IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.579/Coch/2018 : Asst.Year 2008-2009
ITA No.580/Coch/2018 : Asst.Year 2009-2010
ITA No.581/Coch/2018 : Asst.Year 2013-2014

M/s.Kerala State Co-op Agricultural & Rural Development Bank Limited KASCARD Building P.B.No.56, Statue Jn. Trivandrum-695 001. **PAN : AAAAK4391F**	Vs.	The Income Tax Officer Ward 2(1) Thiruvananthapuram.
(Appellant)		(Respondent)

Appellant by : Sri.Jose Jacob
Respondent by : Smt.A.S.Bindhu, Sr.DR

Date of Hearing : 07.02.2019		**Date of Pronouncement : 07.02.2019**

O R D E R

Per Chandra Poojari, AM:

These appeals at the instance of the assessee are directed against separate orders of the CIT(A), all dated 08.11.2018. The relevant assessment years are 2008-2009, 2009-2010 and 2013-2014.

2. Common issues are raised in these appeals. Hence they were heard together and disposed of by this consolidated order.

3. We shall first take up for adjudication the ITA No.579/Coch/2018.

ITA No.579/Coch/2018 : Asst. Year 2008-2009 :

4. The grounds raised in the above appeal read as follows:-

> *"1. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals), Thiruvananthapuram ("CIT(A)") has erred in disallowing the deduction claimed by the Appellant under section 80P(2)(a)(i) amounting to Rs.65,09,15,018 and restricting the deduction under section 80P only to the extent of profits earned by the Appellant from the 'Land Development Bank' activity without considering the fact that the Appellant is a Co-operative Society registered under the Kerala Co-operative Societies Act, 1969 and is in the business of providing credit facilities to its members not as a co-operative bank, but as a credit institution and a co-operative society by virtue of its nature of business of providing credit facilities to its members. The CIT(A) has erred in not considering the fact that to be denied the benefit of Section 80P, the Appellant would have to first fall within the ambit of the term "cooperative bank" as defined under the Banking Regulations Act, 1949. The CIT(A) has erred in not considering the fact that the Appellant is "Co-operative Credit Society" or "State Land Development Bank" which is distinct from the "Co-operative Bank" as the above terms have been defined separately under the Banking Regulation Act, 1949 and NBARD Act respectively and accordingly eligible to claim deduction under Section 80P(2)(a)(i) of the Act."*

5. The assessee for the assessment year 2008-2009 had claimed deduction u/s 80P of the I.T.Act amounting to Rs.65,09,15,018. The Assessing Officer disallowed the claim of deduction u/s 80P of the I.T.Act by following the judgment of the Hon'ble Kerala High Court in assessee's own in ITA No.103 of 2011 dated 26.11.2015.

5.1 Aggrieved by the order of assessment denying the benefit of deduction u/s 80P, the assessee filed an appeal to the first appellate authority. The CIT(A) rejected the claim of the assessee. The relevant finding of the CIT(A) reads as follows:-

> *"3.1.1. The Appellant in the return of income had claimed deduction under section 80P of the Act amounting to Rs.65,09,15,018. The Assessing Officer disallowed the same on the ground that the Appellant is not eligible to claim the same. During the appeal proceedings, the learned AR has argued that the Appellant is eligible for deduction under section 80P of the Act. The arguments of the learned AR are considered. The issue of allowability of deduction under section 80P of the Act was examined by Hon'ble ITAT, Cochin in Appellant's own case for AY 2007-08 in ITA 506/Coch/2010 and vide order dated 23.02.2011, held that the Appellant is eligible to claim deduction under section 80P of the Act only to the extent of profits earned by the Appellant from the "Land Development Bank" activity. The relevant para of the order is as under:*
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> > 5. In view of the obtaining legal position, as discerned from the reading of the applicable laws, i.e., the BR Act and the NBARD Act, in conjunction with which the relevant provisions of the Act are to be read, and the judicial precedents brought to our notice. we are of the clear view that the assessee is a 'cooperative bank' and, consequently, hit by the provision of s. 80P(4), so that the deduction provided by the said section would not be available to it from A.Y. 2007-08 onwards and, accordingly, stood rightly denied the impugned claim in its assessment for the year. So. However, we also clarify that to the extent the assessee is (also) or is acting (also) as a 'state land development bank', which too falls within the purview of the NBARD Act, exigible for financial assistance from NBARD, the assessee's claim merits acceptance. and it would be entitled to deduction u/s. 80P(2)(a)(i) on the income relatable to its lending activities as such a bank. The matter is, therefore, remitted to the file of the AO for a consideration of this aspect of the matter and

