

Income Tax Appellate Tribunal - Panji

The Quepem Urban Co-Op. Credit ... vs Department Of Income Tax on 26 November, 2014

IN THE INCOME TAX APPELLATE TRIBUNAL
PANAJI BENCH, PANAJI

BEFORE SHRI P.K. BANSAL, HON'BLE ACCOUNTANT MEMBER
AND SHRI D.T. GARASIA, HON'BLE JUDICIAL MEMBER

ITA NOS. 335 TO 337/
PNJ/2014 : (ASST. YEARS :2008-09,2009-10 &
2011-12)

Asst. Commissioner of Income Tax, Circle - 1, Margao, Goa. (Appellants)	Vs.	M/s The Quepem Urban Co-operative Credit Society Ltd., Ground Floor, Cindios Apts, Quepem, South Goa,Goa. PAN : AABAT3439L (Respondents)
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Appellant by : Shri Vinay Singh Rawat, Ld. D.R.
Respondent by : Shri Pramod Y. Vaidya, C.A.
Date of Hearing : 26/11/2014
Date of Pronouncement : 26/11/2014

ORDER

PER P.K. BANSAL All these three appeals has been filed by the revenue against the different orders of CIT(A), Panaji dtd. 15.07.2014 for the assessment years 2008-09, 2009-10 and 2011-12 by taking the following common grounds of appeal except change in figures, however grounds for assessment year 2008-09 are reproduced as under:-

1. The order of the learned CIT (A) is opposed to law and fact of the case.
2. Whether on facts and in the circumstances of the case, Ld.CIT(A) has erred in allowing deduction u/s 80P amounting to Rs.1,31,21,061/- to the assessee and deleted the addition made by AO.
3. Whether on facts and in the circumstances of the case, Ld.CIT(A) has erred in deleting the addition amounting to Rs.1,27,21,917/- made by AO on account of disallowance of section 43B. (Asst. Years: 2008-09, 2009-10 & 2011-12))

2. Since the issue involved in all these appeals are common, therefore disposed off by this common order. Ground no.1 since general does not require any adjudication. Both the parties agreed that these appeals be decided on the basis of facts for the assessment year 2008-09. The brief facts of the case for the assessment years 2008-09 for ground no.2 are that the Assessee is a co- operative society registered under the Goa Co-operative Societies Act, 2001. The Assessee filed return declaring gross total income of Rs.1,31,21,061/- and claimed deduction u/s 80P(2)(a)(i) and therefore net taxable income was shown to be nil. The AO did not allow the deduction to the

Assessee u/s 80P(2)(a)(i) and the income was assessed at Rs.1,65,99,094/-. The AO while denying the deduction to the Assessee u/s 80P(2)(a)(i) took the view that the Assessee is a primary co-operative bank and therefore provisions of Sec.80P(4) are applicable in the case of the Assessee. The Assessee went in appeal before the CIT(A). CIT(A) partly allowed the appeal of the Assessee.

2.1 The ld. DR, on the other hand vehemently contended that the Assessee is a co-operative bank in view of the definition of the co-operative bank given under explanation to Sec. 80P(4) the Assessee is engaged in the business of banking. Sec. 80P(4) puts an embargo w.e.f. 1.4.2007 that if a co-operative society is carrying on banking business, the Assessee will not be entitled for the exemption. Reliance was placed on the decision of Hyderabad Bench of the Tribunal in the case of The Citizen Co-operative Society vs. Addl. CIT in ITA Nos. 1003/Hyd/2011 & 1004/Hyd/2011 dt. 2.7.2012.

