

Date: 15<sup>th</sup> December, 2017.

To,  
Office of the Income Tax Officer,  
Ward – 27(3)(3), Mumbai,  
4<sup>th</sup> Floor, Tower No. 6,  
IT office, Vashi Railway Station Building,  
Navi Mumbai – 400 703.

**Sub: Reply to the notice dated 30<sup>th</sup> November, 2017**

**Ref: Notice No. Pen/ 18/ P-143/ 2017-18 u/s 271(1)(c) r.w.s 274 of the Income Tax Act, 1961  
for A.Y. 2015-16 dated 30<sup>th</sup> November, 2017.**

**(Shri Om Sai Co-Operative Credit Society Ltd - PAN- AAEAS5258B)**

Dear Sir,

With reference to the captioned subject and Notice No. Pen/ 18/ P-143/ 2017-18 u/s 271(1)(c) r.w.s 274 of the IT Act, 1961 for A.Y. 2015-16 dated 30<sup>th</sup> November, 2017 please note our reply as follows:

**Explanation as to why an order imposing penalty under section 271 should not be made.**

- 1) Additions made on account of claim for deduction under section 80P of the Income Tax Act, 1961.

**Explanation: -**

- a. As per para 4.3.4 of the assessment order dated 30<sup>th</sup> November, 2017 additions were made by stating that assessee squarely falls within the definition of the co-operative Bank as per Chapter 'V' of the Banking Regulation Act, 1949.
- b. We would like to point out that AO **has not considered the full definition** of the Primary Co-Operative Bank as per section 5(ccv) of the Banking Regulation Act, 1949. The assessment order only states clause (i) and (ii) of the section 5(ccv). Whereas section 5(ccv) has three clauses which are reproduced below for the purpose of brevity:

*“(ccv) "primary co-operative bank" means a co-operative society, other than a primary agricultural credit society, --*

*(i) the primary object or principal business of which is the transaction of banking business;*

*(ii) the paid-up share capital and reserves of which are not less than one lakh of rupees; and*

*(iii) the bye-laws of which do not permit admission of any other co-operative society as a member:”*

- c. It is clearly evident from the above that for a co-operative society to fall under the definition of the Co-operative Bank all of the above conditions should be satisfied together.

- i. The first condition states that primary objective of the society should be that of the banking business. The term Banking has been defined u/s 5(b) of the Banking Regulation Act, 1949 which reproduced below:

*“5(b) ‘banking’ means the accepting, for the purpose of lending or investment, of deposits of money **from the public**, repayable on demand or otherwise, and withdrawal by cheque, draft, order or otherwise;”*

The principal object of the society as per bye laws para 5 is as follows: - Principal Object of the society will be to promote the interest of all its members to attain their social and economic betterment through self-help and mutual aid in accordance with the co-operative principles.

One may also point out that principal object of the Primary Co-Operative Bank as per the model bye-laws enclosed is similar to that of the bye-laws of assessee society.

However, sub-object no. 2 and 4 of the Primary Co-Operative Bank and sub-object no. 2 and 13 of the assessee society clearly makes the distinction between the activities of the Co-operative Bank and Co-Operative credit societies. Assessee society can give loan only to members whereas primary co-operative Bank can give loans to members and non-members as well. **Also, definition of Banking u/s 5(b) of the Banking Regulation Act, 1949 is embodied in the bye-laws of Primary Co-Op Bank and not in the bye-laws of Credit Society.**

Bye Laws of Assessee Society	Bye laws of Primary Co-op Bank
<u>Sub-Object 2</u> <i>Accept deposits <b>from members</b> for the purpose of lending or investment.</i>	<u>Sub-Object 2</u> <i>To accept deposits of money <b>from the public</b>, repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise for the purpose of lending or investment.</i>
<u>Sub-Object 13</u> <i>"Providing loans <b>to members</b> to improve their financial condition."</i>	<u>Sub-Object 4</u> <i>"To lend or to advance fund based or non-fund based facility either with or without security <b>to members and others</b> as permitted by the Registrar/Reserve Bank of India."</i>

We do not accept the explanation given in the para 4.3.5 of the assessment order u/s 143 that "as regards to applicability of Section 80P(4) there is no dispute about the fact that the assessee is carrying on the business of accepting deposits and advancing loans albeit from and to its members. Accepting deposits and advancing loans is a primary objective of any Bank, co-operative or otherwise and the assessee society is engaged in the business of lending money and accepting deposits like all other Co-operative Bank and credit societies." We may notice that the section 80P in the Income Tax Act 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 co-operative sector is based on the principle of mutuality which derives its meaning from the activities carried on for the benefits of members. **Making no distinction between activities carried among members and activities carried for general public would defeat the purpose of the law for which it was enacted.**

Here, we would like to point out that Banks (Both Co-operative or otherwise) have the freedom to **provide there facilitates to the general public**. The intention of the legislature introducing the section 80P(4) of the Income Tax Act, 1961 was to bring the co-operative Banks on par with the other Banks. As both of them were providing services to the general public and it would have been unfair for other Banks to be taxed for profits while co-operative Banks enjoy immunity from the same.