adjudication as per law on factual verification and determination, per a speaking order, after allowing reasonable opportunity to the assessee to establish its claims, the onus for which is only on it. We decide accordingly.

3.1.2 Aggrieved by the order of the Tribunal for AY 2007-08, as above, both the Appellant and Department filed appeal before Hon'ble High Court of Kerala Hon'ble High Court has dismissed both appeals of the Appellant & Department in ITA 103 of 2011 & ITA 137 of 2011 vide order dated 26.11.2015 respectively. Therefore, as on date, the issue of allowability of deduction under section 80P of the Act is covered by the decision of Tribunal for AY 2007-08. Hence, there is no merit in the ground raised by the Appellant that deduction under section 80P of the Act should be allowed as claimed by the Appellant."

5.2 Aggrieved by the order of the CIT(A), the assessee has raised this issue before the Tribunal. The Ld. Counsel for the assessee submitted that as per the RTI information received from NABARD, the assessee is not a co-operative bank. The Ld. AR contended that since the assessee is not a co-operative bank, the provisions of section 80P(4) does not have application and therefore, the assessee is entitled to the benefit of deduction u/s. 80P(2) of the Act.

5.3 The Ld. DR, on the other hand, submitted that the Tribunal order which has been relied on by the CIT(A) for deciding the issue in favour of the Revenue, has been upheld by the Hon'ble High Court of Kerala vide judgment dated 26/11/2015 in ITA No. 103/2011.

5.4 We have heard the rival contentions and perused the material on record. The Hon'ble High Court of Kerala has

categorically held in assessee's own case for the assessment year 2007-08 (supra) that the assessee is not a primary agricultural credit society and it is a co-operative bank. The Hon'ble High Court further held that the assessee is not entitled to deduction u/s 80P(2) of the Act, in view of introduction of section 80P(4) of the Act with effect from 01.04.2007. The relevant finding of the Hon'ble High Court of Kerala reads as follows:-

> *".....These provisions would show that the appellant falls within the term "co-operative bank" in clause (cci) of section 5 of the BR Act and thereby is a co-operative bank for the purpose of section 80P of the IT Act.*
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> *15. Having held as aforesaid, the question for further consideration is as to whether the appellant is also a primary agricultural credit society. We proceed to decide that issue.*
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> *16. In terms of Clause (a) of the Explanation to section 80P(4), "primary agricultural credit society" takes the meaning assigned to it in Part V of the BR Act. Clause (cciv) of Section 5 of BR Act defines the term 'primary agricultural credit society'. It reads as follows:-*
>
> (cciv) "primary agricultural credit society" means a co-operative society,-
> (1) The primary object or principal business of which is to provide financial accommodation to its members for agricultural purposes or for purposes connected with agricultural activities (including the marketing of crops); and
>
> (2) The bye-laws of which do not permit admission of any other co-operative society as member:
>
> Provided that this sub-clause shall not apply to the admission of a co-operative bank as a member by reason of such co-operative bank subscribing to the share capital of

such co-operative society out of funds provided by the State government for the purpose.

To fall under the aforesaid definition of "primary agricultural credit society", an assessee has to satisfy the two conditions under Sub-Clauses (1) and (2) of that Clause; which are conjunctive, and, not alternative.