2.2 The ld. AR before us vehemently contended that the provisions of Sec. 80P(4) are not applicable in the case of the Assessee. The main contentions of the assessee are that Assessee is not a co-operative bank. The Assessee is a co-operative society duly registered under the Goa Co-operative Societies Act, 2001. The primary object of the Assessee is to encourage thrift, (Asst. Years: 2008-09, 2009-10 & 2011-12)) self-help and co-operation among others. Also explaining proper utilization of funds, making savings, cutting unproductive investments. For this, our attention was drawn towards the bye-laws of the Assessee from (i) to (xxiv). The Assessee is a credit society. He contended that the word credit is of outmost important to decide the status of the assessee under the Banking Regulation Act, 1949. According to him the assessee is a co-operative credit society but when we question that section 80P does not talk of co-operative credit society, he could not reply thereto but relied on Banking Regulation Act forgetting that the section 80P only uses the word co-operative society engaged in-. The activities of the Assessee are limited to its members. He also relied on CBDT Circular No.133 of 2007 dated 9.5.2007 for the proposition that section 80P(4) will not apply to an assessee which is not a cooperative bank. The paid up capital of the Assessee, no doubt, is more than Rs. 1 lacs. It was contended that the issue is duly covered in favour of the Assessee by the decision of the Hon'ble Gujarat High Court in the case of CIT vs. Jafari Momin Vikas Co-op. Credit Society Ltd. in Tax Appeal Nos. 442 of 2013, 443 of 2013 and 863 of 2013. Attention was also drawn towards the decision of the Hon'ble Karnataka High Court in the case of Vyavasaya Seva Sahakara Sangha vs. State of Karnataka & Ors. for the proposition of law by referring to para 12 that merely because the co-operative society is required to advance loan to its members, it does not cease to be a co-operative society governed by the Co-operative Societies Act nor can they be treated as banking companies. The activities carried out by the society cannot be regarded to be banking activities as contemplated under the Banking Regulation Act, 1949. Reliance was also placed on the decision of the Bangalore Bench of this Tribunal in ITA No.72/Bang/2013 in the case of ITO vs. Divyajyothi Credit Co-operative Society Ltd. for the A.Y 2009-10 in which it was held that the provisions of Sec. 80P(4) are applicable only to credit co-operative banks and not to credit co- operative society. Reliance was also placed on the decision of the Panaji Bench (Asst. Years: 2008-09, 2009-10 & 2011-12)) in the case of DCIT vs. Jayalakshmi Mahila Vividodeshagala Souharda Sahakari Ltd. in ITA No. 1 to 3/PNJ/2012 dt. 30.3.2012. Reliance was also placed on the decision of Panaji Bench in ITA No. 229 & 230/PNJ/2013 in the case of Tararani Mahila Co-operative Credit Society, vs ITO. Reliance was also placed in ACIT vs Palhawas Primary Agriculture Co-operative Society Ltd, 23

Taxman.com 318 (Delhi), ITO vs Jankalyan Nagri Sahakari Pat Sanstha Ltd, 24 Taxman.com 127 (Pune). Reliance was also placed on the decision of Karnataka High Court in the case of CIT vs Sri Biluru Gurubasava Pattana Sahakari Sangh Niyamitha dated 5.2.2014, which relates to an appeal filed against the order passed u/s 263 and the question involved was whether the Revisional Authority was justified in invoking his power u/s 263 without the foundational fact of the assessee being co-operative bank.

3. We heard the rival submissions and carefully considered the same alongwith the order of the tax authorities below as well as the decisions and the entire material and case laws referred to before us. The question before us is whether the Assessee is entitled for deduction u/s 80P(2)(a)(i) and whether the Assessee is hit by the provisions of Sec. 80P(4) which was introduced in the statute by the Finance Act, 2006 w.e.f. 1.4.2007. The relevant provisions of both the sections are re-produced for our ready reference as under :-

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

(Asst. Years: 2008-09, 2009-10 & 2011-12)) 80P(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 taluka and the principal object of which is to provide for long-term credit for agricultural and rural development activities. 3.1 From the plain reading of Sec. 80P(2)(a)(i) it is apparent that if the co-operative society is engaged in carrying of business of banking or providing credit facilities to its members, the co-operative society is entitled for deduction on whole of the income relating to any one or more of such business. From

the reading of Sec. 80P(4) it is apparent that this section denies deduction to a co-

operative bank other than a primary agricultural credit society or primary co-operative agricultural and rural development bank. The provisions of Sec. 80P(4) was introduced in the statute by the Finance Act, 2006 w.e.f. 1.4.2007. The explanation to the section defines the co-operative bank and primary agricultural credit society to have the same meaning as assigned to them in Part- V of the Banking Regulation Act, 1949. It is not the case of either of the parties that the Assessee is a primary co-operative agricultural and rural development bank. It is also not the claim of the Assessee that Assessee is a primary agricultural credit society. If we read both the sections, Sec. 80P(2)(a)(i) and Sec. 80P(4) together, we find that the provisions of Sec. 80P(4) mandates that the provisions of Sec. 80P will not apply to any co-operative bank other than a primary agricultural credit society or primary co-operative agricultural and rural development bank but as per the provisions of Sec. 80P(2)(a)(i), a co-operative society engaged in carrying on the business of banking or providing credit facilities to its members is entitled for deduction. After the insertion of Sec. 80P(4), the provisions of Sec. 80P(2)(a)(i) were not amended, rather the co-