Also, facts of the case law relied upon by the AO of the Citizen Co-Op credit society are clearly different from the case of the assessee. If we were to examine para 25 of the said order passed by the apex court. **The main reason behind not allowing the deduction to the Citizen Co-op society was that it was in violation of the Mutually aided co-operative societies Act under which it was formed by giving loans to general public as well.** This is clearly not the case here. The assessee is only providing credit facilities to its members and not to the general public. The Bye-law of the assessee society does not permit it to provide loans to anyone other than a qualified share member. **We would also like you to refer page no. 15 of the enclosed Statutory Audit Report dated 29<sup>th</sup> June 2015, which has not made any qualification as to society has violated the bye laws and provided loans to the non-members.**

- ii. As for the second condition there is no doubt that share capital and reserves of the society exceed rupees one lakh. This condition is satisfied.
- iii. The third condition provides that bye laws of the society should not allow any other co-operative society as a member. **This condition is clearly not satisfied as “para 10(e) – membership” of the bye-laws of the assessee permits admission of other co-operative societies.** Except for those which are in the same business as of the assessee. Hence, except for other credit society assessee can admit all of the other types of co-operative societies as member.

Here, we would also like you to refer to the Model Bye-laws of the primary co-operative Bank given by ‘Registrar of Co-Operative Societies, Maharashtra’ which clearly has a condition in the membership para 10(v) that any other co-operative society cannot be admitted as a member. (engaged in the same business or otherwise). This condition is in conformity with the Section 5(ccv) of the Banking Regulation Act, 1949. If the intent of the legislature was to also include the credit societies in the definition of the Primary Co-operative Bank the same condition would have been given in the bye-laws of credit society as well.

**Hence, the third condition is clearly not satisfied in the case of the assessee.** If the AO had considered the full and complete definition of the Primary Co-operative Bank as per Section 5(ccv) of the Banking Regulation Act, 1949 in the assessment order, it would have been clear that assessee is not covered under the said definition.

Further, we would like to bring to your notice the decisions of the various high courts and tribunals on the matter “whether the co-operative society is a co-operative bank or not?”

- i. In the case of the **ACIT vs Buldana Urban Co-operative Credit Society Ltd.** [2013] 32 taxmann.com 69 (Nagpur - Trib.)/ [2013] 23 ITR(T) 411 (Nagpur - Trib.)/ [2013] 57 SOT 76 (Nagpur - Trib.)/[2013] 153 TTJ 728 (Nagpur - Trib.) ITAT Nagpur has held as follows:

*Deductions - Income of co-operative societies [Cooperative banks] - Assessment year 2007-08 to 2009-10 - Assessee had income from banking and non-banking activities - Assessing Officer took a view that assessee was not a credit co-operative society and therefore not eligible for deduction under section 80P(2)(a)(i) - It was undisputed that assessee was neither a State Co-operative bank nor a Central co-operative bank - Further bye-laws of assessee permitted admission of any co-operative society to be member of assessee indicating that assessee could not be regarded as a primary co-operative bank under section 5 (ccv) of Banking Regulation Act, 1949, and, thus, it would not be hit by section 80P(4) - Whether in view of above, assessee's claim for deduction under section 80P(2)(a)(i) was to be allowed - Held, yes [Para 11] [In favour of assessee]*

- ii. In the case of **CIT vs Jafari Momin Vikas Co-op. Credit Society Ltd** [2014] 49 taxmann.com 571 (Gujarat)/[2014] 227 Taxman 59 (Gujarat)(MAG.)/ [2014] 362 ITR 331 (Gujarat)/ [2015] 274 CTR 153 (Gujarat), Hon'ble High Court of Gujrat held as follows:

*Deductions - Income of co-operative societies (Credit co-operative society) - Whether where assessee was not a credit co-operative bank but a credit co-operative society, its claim for deduction under section 80P(2)(a)(i) could not be rejected by invoking exclusion clause of sub-section (4) of section 80P - Held, yes [Para 7] [In favour of assessee]*

