIT(Appeals) erred in law and on facts in not appreciating the definition of a Co-operative Bank which as per Explanation below section 80P(4) namely "the cooperative bank" shall have the meaning assigned to it in Part- V of the Banking Regulation Act, 1949.

(3) The learned CIT(Appeals) erred in law and on facts in not appreciating the fact that the assessee society being a Credit Co-operative Society engaged in banking business is a Primary Co-operative Bank within the definition of section 5(ccv) of the Banking Regulation Act, 1949 and as such, is not eligible for deduction under section 80P(2)(a)(i) of the I. T. Act, 1961.

(4) The learned CIT(Appeals) erred in not considering the fact that the Special Leave Petition filed by the Department before the Hon'ble Supreme Court, vide SLP No. 18221 of 2015 has been converted to Civil Appeal No. 5103/2015 which is pending for a final decision on the same issue, in the case of CIT Vs. Shri Biluru Gurbasava Pattin Sahakari Sangh Niyamit.”

3. Briefly the facts of the case are that the respondent-assessee is a cooperative society providing credit facilities. Return of income for the AY 2013-14 was filed on 23.09.2013 declaring NIL income after claiming exemption u/s. 80P of the Act of Rs.87,10,540. Against the said return of income, assessment was completed by the ITO, Ward-1, Bagalkot by order dated 31.12.2015 passed u/s. 143(3) of the Act by denying the exemption u/s. 80P of the Act and disallowing Pigmi commission on the ground that no TDS was made of Rs.1,70,46,946. The AO denied the exemption u/s. 80P on the ground that the respondent-assessee society is a bank and is hit by the provisions of sub-section (4) of section 80P of the Act.

4. Being aggrieved, an appeal was preferred before the CIT(Appeals). The Id. CIT(Appeals) following the decision of the Hon'ble jurisdictional High Court and the ITAT in the cases of *CIT v. Sri Biluru Gurubasava Pattina Sahakari Sangha Niyamitha in ITA No.5006/13*, *ITO v. Venugram Multipurpose Co-operative Credit Society Ltd. in ITA No.100042 of 2014* and *CIT v. Zafari Momim Vikas Co-op. Credit Society Ltd.* has allowed the appeal holding that the respondent-assessee is not a co-operative bank, therefore, is not hit by provisions of sub-section (4) of section 80P of the Act. The Id. CIT(Appeals) also granted relief in respect of addition of Pigmi commission paid on the ground that TDS provisions are not applicable.

5. The revenue is in appeal before us contesting only against the finding of the CIT(Appeals) allowing the benefit u/s. 80P of the I.T. Act. The Id. Sr.DR vehemently contended that the respondent-assessee co-operative society is not eligible for deduction for the benefit of section 80P as it is engaged in the business of providing credit facilities to the third parties.

6. On the other hand, the Id. AR placed reliance on the decision of Hon'ble jurisdictional High Court and the ITAT in the cases of *CIT v. Sri Biluru Gurubasava Pattina Sahakari Sangha Niyamitha in ITA No.5006/13*, *ITO v. Venugram Multipurpose Co-operative Credit Society Ltd. in ITA No.100042 of 2014* and *CIT v. Zafari Momim Vikas Co-op. Credit Society Ltd.*

7. We have heard the rival submissions and perused the material on record. The only issue in the present appeal is whether the respondent-assessee co-operative society is entitled for deduction u/s. 80P of the Act. The respondent-assessee is registered under the Karnataka Co-operative Societies Act. According to the respondent-assessee, the primary activity of the assessee is only to provide credit facilities to its members and therefore it is not a co-operative bank. Hence the provisions of sub-section (4) of section 80P of the Act are not applicable. For the sake of better appreciation of facts, the provisions of section 80P are reproduced below:-

“80P. (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) in the case of a co-operative society engaged in—

- (i) carrying on the business of banking or providing credit facilities to its members, or
- (ii) a cottage industry, or
- (iii) the marketing of agricultural produce grown by its members, or
- (iv) the purchase of agricultural implements, seeds, livestock or other articles intended for agriculture for the purpose of supplying them to its members, or
- (v) the processing, without the aid of power, of the agricultural produce of its members, or
- (vi) the collective disposal of the labour of its members, or
- (vii) fishing or allied activities, that is to say, the catching, curing, processing, preserving, storing or marketing of fish or the purchase of materials and equipment in connection therewith for the purpose of supplying them to its members,

the whole of the amount of profits and gains of business attributable to any one or more of such activities :