(Asst. Years: 2008-09, 2009-10 & 2011-12)) operative society engaged in carrying on business of banking facilities to its members continued to be entitled for deduction u/s 80P(2)(a)(i). This presupposes that every co-operative society engaged in carrying on business of banking cannot be regarded to be a co-operative bank. The embargo put u/s 80P(4) are applicable only to a co-operative bank. In our opinion, it cannot be said that a co-operative society cannot carry on business of banking facilities to its members even if it is not a co-operative bank. If we read the provisions in the manner that every co-operative society engaged in carrying on business of banking even for its members is regarded to be a co-operative bank, then, the provisions of Sec. 80P(2)(a)(i) will become redundant. Therefore, in our opinion, before deciding the issue whether the Assessee is entitled for deduction u/s 80P(2)(a)(i), it is essential to decide whether the Assessee is a co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank. In case it is found that the Assessee is a co-operative bank, the Assessee will not be entitled for deduction as stipulated u/s 80P(2)(a)(i) but in case the Assessee is not a co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank, the provisions of Sec. 80P(2)(a)(i) will be applicable to the Assessee provided the Assessee is engaged in carrying on business of banking or providing credit facilities to its members. This section nowhere states co-operative credit society except mentioned under proviso 2 to section 80P which is relevant for sub-clause 6 or 7. It has nothing to do with section 80P(2)(a)(i).

4. In our opinion, Sec. 80P(2)(a)(i) provides two types of activities in which the co-operative society must be engaged to be eligible for deduction under sub-clause (i). These two activities are not alternate ones because the section allows deduction to the co-operative society on the whole of profits and gains of business attributable to any one or more of such activities. This pre-

(Asst. Years: 2008-09, 2009-10 & 2011-12)) supposes that eligible co-operative society can carry on either one of these two businesses or can carry both these businesses for the members. If the Assessee co-operative society carries on one or both of the activities, it will be eligible for deduction.

These two activities are (a) co-operative society engaged in carrying on business of banking facilities to its members or (b) co-operative society engaged in providing credit facilities to its members. Both the activities can be carried on by the co-operative society for its members. If a co-operative society is engaged in carrying on these activities/facilities for the persons other than its members, the co-operative society, in our opinion, will not be eligible for deduction u/s 80P(2)(a)(i) on the income which it derives from carrying on the activities not relating to its members. Therefore, where a co-operative society is engaged in carrying on business of banking facilities to its members and to the public or providing credit facilities to its members or to the public, the income which relates to the business of banking facilities to its members or providing credit facilities to its members will only be eligible for deduction u/s 80P(2)(a)(i). There is no prohibition u/s 80P not to allow deduction to such co- operative societies in respect of business relating to its members.

4.1 Now, the question before us is whether the Assessee is a co- operative bank or not. Co-operative Bank is defined in Part V of the Banking Regulations Act, 1949 as under :-

Co-operative bank means a state co-operative bank, a central co-operative bank and a primary co-operative bank:

5. From the definition of Co-operative bank it is apparent that Co- operative bank means state co-operative bank, a Central Co-operative Bank and a Primary Co-operative bank. It is not the case of the revenue that the assessee is a state Co-operative bank or Central Co-operative bank. We have therefore to find whether the assessee is a primary Co-operative bank.

(Asst. Years: 2008-09, 2009-10 & 2011-12))

6. The Primary Co-operative bank is defined under section 5 clause (CCV) of Banking Regulation Act 1949 as under:-

(CCV) primary co-operative bank means a co-operative society, other than a primary agricultural credit society-

(1) the primary object or principal business of which is transaction of banking business:

(2) the paid-up share capital and reserves of which are not less than one lakh of rupees: and (3) the bye-laws of which do not permit admission of any other co-operative society as a 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.