- iii. In the case of **Tararani Mahila Co-Op credit society Ltd. vs ITO**, Ward (1)(2), Belgaum [2014] 44 taxmann.com 123 (Panaji - Trib.)/ [2015] 152 ITD 621 (Panaji - Trib.) ITAT Panajai held as follows :

*Section 80P of the Income-tax Act, 1961 - Deductions - Income of co-operative societies (Primary co-operative bank) - Assessment years 2009-10 and 2010-11 - Assessee, a co-operative society, was registered under Karnataka State Co-operative Societies Act, 1959 - It claimed deduction under section 80P(2)(a)(i) - Assessing Officer denied deduction taking view that assessee was a primary co-operative bank and, therefore, provisions of section 80P(4) were applicable - **Whether since none of aims and objects of assessee-society allowed it to accept deposits of money from public for purpose of lending or investment, it could not be regarded to be a primary co-operative bank - Held, yes** - Whether, therefore, provisions of section 80P(4) were not applicable in instant case - Held, yes - Whether in given situation assessee was entitled for deduction under section 80P(2)(a)(i) - Held, yes [Paras 3.3.7 and 3.3.8] [In favour of assessee]*

- iv. In the case of **Chandrababhu Urban Co-Op Credit Society v. ITO**, Ward -1, Nipani [2015] 64 taxmann.com 336 (Karnataka) Hon'ble High Court of Karnataka held as follows:

*Section 80P of the Income-tax Act, 1961 - Deductions - Income of co-operative societies (Co-operative bank) - Assessment years 2009-10 and 2010-11 - **Whether in event of dispute as to primary object or principal business of co-operative society referred to in clauses (cciv), (ccv) and (ccvi) of section 56 of Banking Regulation Act, determination thereof by RBI shall be final before revenue authorities can term said society as a co-operative bank for purpose of section 80P - Held, yes** [Para 10] [In favour of assessee]*

- d. Hence, the claim of the assessee u/s 80P(2)(a)(i) of the Act was bonafide and duly supported with the various judgments of the High court's and tribunals. Further, the fact that AO does not agree with the claim made by the assessee could not be justified for imposing the penalty u/s 271(1)(c) of the Income Tax Act, 1961. **In the para 4.3.15. of the assessment order dated 30<sup>th</sup> November, 2017 it was admitted that assessee has made a wrong claim. Nowhere, in the assessment order it has been mentioned that claim made by the assessee was false.**

The Assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, attract the penalty under Section 271(1)(c) and the same is already an established principal laid down by the Apex Court in the case of **Commissioner of income Tax, Ahmadabad v. Reliance Petroproducts Pvt. Ltd.** [2010] 189 Taxman 322 (SC)/[2010] 322 ITR 158 (SC)/[2010] 230 CTR 320 (SC) It was up to the authorities to accept its claim in the return or not. It was firmly held by the Hon'ble Supreme Court of India that, merely because the claim was not accepted by the

revenue, cannot tantamount to furnishing inaccurate particulars. The conditions u/s 271(1)(c) must exist before any penalty is imposed.

In a recent case, the Hon'ble ITAT, Mumbai in the case of **Dr. Francis P Candesev. Income Tax Officer** (ITA No. 5830/Mum/2012) has taken a similar stand while relying upon the judgment above and has categorically held that mere disallowance of any claim will not make the case fit for levy of penalty under section 271(1)(c) of the Income Tax Act, 1961.

## 2) Additions made on account of house property.

### **Explanation: -**

- a. The assessee has received Income in the form of rental receipts from The Mumbai District Central Co-Operative Bank Ltd. of Rs. 6,60,000/- during the A.Y. 2015-16. The same has been considered in the return of income as Business Income.
- b. The assessee was under bonafide belief that the income of the assessee is allowed as deduction under section 80P as stated above. Following the accounting system assessee has mentioned the income received from rent as credit to the Profit and Loss account in the return of income. Which was an inadvertent mistake from the assessee while filing the return of income.
- c. However, we would like to point out that it was never the intention of the assessee to mislead the tax authorities or provide inaccurate particulars.
  - i. The rental receipts have been duly disclosed as a separate line item in the profit and loss account both in books of accounts and return of income.
  - ii. Balance sheet of the assessee shows the property owned as an asset both in both in books of accounts and return of income.
  - iii. Further the tenant The Mumbai District Central Co-Op Bank was also deducting TDS on the same. The same was also shown in the profit and loss account under separate head TDS deducted both in books of accounts and return of income.
  - iv. Assessee had also duly submitted the copy of the 'Rent Agreement' with the tenant The Mumbai District Central Co-Op Bank in the reply to notice under section 142(1) dated 8<sup>th</sup> November, 2017.
  - v. Assessee had received the rent receipts via account transfer from the tenant in the Overdraft Account No. 00541806000001 of the Mumbai District Central Co-Op Bank, Chembur Colony Branch. The said Bank account No. was duly mentioned in

the return of income. Assessee had also provided the Bank statement of the account to the AO in the reply to notice under section 142(1) dated 8<sup>th</sup> November, 2017.