Provided that in the case of a co-operative society falling under sub-clause (vi), or sub-clause (vii), the rules and bye-laws of the society restrict the voting rights to the following classes of its members, namely:—

- (1) the individuals who contribute their labour or, as the case may be, carry on the fishing or allied activities;
 - (2) the co-operative credit societies which provide financial assistance to the society;
 - (3) the State Government;
- (b) in the case of a co-operative society, being a primary society engaged in supplying milk, oilseeds, fruits or vegetables raised or grown by its members to—
- (i) a federal co-operative society, being a society engaged in the business of supplying milk, oilseeds, fruits, or vegetables, as the case may be; or
 - (ii) the Government or a local authority; or
 - (iii) a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956), or a corporation established by or under a Central, State or Provincial Act (being a company or corporation engaged in supplying milk, oilseeds, fruits or vegetables, as the case may be, to the public),

the whole of the amount of profits and gains of such business;

- (c) in the case of a co-operative society engaged in activities other than those specified in clause (a) or clause (b) (either independently of, or in addition to, all or any of the activities so specified), so much of its profits and gains attributable to such activities as does not exceed,—
- (i) where such co-operative society is a consumers' co-operative society, one hundred thousand rupees; and
 - (ii) in any other case, fifty thousand rupees.

Explanation.—In this clause, "consumers' co-operative society" means a society for the benefit of the consumers;

- (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) in respect of any income derived by the co-operative society from the letting of godowns or warehouses for storage, processing or facilitating the marketing of commodities, the whole of such income;
- (f) in the case of a co-operative society, not being a housing society or an urban consumers' society or a society carrying on transport business or a society engaged in the performance of any manufacturing operations with the aid of power, where the gross total income does not exceed twenty thousand rupees, the amount of any income by way of interest on securities or any income from house property chargeable under section 22.

Explanation.—For the purposes of this section, an "urban consumers' co-operative society" means a society for the benefit of the consumers within the limits of a municipal corporation, municipality, municipal committee, notified area committee, town area or cantonment.

(3) In a case where the assessee is entitled also to the deduction under section 80HH or section 80HHA or section 80HHB or section 80HHC or section 80HHD or section 80-I or section 80-IA or section 80J, the deduction under sub-section (1) of this section, in relation to the sums specified in clause (a) or clause (b) or clause (c) of sub-section (2), shall be allowed with reference to the income, if any, as referred to in those clauses included in the gross total income as reduced by the deductions under section 80HH, section 80HHA, section 80HHB, section 80HHC, section 80HHD, section 80-I, section 80-IA, section 80J and section 80JJ.

(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.

Explanation.—For the purposes of this sub-section,—

- (a) "co-operative bank" and "primary agricultural credit society" shall have the meanings respectively assigned to them in Part V of the Banking Regulation Act, 1949 (10 of 1949);
- (b) "primary co-operative agricultural and rural development bank" means a society having its area of operation confined to a taluk and the principal object of which is to provide for long-term credit for agricultural and rural development activities."

8. The AO had denied the benefit of section 80P on the ground that it is a co-operative bank and hit by the provisions of sub-section (4) of section 80P of the Act. Recently identical issue had come up before the Hon'ble Supreme Court in the case of *The Citizen Co-operative Society Ltd. v. ACIT [2017] 397 ITR 1 (SC)* wherein it was held that though business of the society does not amount to that of co-operative bank so as to come within the mischief of sub-section (4) of section 80P, since the assessee was catering to the needs of non-members also, the principle of mutuality is tainted and therefore the benefit of section 80P was denied. The relevant

portion of the judgment of the Hon'ble Apex Court in the said decision is as under:-