7. From the aforesaid definition, it is apparent that if the co-operative society complied with all the three conditions; firstly that the primary object or principle business transacted by it is a banking business, secondly, the paid up share capital and reserve of which are 1 lakh or more and thirdly, by laws of the co-operative society do not permit admission of any other co-operative society as a member, it will be regarded to be primary co-operative bank. If co- operative society does not fulfil any of the conditions, it cannot be regarded to be a primary co-operative bank. Therefore, in the case of the Assessee we have to examine on the basis of the facts and materials on record whether the Assessee co-operative society complies with all the three conditions. In case, it does not comply with all the three conditions, it cannot be regarded to be a co- operative bank and the provisions of Sec. 80P(4), in our opinion, will not be applicable in the case of the Assessee. Once, the Assessee will not fall within the provisions of Sec. 80P(4), the Assessee, in our opinion, will be eligible to get deduction u/s 80P(2)(a)(i) in respect of whole of the income which the Assessee derives from carrying on the business of banking or providing credit facilities to its members.

(Asst. Years: 2008-09, 2009-10 & 2011-12))

8. Whether condition no. 1 is applicable in the case of the Assessee, for this we have to look into the bye-laws of the Assessee. The objects of the Assessee in this case are enumerated as under :-

- i) to encourage thrift, self-help and co-operation among others.
- ii) To accept deposit of money from the members repayable on demand or otherwise and withdrawable by cheque draft, order or otherwise, for the purpose of lending or investment.
- iii) To borrow or raise money.
- iv) To lend or to advance money either upon or without security to members and others as permitted by the Registrar.
- v) To acquire, to hold, to issue on commission, to under-write and to deal in stocks, funds, shares, debentures, debenture stocks, bonds, obligations, securities and investment of all kinds.
- vi) To purchase and to sell bonds, scrips or others forms of securities on behalf of constituents.
- vii) To receive all kinds of bonds, scrips, valuables on deposit or for safe custody or otherwise.
- viii) To provide safe deposit vaults and ancillary services.
- ix) To collect and transmit money and securities.
- x) To negotiate loans and advances.
- xi) To carry on and to transact every kind of guarantee and indemnity business on behalf of constituents.
- xii) To effect, to insure, to guarantee, to underwrite, to participate in managing

and carrying out any issue, public or private, debentures, debenture stock of any company, co-operative society, corporation or association and to lend money for the purpose if any such issue with the prior permission of the Registering Authority.

xiii) To acquire to construct , to maintain and to alter any building or works necessary or convenient for the purposes of the society.

xiv) To manage, to sell and to realise any property which may come into the possession of the society in satisfaction of any of its claims.

xv) To open branches and pay offices, with the permission of the Registering Authority within the area of operation of the society so as to provide society's services to the public.

xvi) To acquire, to manage and to undertake the whole or part of the business of any other cooperative society with the prior permission of the Registering Authority.

xvii) To establish, to support or to aid in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit members, employees/ ex employees of the society or the dependants or connections of such persons and to grant pensions.

(Asst. Years: 2008-09, 2009-10 & 2011-12)) xviii) To prepare and to finance schemes for amelioration of the financial condition of the members.

xix) To provide financial and technical assistance to small scale and cottage industries and to help self-employed persons for setting up their own business. xx) To enter into participation, consortium arrangements with any other society/s or bank/s, financial institution/s with the objects of making loans and advances with the permission of the registering authority/ Apex Bank/higher agency wherever necessary.

xxi) To do any other form of business as specified in the Act, Rules and Bye-laws.

xxii) To act as agents for collection of monies of various Government, Quasi-

Government and Statutory Bodies.

xxiii) To undertake any other form of business which the Central Government / State Government may specify as a form of business in which it is lawful for a co-operative institution to engage.

xxiv) To do all such other things as are incidental and conducive to the promotion or advancement of these objects and of the business of the society. On the basis of these objects whether it can be said that the primary object or principal business of the Assessee is transaction of banking business?

