IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH, 'A' PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S.VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.709/PUN/2017

निर्धारण वर्ष / Assessment Year : 2008-09

ITO, Ward 5(1), Pune	Vs.	Maharashtra State Co-operative Credit Societies Deposit Guarantee Corp. Ltd., Suraksha Bhawan, Plot No.9, Gultekdi, Pune – 411037 PAN: AABTM4090M
Appellant		Respondent

आयकर अपील सं. / ITA Nos.1492 & 1493/PUN/2018

निर्धारण वर्ष / Assessment Years : 2007-08 & 2008-09

ITO, Ward 5(1), Pune	Vs.	Maharashtra State Co-operative Credit Societies Deposit Guarantee Corp. Ltd., Suraksha Bhawan, Plot No.9, Gultekdi, Pune – 411037 PAN: AABTM4090M
Appellant		Respondent

Assessee by	Shri Kishor Phadke
Revenue by	Shri Vitthal Bhosale
Date of hearing	13-08-2021
Date of pronouncement	13-05-2021

आदेश / ORDER

PER R.S.SYAL, VP :

These three appeals by the Revenue include two appeals against quantum assessments for the A.Ys. 2007-08 and 2008-09 and one appeal against penalty u/s.271(1)(c) of the Income-tax Act,

1961 (hereinafter also called `the Act') for the A.Y. 2008-09. Since some common issues are raised in these appeals, we are, therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

2. The assessee, a Co-operative society registered under the Maharashtra Co-operative Societies Act, 1960 filed return with Nil income after claiming deduction u/s 80P of the Act for the A.Y. 2007-08. It earned profit of Rs.3,01,69,574 from sale of units of various mutual funds, which was claimed as deductible u/s 80P(2)(a)(i) of the Act. The AO opined that the activity of making investment in mutual funds or income from mutual funds did not fall under the head 'Business of banking' as these transactions were not with the members of assessee society and hence no deduction u/s 80P was admissible. He observed that total expenses for earning income were at 27.54%. After granting deduction for expenses at such rate, calculated at Rs.16,02,025, the AO treated the remaining amount of Rs.2,85,67,549 as income not eligible for deduction u/s 80P(2)(a)(i). The assessee appealed before the ld. CIT(A), who dismissed the appeal as time barred. The matter was taken up before the Tribunal. After condoning the delay in the first appeal, the Tribunal restored the matter to the file of the ld. CIT(A) for

deciding the issues on merits vide its order dated 13.02.2015. That is how, it is a second round of proceedings before the Tribunal.

3. One of the issues raised before the ld. CIT(A) was about the eligibility of deduction u/s 80P(2)(a)(i). In the fresh round of proceedings, the ld. CIT(A) noticed that the assessee was formed for the purpose of giving guarantee to deposits of members of Member Credit Co-operative Society after strategic decision taken by the Government of Maharashtra. Necessary approvals for this were required to be taken from IRDA and section 22 of the Banking Regulation Act provides that no company shall carry on a banking business in India unless it holds a license As the necessary approval was not granted, the assessee eventually could not commence its business for which it was set up. The amounts received from various stakeholders, which were temporarily invested in securities, resulted in the income under consideration. The ld. CIT(A) held that since the business of banking was not carried on, the assessee was not entitled to deduction u/s 80P(2)(a)(i). He held the gain on sale of mutual funds, etc. as falling under the head ‘Capital gains’ as against the AO's determination of the same as ‘Business income’. Thereafter, he directed the AO to allow set off in terms of section 74. The third direction of ld. CIT(A) was that the interest earned

from FDRs, etc. placed with the nationalized banks should be taxed under the head `Income from other sources'. Aggrieved thereby, the Revenue has come up in appeal before the Tribunal.

4. We have heard the rival submissions through the Virtual Court and scanned through the relevant material on record. It is found an undisputed position that the assessee was set up by the Government of Maharashtra for providing guarantee to its members in respect of loans taken by them from the agencies other than it. To carry on this business, it was mandatory to obtain license from IRDA. During pendency proceedings for obtaining license, the assessee received amounts from various stakeholders and invested the same in Mutual funds as well as FDRs. Eventually, no license was issued and hence the assessee could not commence its business for which it was set up. In such circumstances, there can be no question of treating the assessee as carrying on the business for which the deduction could be allowed u/s 80P of the Act. To this extent, the assessee has also accepted the position. Now, the grievance of the Revenue is that in the absence of carrying on any business, the income earned from sale of mutual funds, etc. should have been taken as `Business income' as held by the AO because the frequency of the transactions was very high rather than `Capital

gains' as held in the first appeal. We do not find much force in the contention of Revenue for the obvious reason that when the business itself was not allowed to be carried on to the assessee, the investment made in mutual funds, etc. cannot amount to fetching business income. Ex consequenti, the profit or loss from transfer of such mutual funds, etc. would fall under the head 'Capital gains'. On the question of taxability of interest on FDRs with nationalized banks, we hold that the same shall be taken as `Income from other sources' and cannot be construed as income from business. We, therefore, accord our imprimatur to the finding given by the ld. CIT(A) in this regard.