17. The condition in Sub-Clause (2) of Clause (cciv) of Section 5 of the BR Act is to the effect that a primary co-operative society should not be one which permits admission of any other co-operative society as member, to be a 'primary agricultural credit society'. The provisions of the Kerala Co-operative Land Mortgage Banks Act, 1960 and of the ITA Nos.182 & 26/Coch/2015 CARDB Act show that the appellant Kerala State Co-operative Agricultural and Rural Development Bank Limited may admit a primary bank as its member. 'Primary bank' as defined in Section 2(h) of the CARDB Act means, among other things, a co-operative society. Therefore, the appellant does not satisfy the condition prescribed in Sub-Clause (2) of Clause (cciv) of Section 5 of the BR Act and hence, it is not a co-operative bank which is a primary agricultural credit society."

5.5 In view of the above judgment of the Hon'ble High Court of Kerala in assessee's own case (supra), we hold that the orders of the A.O. and CIT(A) in denying the benefit of deduction u/s. 80P(2) of the Act is correct and is in accordance with law. It is ordered accordingly. Hence, the grounds relating to disallowance of deduction u/s. 80P(2)(a)(i) of the Act are rejected.

6. In the result, the appeal of the assessee in ITA No.579/Coch/2018 is dismissed.

ITA No.580/Coch/2018 : Asst.Year 2009-2010 :

8. The only ground raised in the above appeal is with regard to grant of deduction u/s 80P(2)(a)(i) of the I.T.Act. We have already considered the issue in ITA No.579/Coch/2018. For our reasoning mentioned in paragraph 5.5 (supra), we decide this ground against the assessee.

9. In the result, the appeal of the assessee in ITA No.580/Coch/2018 is dismissed.

ITA No.581/Coch/2018 : Asst.Year 2013-2014:

10. The grounds raised in the above appeal read as follows:-

> *"1. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals), Thiruvananthapuram ("CIT(A)") has erred in disallowing the deduction claimed by the Appellant under section 80P(2)(a)(i) amounting to Rs.116,75,66,661 and restricting the deduction under section 80P only to the extent of profits earned by the Appellant from the 'Land Development Bank' activity without considering the fact that the Appellant is a Co-operative Society registered under the Kerala Co-operative Societies Act, 1969 and is in the business of providing credit facilities to its members not as a co-operative bank, but as a credit institution and a co-operative society by virtue of its nature of business of providing credit facilities to its members. The CIT(A) has erred in not considering the fact that to be denied the benefit of Section 80P, the Appellant would have to first fall within the ambit of the term "cooperative bank" as defined under the Banking Regulations Act, 1949. The CIT(A) has erred in not considering the fact that the Appellant is "Co-operative Credit Society" or "State Land Development Bank" which is distinct from the "Co-operative Bank" as the above terms have been defined separately*

under the Banking Regulation Act, 1949 and NBARD Act respectively and accordingly eligible to claim deduction under Section 80P(2)(a)(i) of the Act.

2. On the facts and in the circumstances of the case, the CIT(A) has erred in disallowing the contribution made to Staff Retirement Benefit Fund amounting to Rs.2,80,26,064 without considering the fact that the said contribution was made as a staff welfare measure, for the purpose of benefit of the employees and accordingly eligible as deduction as business expenditure under section 37 of the Act.

3. On the facts and in the circumstances of the case, the CIT(A) has erred in disallowing the amount of Rs.46,43,961 paid to Primary banks by erroneously treating the said payment as commission and disallowing the same under section 40(a)(ia) of the Act for non-deduction of TDS without considering the fact that the said payment is only incentives paid for mobilizing deposits from its members and not a commission payment."

11. The first ground raised in the above appeal is with reference to grant of deduction u/s 80P(2)(a)(i) of the I.T.Act. We have already considered the issue in ITA No.579/Coch/ 2018. For our reasoning mentioned in paragraph 5.5 (supra), we decide this ground against the assessee.