Banking business has been defined u/s 5(b) of the Banking Regulation Act in the following manner :-

" banking" means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise. From the said definition it is clear that banking means accepting deposit of money from the public which is repayable on demand or otherwise and withdrawal of these deposits by cheque, draft, order or otherwise and these deposits are accepted for the purpose of lending or investment. These deposits must be accepted from the public, not only from the members. These deposits must be repayable on demand or otherwise and could be withdrawn by the depositor by cheque, draft or otherwise. We noted that the CIT(A) at page 19 of its order has given a categorical finding that the other cases of dealings with non-members are very few and of extremely miniscule and insignificant amount and at the most they may be termed as minor deviations from the bye-

laws since the bye-laws of the assessee society do not permit it. Even before us (Asst. Years: 2008-09, 2009-10 & 2011-12)) the learned A.R did not deny this fact that the assessee has dealt with non- members but he contended it is not a prime object and there are only few cases where assessee has dealt with non-members.

9. We do not agree with the CIT(A) as well as ld. A.R if the assessee has accepted deposits from the public and lended the money to them. Even we noted, that under bye-laws 43 the assessee can receive the deposits from any person. This bye-law does not restrict the assessee for receiving the deposit only from members. In our opinion condition no.1 does stand satisfied and it can be said that the Assessee society was carrying on banking business as it was accepting deposits from the persons who were not members and was advancing loans to the non-members.

10. The authorised representative took the plea that the assessee has not obtained banking licence. In our opinion it is not necessary that the co- operative society should have a banking licence as per the definition under the Income Tax Act for carrying on banking business. If licence is not obtained it may be an illegal banking business under the other statute. What we have to see whether the nature of the business carrying on by the assessee is a banking business or not. The Income Tax in our opinion is not concerned whether the banking business carried on by the assessee is legal or illegal. The income has to be assessed u/s 14 of the Income Tax Act under the same head even if the nature of the business is illegal.

11. So far as the second condition is concerned, there is no dispute that the paid up share capital and reserves in the case of the Assessee is more than Rs. 1 lac. Therefore, the Assessee satisfies the second condition.

(Asst. Years: 2008-09, 2009-10 & 2011-12))

12. So far as the third condition is concerned, we noted that Sec. 21 of The Goa Co-operative Societies Act, 2001 permits admission of any other co- operative society as a member. The provisions of Sec. 21 are laid down as under :-

21. Person who may become member - (1) Any person, who needs the services of the society, accepts the responsibilities of membership and fulfils such other conditions as may be specified in the bye-laws of the society, may be admitted as a member.

(2) No person shall be admitted as a member of a society except the following, that is to say :-

(a) an individual, who is a citizen of India and who is competent to contract under the Contract Act, 1872 (9 of 1872);

(b) a firm, company or any other body corporate constituted under any law for the time being in force, or a society registered under the Societies Registration Act, 1860 (XXI of 1860);

(c) a society registered, or deemed to be registered, under this Act or any other Co-operative Societies Act;

(d) a public trust registered under any law for the time being in force for the registration of such trusts.

[(e) Any Self Help Group formed by women for mutual assistance or with an objective to avail any type of assistance from the Government or any organization for their social, economic, cultural and educational improvement.] (3) Admission of members may be made only by an elected board of directors or by the general body where such a board does not exist:

12[Omitted].

(4) A person admitted as a member may exercise the rights of membership, including the right to vote, only on fulfilment of such conditions as may be laid down from time to time in the bye-laws.

22. Open Membership. - (1) No society shall, without sufficient cause, refuse admission to membership to any person duly qualified therefore under the provisions of this Act and its bye-laws.

(2) Where a person is refused admission as a member of a society, the decision, with the reason therefore, shall be communicated to that person within fifteen days of the date of the decision, or within three months from the date of the application for admission, whichever is earlier.

(Asst. Years: 2008-09, 2009-10 & 2011-12)) (3) Any person aggrieved by the decision of a society refusing him admission of its membership, may appeal to the Co-operative Authority.

(4) Where a society refuses to accept the application from an eligible person for admission as member, or the payment made by him in respect of membership, or having accepted the membership application, a society does not convey its decision within three months from the date of receipt of application, the membership shall be deemed to have been refused and the person aggrieved may appeal to the Co-operative Authority.