It is evident from the point (i) to (v) above that assessee had made available all facts relating to rental receipts with complete disclosure of all the aspects of the transactions to the assessing officer.

- d. Further the additions made only account for change in head of income. Rental receipt was categorized in profit and loss with heading "Rent Received from MDCC Bank". The quantum of receipts i.e. Rs. 6,60,000/- was also correctly reported. The assessee never attempted to camouflage the rental receipts with other receipts of income nor it reported the lower amount of receipts.
- e. The assessee only made an inadvertent mistake of classifying the income under wrong head. Further we would like you to consider the orders passed in the following cases by various tribunals and high courts where it was held that mere change of head of income does not attract penalty u/s 271(1)(c) of the act for concealment of income.

- i. In the case of **CIT-1, Mumbai vs. Bennett Coleman & Co. Ltd** [2013] 33 taxmann.com 227 (Bombay)/[2013] 215 Taxman 93 (Bombay)(MAG.)/[2013] 259 CTR 383 (Bombay) Hon'ble High court of Bombay held as follows:

*Section 271(1)(c) of the Income-tax Act, 1961 - Penalty - For concealment of income [Bona fide claim, disallowance of] - Assessment year 1999-2000 - Assessee claimed premium received on redemption of debentures as income from capital gains - Assessing Officer held that said premium was assessable to tax under head 'income from other sources' - Thereupon he also levied penalty under section 271(1)(c) on assessee - Tribunal deleted penalty on plea that there was only a change of head of income by Assessing Officer and it was not case of department that assessee had concealed any particulars of income or furnished inaccurate particulars of income by stating incorrect facts - Whether Tribunal was justified in cancelling penalty levied upon assessee - Held, yes [Para 3] [In favour of assessee]*

- ii. In the case of **Simran Singh Gambhir Vs DDIT International Taxation (ITAT Delhi)** [2016] 69 taxmann.com 357 (Delhi - Trib.)/[2015] 42 ITR(T) 624 (Delhi - Trib.)(MAG.) ITAT New Delhi held that :

*If the assessee had disclosed the income by mistake under wrong head of income and that mistake was bonafide then the same could not be treated as an undisclosed income and penalty u/s 271(1)(c) could not be levied. **Penalty u/s 271(1)(c) could***



*only be levied if the assessee had not disclosed the income. In this case as the assessee had disclosed his income so penalty u/s 271(1)(c) could not be levied, as concluded by ITAT New Delhi. [Para 6] [In favour of assessee]*

- iii. In the case of **DCIT Circle (4)(1) New Delhi vs. JMD Advisors Pvt. Ltd.** [2010] 124 ITD 223 (Delhi) ITAT Delhi held as follows:

*Section 271(1)(c) of the Income-tax Act, 1961 - Penalty - For concealment of income - Assessment year 2003-04 - Whether a mere change of head of income by Assessing Officer in assessment cannot be construed as concealment as envisaged in section 271(1)(c) so as to attract penal provisions contained therein - Held, yes - Whether valuation made by DVO is an estimate which can be a basis for making addition to income of assessee for purpose of assessment, but same alone cannot be basis to construe concealment for purpose of imposing penalty under section 271(1)(c) - Held, yes [Para 11] [In favour of assessee]*

Hence, we humbly pray to the AO to consider the facts and material on record and avoid undue hardship to the assessee by imposing the penalty under section 271(1)(c) of the Income Tax Act, 1961.

Kindly take the above on record and oblige. Feel free to contact us in case you require further information/ clarifications.

Yours faithfully,

Amol Chavan.

Manager, Shri Om Sai Co-Operative Credit Society Ltd

**Enclosure:**

1. Copy of Bye-laws of the assessee society duly approved by Registrar of Co-Op Societies
2. Extract of the Model Bye-laws of the Primary Co-Operative Bank as given on the website of 'Registrar of co-operative societies, Maharashtra'
3. Copy of the Statutory Audit Report for the F.Y. 2014-15
4. Copy of cases referred to in pages before.