5. The last contention of Revenue is about allowing set off of loss against the income from transfer of capital gains. In this regard, it is seen that the ld. CIT(A) directed to allow the set off in terms of section 74 of the Act. In principle, we hold that the assessee is entitled to set off the loss from mutual funds, etc. against the income from mutual funds, etc. However, this exercise requires examination of the amount of loss incurred from sale of mutual funds, etc. during the year and the amount of loss brought forward from earlier years eligible for set off against income from mutual funds during the year. Such an exercise can be carried out only

after considering the break-up of the loss, which information is not available on record. We, therefore, overturn the impugned order on this score and remit the matter to the file of the AO for examining the details of loss incurred by the assessee during the year and that brought forwarded from earlier years and then allow set off in terms of sections 70/71 (for the same year) and section 74 (for the brought forward losses) of the Act.

6. The appeal for the A.Y. 2008-09 also involves similar issues. Both the sides agree that the facts and circumstances of the appeal for the later year are mutatis mutandis similar. Following the view taken hereinabove for the A.Y. 2007-08, we hold that income from sale of mutual funds, etc. would fall under the head 'Capital gains', interest on FDs, etc. would fall under the head 'Income from other sources' and the amount of loss for the year and brought forward loss from sale of mutual funds would be set off in terms of sections 70/71 and 74 of the Act.

7. In the result, these two appeals are partly allowed for statistical purposes.

8. The last appeal by the Revenue is against the deletion of the penalty imposed u/s 271(1)(c) of the Act in the first round of proceedings. It is seen that as against the Nil income declared by

the assessee in its return of income for the A.Y. 2008-09, the assessment order was passed u/s.143(3) of the Act making an addition of Rs.4,51,74,750 towards profit on sale of units of mutual funds, interest on Govt. securities and interest from nationalized banks by not allowing deduction u/s 80P of the Act. Thereafter, the penalty was imposed u/s.271(1)(c), which came to be deleted in the first appeal. The Revenue has come up in appeal before the Tribunal.

9. We have heard the rival submissions through the Virtual Court and scanned through the relevant material on record. It is seen that the case of the assessee is that the AO did not strike off the irrelevant limb in the notice issued u/s.274 r.w.s. 271(1)(c) of the Act. We have examined the notice u/s.274 for the assessment year 2008-09, whose copy has been placed at page 32A of the paper book in which both the limbs are present, namely, "*have concealed the particulars of your income or U/s 271(1)(c) of the Income Act, 1961 furnished inaccurate particulars of such income*". None of them was struck off by the AO. As against that, the penalty has actually been imposed on account of disallowing wrong claim of deduction u/s 80P(2)(a)(i), which falls only under the second limb, namely, "*furnishing of inaccurate particulars of income*". It is

evident from notice u/s 274 read with section 271(1)(c) of the Act that the AO did not mention correct charge. He allowed to remain present both the charges envisaged u/s 271(1)(c). Recently, the full Bench of Hon'ble Bombay High Court in *Mohd. Farhan A. Shaikh Vs. Dy.CIT (2021) 125 taxmann.com 253 (Bom)* has considered this very issue. Answering the question in affirmative, the Full Bench held that a defect in notice of not striking the relevant words vitiates the penalty even though the AO had properly recorded the satisfaction for imposition of penalty in the order u/s 143(3) of the Act. In another judgment, the Hon'ble Bombay High Court in *Pr.CIT Vs. Golden Peace Hotels and Resorts (P.) Ltd. (2021) 124 taxmann.com 248 (Bom)* also took similar view that where inapplicable portions were not struck off in the penalty notice, the penalty was vitiated. The SLP of the Department against this judgment has recently been dismissed by the Hon'ble Supreme Court in *Pr.CIT Vs. Golden Peace Hotels and Resorts (P.) Ltd. (2021) 124 taxmann.com 249 (SC).*

10. In view of this overwhelming position, it is clear that where the charge is not properly set out in the notice u/s 274 viz., both the limbs stand therein without striking off of the inapplicable limb, but the penalty has, in fact, been levied for one of the two, such a

penalty order gets vitiated. Turning to the facts of the extant case, we find from the notice u/s 274 of the Act that the AO did not strike out the irrelevant limb. Respectfully following the Full Bench judgment of the Hon'ble jurisdictional High Court, we affirm the order of ld. CIT(A) in rightly deleting the penalty levied by AO. Thus, the appeal is dismissed.

11. In the result, quantum assessment appeals for the A.Ys. 2007-08 and 2008-09 are partly allowed for statistical purposes and the penalty appeal for the A.Y. 2008-09 is dismissed.

Order pronounced in the Open Court on 13th August, 2021.

Sd/-	Sd/-
(S.S. VISWANETHRA RAVI)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 13th August, 2021
GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-4, Pune
4. The CIT(Exemptions), Pune
5. DR, ITAT, 'A' Bench, Pune
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	13-08-2021	Sr.PS
2.	Draft placed before author	13-08-2021	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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