“18) We may mention at the outset that there cannot be any dispute to the proposition that Section 80P of the Act is a benevolent provision which is enacted by the Parliament in order to encourage and promote growth of co-operative sector in the economic life of the country. It was done pursuant to declared policy of the Government. Therefore, such a provision has to be read liberally, reasonably and in favour of the assessee (*See – Bajaj Tempo Limited, Bombay v. Commissioner of Income Tax, Bombay City-III, Bombay (1992) 3 SCC 78; 196 ITR 188 (SC) = 2002-TIOL-763-SC-IT*). It is also trite that such a provision has to be construed as to effectuate the object of the Legislature and not to defeat it (*See – Commissioner of Income Tax, Bombay & Ors. v. Mahindra and Mahindra Limited & Ors. (1983) 4 SCC 392; [1983] 144 ITR 225 (SC) = 2002-TIOL-988-SC-IT*). Therefore, it hardly needs to be emphasised that all those co-operative societies which fall within the purview of Section 80P of the Act are entitled to deduction in respect of any income referred to in sub-section (2) thereof. Clause (a) of sub-section (2) gives exemption of whole of the amount of profits and gains of business attributable to anyone or more of such activities which are mentioned in sub-section (2).

19) Since we are concerned here with sub-section (i) of clause (a) of sub-section (2), it recognises two kinds of co-operative societies, namely: (i) those carrying on the business of banking and; (ii) those providing credit facilities to its members.

20) In the case of *Kerala State Cooperative Marketing Federation Limited & Ors. v. Commissioner of Income Tax (1998) 5 SCC 48*, this Court, while dealing with classes of societies covered by Section 80P of the Act, held as follows:

“6. The classes of societies covered by Section 80-P of the Act are as follows:

(a) Engaged in business of banking and providing credit facilities to its members;

xx xx xx

We may notice that the provision is introduced with a view to encouraging and promoting growth of cooperative sector in the economic life of the country and in pursuance of the declared policy of the Government. The correct way of reading the different heads of exemption enumerated in the section would be to treat each as a separate and distinct head of exemption. Whenever a question arises as to whether any particular category of an income of a cooperative society is exempt from tax what has to be seen is whether income fell within any of the several heads of exemption. If it fell within any one head of exemption, it would be free from tax notwithstanding that the conditions of another head of exemption are not satisfied and such income is not free from tax under that head of exemption...”

21) In the case of Commissioner of Income Tax v. Punjab State Co-operative Bank Ltd. (2008) 300 ITR 24 (Punjab & Haryana) = 2008-TIOL-337-HC-P-H-IT while dealing with an identical issue, the High Court of Punjab and Haryana held as follows:

“ The provisions of section 80P were introduced with a view to encouraging and promoting the growth of the co-operative sector in the economic life of the country and in pursuance of the declared policy of the Government. The different heads of exemption enumerated in the section are separate and distinct heads of exemption and are to be treated as such. Whenever a question arises as to whether any particular category of an income of a co-operative society is exempt from tax, then it has to be seen whether such income fell within any of the several heads of exemption. If it fell within any one head of exemption,.... It means that a co-operative society engaged in carrying on the business of banking and a co-operative society providing credit facilities to its members will be entitled for exemption under this sub-clause. The carrying on the business of banking by a cooperative society or providing credit facilities to its members are two different types of activities which are covered under this sub-clause

.....

So, in our view, if the income of a society is falling within any one head of exemption, it has to be exempted from tax notwithstanding that the condition of other heads of exemption are not satisfied. A reading of the

provisions of section 80P of the Act would indicate the manner in which the exemption under the said provisions is sought to be extended. Whenever the Legislature wanted to restrict the exemption to a primary co-operative society, it was so made clear as is evident from clause (f) with reference to a milk co-operative society that a primary society engaged in supplying milk is entitled to such exemption while denying the same to a federal milk co-operative society.”

22) The aforesaid judgment of the High Court correctly analyses the provisions of Section 80P of the Act and it is in tune with the judgment of this Court in Kerala State Cooperative Marketing Federation Limited (supra).

23) With the insertion of sub-section (4) by the Finance Act, 2006, which is in the nature of a proviso to the aforesaid provision, it is made clear that such a deduction shall not be admissible to a co-operative bank. However, if it is a primary agriculture credit society or a primary co-operative agriculture and rural development bank, the deduction would still be provided. Thus, co-operative banks are now specifically excluded from the ambit of Section 80P of the Act.