(5) An appeal under sub-section (3) shall be filed within two months of the date of communication of refusal and under sub-section (4) within two months of deemed refusal. as far as possible, be disposed of by the Co-operative Authority within a period of three months from the date of its receipt.

(6) Every such appeal under sub-section (3) or (4) shall, as far as possible, be disposed of by the Co-operative Authority within a period of three months from the date of its receipt.

23. Joint Member. - (1) Subject to the provisions of section 21, a society may admit any person as a joint member. A joint member shall hold jointly a share of the society with another but his name shall not stand first in the share certificate.

(2) A member of a society may appoint not more than one joint member.

(3) When a person whose name stands first in the share certificate ceases to be a member, the person admitted as joint member shall automatically be the first member. In the event of the cessation of membership of the first member by death, the joint member shall be the first member and the nominee, if any, of the deceased member shall be the joint member.

(4) The joint member shall have equal right in the capital and property of the society with the first member.

(5) The joint member shall have the right to vote only in the absence of the members whose name stands first in the share certificate. The aforesaid provision of Sec.21 mandates admission of any other co-operative society as a member of the co-operative society. The word used in Sec. 21 (2) is shall. This fact is clarified further by section 22 as re-produced hereinabove that no co-operative society shall refuse admission to the membership, without sufficient reason, to any person who is qualified to become member under the provisions of this Act, rules and bye-laws. This clearly proves that in case the rules and bye-laws of the other co-operative (Asst. Years: 2008-09, 2009-10 & 2011-12)) society provides otherwise, the co-operative society may not be admitted as a member of the co-operative society. The person, as per section 22, must be qualified for becoming member not

only u/s 21(2) but also as per the rules and bye-laws of the co-operative society. We cannot read sub-section (2) in the manner that the rules and bye-laws cannot permit the admission of any other co-operative society as a member of the co-operative society. Had that been the intention of the legislature, they would have not used the words "under the provision of this act and bye-laws" in section 22.

13. We have gone through the bye-laws which contains the membership clause. Bye-laws no.9 and 10 states as under :-

9. MEMBERS :

a) An individual may be admitted as a member of the society if he is an adult , competent to contract and resides within the area of operation of the society and /or is gainfully engaged in any occupation in the area;

b) Any other person, as defined under bye-law No.4 (ix) having its registered office within the area of operation of the society and / or conducting business within such area may be admitted as a member, provided that :

i) The individual or any partner of a partnership firm is not convicted of any criminal offence involving moral turpitude.

ii) The individual or the person is not engaged in a business competing with or conflicting with the business of the society.

iii) The individual or the person has subscribed to and fully paid for at least one share of the society by the committee members.

c) Government of Goa.

d) Notwithstanding anything contained in bye-law No.4 (ix) and this bye-law no co-operative society registered or deemed to be registered shall be admitted to the membership of the society under the co-operative societies Act except The Goa State Co-operative Bank Ltd.

e) No right of membership shall be exercisable until the expiry of one year from the date of admission as a member for the purpose of voting for the election to the membership of the committee of the society.

f) No right of membership shall be exercisable until the expiry of one year from the date of admission as a member for the purpose of voting for the election to the membership of the committee of the society.

10.NOMINAL MEMBERS :-

i) Any person, who is co-partner or who desire to stand surety for a borrowing member of the society or who desires to borrow occasionally for a temporary period against certain tangible securities such as gold and silver ornaments and other silver articles, Life Insurance policies and Government and other trustees securities, may be enrolled as a nominal member upon his application in the prescribed form on payment of Rs.10/- as non-refundable entrance fee and upon his agreeing to the condition that he shall cease to be (Asst. Years: 2008-09, 2009-10 & 2011-12)) nominal member when all liabilities against him either as a borrower or as a surety are fully discharged.

ii) A Co-operative society registered under the Act shall not be eligible and as such, shall not be admitted to nominal membership in terms of the provisions of this bye-law.

iii) The nominal member shall not be entitled :

a) To receive a share certificate.

b) To receive audited accounts and annual report.

c) To attend, participate and to vote in the General Meeting and / or special General Meeting of the society and

d) To receive dividend.