12. As regards ground No.2, the CIT(A) had confirmed the disallowance made by the Assessing Officer by observing as under:-

"4.2.1 The Appellant had paid Rs.2,80,26,064 towards contribution to Staff Retirement Benefit Fund. During the assessment proceedings, the Assessing Officer noticed that the said payment is in contravention of the provisions of section 40A(9) r.w.s. 36(1)(v) of the Act and therefore disallowed the

said amount. The relevant part of the assessment order is as under:-

> `The contention of the assessee cannot be accepted, as it is seen that the fund is not recognized provident fund or superannuation fund as mentioned in section 36(1)(iv) nor an approved gratuity fund as mentioned in section 36(1)(v) of the Act. By virtue of the provisions of section 40A(9), no deduction shall be allowed in respect of any sum paid by the society as an employer towards setting up or promotion of or contribution to any fund unless paid for specific purposes provided under the Act. As per section 40A(9), the claim of deduction for any payment made not in accordance with section 36(1)(iv) or 36(1)(v) of the Act is not an allowable expenditure. The claim of deduction can be allowed only when the same is allowable under the Act. Since the assessee has not complied with the specific provisions of the Act, the claim of deduction made towards contribution to the staff retirement benefit fund cannot be entertained and need be rejected. Hence, the contribution made to Un-recognized Superannuation Fund to the tune of Rs.2,80,26,064/- is added to the total income.
>
> Addition : Rs.2,80,26,064/-'

4.2.2 During the appeal proceedings, the Appellant has submitted as under:-

1. *<u>Contribution to Unrecognized Superannuation Fund</u>*

In the AY 2013-14 contribution made to Unrecognized Superannuation Fund amounting to Rs.2,80,26,064/- was claimed by the assessee u/s 40A(9). The same was denied as it was observed by the Assessing Officer that the said Fund is not recognized provident fund or Superannuation Fund as mentioned in

section 36(1)(iv) nor an approved gratuity fund as mentioned in section 36(1)(v).

The true intention of the Law is to restrict contribution by employers to non statutory funds as certain employers have created irrevocable trusts ostensibly for the welfare of the employees and transferred substantial amounts to such trusts by way of contribution. Such trusts have been set up as discretionary trusts with absolute discretion to the trustees to utilize the trust property as they may think fit.

In the case of the assessee, it is a Government of Kerala undertaking, the Staff Retirement Benefit fund has been set up purely as a welfare measure of the employees which is also approved by the Registrar of Co-operative Societies.

By virtue of all the above facts the contribution made to Unrecognized Superannuation Fund is an allowable business expenditure u/s 37 which wholly incurred for the business purpose.'

4.2.3 The argument of the Appellant are considered. The issue of disallowance under section 40A(9) of the Act on the contribution made to Staff Retirement Benefit Fund is covered against the Appellant by the decision of Hon'ble ITAT, Cochin in Appellant own case for AY 2008-09 & 2009-10 vide order dated 15.09.2017. The relevant part of the order is as under:

> `8.2 Admittedly in this case, the staff retirement benefit fund of the assessee is not a recognized provident fund / approved superannuation fund as mentioned in section 36(1)(iv) of the Act nor an approved gratuity fund as mentioned in section 36(1)(v) of the I.T.Act. By virtue of section 40A(9) of the Act, the claim of deduction made for any payment to superannuation fund must be in accordance with section 36(1)(iv) and 36(1)(v) of the Act.

> Since the assessee has not been able to prove that it is a recognized provident fund or an approved gratuity fund as mentioned in section 36(1)(iv) or section 36(1)(v) respectively, the claim of deduction cannot be allowed. Therefore, the assessee's grounds for both the assessment years with regard to the additions made by the Assessing Officer on account of contribution made to non-recognized superannuation fund, are rejected. It is ordered accordingly.'

4.2.34 Following the decision of jurisdictional Tribunal, as above, the disallowance of Rs.2,80,26,064 is confirmed and the grounds raised by the Appellant on this issue are dismissed."