24) Undoubtedly, if one has to go by the aforesaid definition of ‘co-operative bank’, the appellant does not get covered thereby. It is also a matter of common knowledge that in order to do the business of a co-operative bank, it is imperative to have a licence from the Reserve Bank of India, which the appellant does not possess. Not only this, as noticed above, the Reserve Bank of India has itself clarified that the business of the appellant does not amount to that of a co-operative bank. The appellant, therefore, would not come within the mischief of sub-section (4) of Section 80P.

25) So far so good. However, it is significant to point out that the main reason for disentitling the appellant from getting the deduction provided under Section 80P of the Act is not sub-section (4) thereof. What has been noticed by the Assessing Officer, after discussing in detail the activities of the appellant, is that the activities of the appellant are in violation of the provisions of the MACSA under which it is formed. It is pointed out by the Assessing Officer that the assessee is catering to two distinct categories of people. The first category is that of resident

members or ordinary members. There may not be any difficulty as far as this category is concerned. However, the assessee had carved out another category of 'nominal members'. These are those members who are making deposits with the assessee for the purpose of obtaining loans, etc. and, in fact, they are not members in real sense. Most of the business of the appellant was with this second category of persons who have been giving deposits which are kept in Fixed Deposits with a motive to earn maximum returns. A portion of these deposits is utilised to advance gold loans, etc. to the members of the first category. It is found, as a matter of fact, that the depositors and borrowers are quiet distinct. In reality, such activity of the appellant is that of finance business and cannot be termed as co-operative society. It is also found that the appellant is engaged in the activity of granting loans to general public as well. All this is done without any approval from the Registrar of the Societies. With indulgence in such kind of activity by the appellant, it is remarked by the Assessing Officer that the activity of the appellant is in violation of the Co-operative Societies Act. Moreover, it is a co-operative credit society which is not entitled to deduction under Section 80P(2)(a)(i) of the Act.

26) It is in this background, a specific finding is also rendered that the principle of mutuality is missing in the instant case. Though there is a detailed discussion in this behalf in the order of the Assessing Officer, our purpose would be served by taking note of the following portion of the discussion:

“As various courts have observed that the following three conditions must exist before an activity could be brought under the concept of mutuality;

that no person can earn from him;

that there a profit motivation;

and that there is no sharing of profit.

It is noticed that the fund invested with bank which are not member of association welfare fund, and the interest has been earned on such investment for example, ING Mutual Fund [as said by the MD vide his statement dated 20.12.2010]. [Though the bank formed the third party vis-a-vis the assessee entitled between contributor and recipient is lost in such case. The other

ingredients of mutuality are also found to be missing as discussed in further paragraphs].

In the present case both the parties to the transaction are the contributors towards surplus, however, there are no participators in the surpluses. There is no common consent of whatsoever for participators as their identity is not established. Hence, the assessee fails to satisfy the test of mutuality at the time of making the payments the number in referred as members may not be the member of the society as such the AOP body by the society is not covered by concept of mutuality at all.”

27) These are the findings of fact which have remained unshaken till the stage of the High Court. Once we keep the aforesaid aspects in mind, the conclusion is obvious, namely, the appellant cannot be treated as a co-operative society meant only for its members and providing credit facilities to its members. We are afraid such a society cannot claim the benefit of Section 80P of the Act.”

9. In the present case also, during the course of hearing we had called for the financial statements of the respondent-assessee from which it is clear that there is income in the form of interest on investments of Rs.1,11,84,095 and commission income of Rs.24,02,183 indicating that the respondent-society had dealings with the other non-members. Furthermore, the fact that the co-operative society had paid commission to Pigmi agents of Rs.1,70,46,946 goes to indicate that it has accepted deposits even from non-members. These aspects need to be examined thoroughly in the light of the judgment of the Hon'ble Apex Court in the case of *The Citizen Co-operative Society Ltd. v. ACIT (supra)*. Therefore, we remand this issue back to the file of the AO for *de novo* assessment on the above lines.

10. In the result, the appeal filed by the revenue is allowed for statistical purposes.

Pronounced in the open court on this 31st day of October, 2017.

Sd/-

(LALIET KUMAR)
Judicial Member

Sd/-

(INTURI RAMA RAO)
Accountant Member

Bangalore,
Dated, the 31st October, 2017.

/ Desai Smurthy /

Copy to:

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

By order

Senior Private Secretary
ITAT, Bangalore.