e) From clause 9 and 10, it is apparent that the bye-laws of society does not permit the admission of any other co-operative society as member. The Id. A.R drawn our attention to page 23 of the paper book and contended that bye-laws 9(d) which deals with the membership has been amended w.e.f. 12.01.2001 by substituting following clause :-

Notwithstanding anything contained in the bye-laws no.4(IX) and this bye-laws society registered or deemed to be registered may be admitted to the membership of the society under the Co.op. Societies Act. Even after the amendment also we noted only society registered can become the member not the co-operative society. Section 5 clause (CCV) of Banking Regulation Act, 1949 requires that the bye-laws should not permit any co-operative society to become member. The society and the co-operative societies both are different and are being registered and regulated by the different statute. We cannot treat a society to be a co-operative society. Thus the third condition for becoming primary co-operative bank is also complied with. Since the assessee society does complies with all the three conditions, therefore, in our opinion the assessee society does become a primary co-

operative bank and in view of explanation (a) of section 80P(4) it has to be regarded as a co-operative bank and is hit by section 80P(4).

14. We have gone through the decision of the Hyderabad bench of this Tribunal in the case of The Citizen Cooperative Society vs. Addl. CIT (supra).

(Asst. Years: 2008-09, 2009-10 & 2011-12)) We noted that this decision is not applicable to the facts of the case before us. In this decision, under para 23 the Tribunal has given a finding that the Assessee is carrying on banking business and for all practical purposes it acts like a co-operative bank. The Society is governed by the Banking Regulations Act. Therefore, the society being a co-operative bank providing banking facilities to members is not eligible to claim deduction u/s 80P(2)(a)(i) after the introduction of sub-section (4) to section 80P. In view of this finding, the Assessee was denied deduction u/s 80P(2)(a)(i). We have also gone through the decision of the Bangalore Bench of the Tribunal in the case of ITO vs. Divyajyothi Credit Co-operative Society Ltd. (supra) in ITA No. 72/Bang/2013. In this case, we noted that the Hon'ble Tribunal confirmed the order of CIT(A) following the decision of the Tribunal in the case of ACIT, Circle 3(1), Bangalore vs. M/s. Bangalore Commercial Transport Credit Co-operative Society Ltd. in ITA No. 1069/Bang/2010 holding that Sec. 80P(2)(a)(i) is applicable only to credit co-operative society and not to co-operative bank. With due regards to the Bench, we are unable to find any term credit co-operative society u/s 80P(2)(a)(i) or u/s 80P(4), therefore, this decision cannot assist us. We noted that the Hon'ble Gujarat High Court in the case of CIT vs. Jafari Momin Vikas Co-op. Credit Society Ltd. in Tax Appeals no. 442 of 2013, 443 of 2013 and 863 of 2013 (supra) vide order dt. 15.1.2014 took the view that Sec. 80P(4) will not apply to a society which is not a co-operative bank. In the case of Vyavasaya Seva Sahakara Sangha vs. State of Karnataka & Ors. (supra) we noted that the issue before the Hon'ble High Court in the Writ Petition filed by the Petitioner related to the legislative competence of the State Legislature for issuing a circular. The issue does not relate to the claim of deduction u/s 80P(2)(a)(i). While dealing with this issue, the Hon'ble High Court under para 12 observed as under :-

(Asst. Years: 2008-09, 2009-10 & 2011-12)) 12. It is not possible to accept this contention. The petitioners are not the banking institutions coming under the purview of the Banking Regulation Act. They are the co-operative societies registered under the Act, and as such they are governed by the provisions of the Act passed by the State Legislature. Consequently, the State Government has control over them to the extent the Act permits. Major activities of the petitioners are to finance its members. For the purpose of financing its members, they borrow money from the financing agencies and repay the same. Merely because the petitioners-the co-operative societies in question-are required to advance loans to their members, they do not cease to be co-operative societies governed by the Act nor can they be treated as banking companies. It is also not possible to hold that these activities of the petitioners amount to banking as contemplated under the Banking Regulation Act, 1949, inasmuch as these co-

operative societies are not established for the purpose of doing banking as defined in section 5(b) of the Banking Regulation Act, 1949. This decision, in our opinion, is not applicable to the case before us because the provisions of Sec. 80P(2)(a)(i), as we have already held in the preceding paragraphs, are applicable to a co-operative society which is engaged in carrying on banking business facilities to its members if it is not a co-operative bank. We have also gone through the decision of this Bench in the case of DCIT vs. Jayalakshmi Mahila Vividodeshagala Souharda Sahakari Ltd. In ITA No. 1 to 3/PNJ/2012 dt. 30.3.2012 (supra), for which the undersigned is the author. While discussing this issue, after analysing the aims and objects of the co-operative society under para 12 of its order, this Tribunal has held as under :-

12. From the aforesaid objects, it is apparent that none of the aims and objects allows the assessee cooperative society to accept deposits of money from public for the purpose of lending or investment. In our opinion until and unless that condition is satisfied, it cannot be said that the prime object or principal business of the assessee is banking business. Therefore, the assessee will not comply with the first condition as laid down in the definition as given u/s. 5(ccv) of the Banking Regulation act, 1959 for becoming primary cooperative bank. The assessee, therefore, cannot be regarded to be primary cooperative bank and in consequence thereof, it cannot be a co-operative bank as defined under part V of the Banking Regulation Act 1949. Accordingly, in our opinion the provisions of section 80P (4) read with explanation there under will not be applicable in the case of the assessee. The assessee, therefore, in our opinion will be entitled for the deduction u/s (Asst. Years: 2008-09, 2009-10 & 2011-12)) 80P(2)(a)(i). We accordingly confirm the order of CIT(A) allowing deduction to the assessee.

15. We have also gone through the decision of ACIT vs Palhawas Primary Agriculture Co-operative Society Ltd, 23 Taxman.com 318 (Delhi). Section 80P(4) clearly excludes primary agriculture credit society from its domain. Therefore this decision will not assist the assessee. We have also gone through the decision of Pune Bench in the case of ITO vs Jankalyan Nagri Sahakari Pad Sanstha Ltd, 24 Taxman.com 127 Pune. This we have already stated that section 80P(2)(a)(i) nowhere talks of co-operative credit society and therefore the distinction made under the Banking Regulation Act cannot be imported u/s 80P(2)(a)(i). This decision in our opinion will not assist the assessee. We have also gone through the decision of Tararani Mahila Co- operative Credit Society Ltd to which the undersigned is the author similar finding as has been given in this are given in that case also. The decision of Karnataka High Court in the case of CIT vs Sri Biluru Gurubasava Pattana Sahakari Sangh Niyamitha dated 5.2.2014, relates to an appeal filed against the order passed u/s 263 and the question involved was whether the Revisional Authority was justified in invoking his power u/s 263 without the foundational fact of the assessee being co-operative bank. Therefore, this decision is not applicable.

16. We, therefore, in view of our aforesaid discussion hold that the Assessee has to be regarded to be a primary co-operative bank as all the three basic conditions are complied with, therefore, it is a primary co-operative bank and the provisions of Sec. 80P(4) are applicable in the case of the Assessee and Assessee is entitled for deduction u/s 80P(2)(a)(i). We, therefore, set aside the order

of the CIT(A) allowing deduction u/s 80P(2)(a)(i) to the assessee and direct the assessing officer not to allow the deduction to the assessee u/s 80P(2)(a)(i). Thus, the ground no.2 stands allowed in all the appeals.

(Asst. Years: 2008-09, 2009-10 & 2011-12))

17. In respect of ground no.3 we noted that the assessing officer invoked section 143B in respect of audit fee payable. After hearing the rival submissions, we noted that audit fees cannot be regarded to be a tax, duty, cess or fee or the expenditure the deduction of which is restricted u/s 43B. We accordingly, confirm the order of the CIT(A) deleting the disallowance made u/s 43B. Thus, this ground stands dismissed in all the years.

18. In the result, all the appeals filed by the revenue are partly allowed.

19. Order pronounced in the open court on 26.11.2014.

Sd/-
(D.T.Garasia)
Judicial Member

Sd/-
(P.K. Bansal)
Accountant Member

Place : PANAJI / GOA

Dated : 26.11.2014

A

Copy to :

- (1) Appellant
- (2) Respondent
- (3) CIT concerned
- (4) CIT(A) concerned
- (5) D.R
- (6) Guard file

By order

Assistant Registrar
ITAT, Panaji, Goa