12.1 Aggrieved by the order of the CIT(A), the assessee has filed the present appeal before us.

12.2 The Ld. Counsel for the assessee stated that the contribution made by the assessee in the unrecognized provident fund or superannuation fund can be disallowed. However, it was submitted that when the employees withdraw the amount from such fund, to the extent of withdrawals, it should be allowed as deduction u/s. 37(1) of the Act.

12.3 We have heard the rival submissions and perused the material on record. We notice that for the assessment year 2009-10 the assessee has accepted the CIT(A)'s order and no further appeal was preferred to the Tribunal. The assessee's contention that to the extent of withdrawals made by the employees from unrecognized provident fund should be allowed as deduction u/s. 37 of the I.T. Act was never raised before any of the authorities below nor the assessee was able

to prove fresh facts are not required to be examined. Hence, this plea of the assessee is rejected. Therefore, the order of the CIT(A) on this issue is confirmed.

13. Ground No.3 is with reference to disallowance of expenditure for non-deduction of TDS. The assessee had paid a sum of Rs.46,43,961 as commission to PCARDB. The commission was paid by the assessee to PCARDB for mobilizing deposits for the assessee. Since there was no tax deduction at source, the Assessing Officer by invoking the provisions of section 40(a)(ia) of the I.T.Act, disallowed the commission payment to PCARDB.

13.1 Aggrieved by the disallowance of commission payment, the assessee preferred an appeal to the first appellate authority. The CIT(A) confirmed the disallowance made by the Assessing Officer. The relevant finding of the CIT(A) reads as follows:-

> *"4.1.2 The arguments of the Appellant are considered. The Appellant is paying commission to the PCARDB for the services rendered by it to the Appellant in terms of mobilizing deposits. The Appellant has not explained how the said payment is not covered by the provisions of section194H of the Act. Under the given facts, it is apparent that the said payment is covered by the provisions of section 194H of the Act. Hence, the disallowance of Rs.1,21,86,468 is upheld and the grounds raised on this issue are dismissed."*

13.2 The assessee being aggrieved, has raised this issue before the Tribunal. The learned AR reiterated the submissions made before the Income-tax authorities. The learned AR further submitted that the assessee may be given an opportunity to produce the necessary certificate before the

A.O. to prove that the deductees / payees have paid the requisite tax and hence expenses may be allowed as deduction.

13.3 The learned Departmental Representative, on the other hand, supported the orders of the Income-tax authorities.

13.4 We have heard the rival submissions and perused the material on record. Admittedly, the assessee has paid commission to PCARDB for mobilizing deposits for the assessee. Such commission payment was liable for tax deduction at source u/s 194H of the I.T.Act. The assessee having failed to deduct tax at source, the commission payment was rightly disallowed as per the provisions of section 40(a)(ia) of the I.T.Act. However, in the interest of justice and equity, we are of the view that the assessee should be given an opportunity to prove that the deductees / payees have duly paid the tax on receipt of commission. For the above said exercise, the matter is restored to the Assessing Officer. The assessee shall produce such proof as mandated by second proviso to section 40(a)(ia) read with 1st proviso to section 201 of the I.T.Act to prove that payees have duly paid taxes on the commission received by it from assessee. If the assessee is able to prove that the deductees / payees paid the tax on the commission that it had received from the assessee, such commission expenses shall not be disallowed. It is ordered accordingly.

14. In the result, the appeal filed by the assessee in ITA No.581/Coch/2018 is partly allowed, as indicated above.

15. In the result –

(i) the appeal filed by the assessee in ITA No.579/Coch/2018 is dismissed;

(ii) the appeal filed by the assessee in ITA No.580/Coch/2018 is dismissed ; and

(iii) the appeal filed by the assessee in ITA No.581/Coch/2018 is partly allowed.

Order pronounced on this 07th day of February, 2019.

Sd/-	Sd/-
(George George K)	**(Chandra Poojari)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Cochin ; Dated : 07th February, 2019.
Devdas*

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT (A), Trivandrum.
4. The Pr.CIT, Trivandrum.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin