

Income Tax Appellate Tribunal - Mumbai

Ito 15(2)(4), Mumbai vs Shivraj Sahakari Patsanstha ... on 31 March, 2017

Income-tax Appellate Tribunal - "E" Bench Mumbai

Before S/Sh.Rajendra, Accountant Member and Amarjit Singh, Judicial Member
./I.T.A./5268/Mum/2014, /Assessment Year: 2010-11
Income tax Officer-15(2)(4) M/s. Shivraj Sahakari Patsanstha Maryadit
Matru Mandir, Room No.111, Grant S.S. Sanstha Maryadit, Omkar CHS, Bldg.
Road (W) Vs. No.32/934, Pant Nagar, Ghatkopar (E)
Mumbai-400 007. Mumbai.
PAN:AAAJS 2751 A
(/Appellant) (/ Respondent)

/ Revenue by: Dr. A.K. Nayak-DR / Assessee by: None / Date of Hearing: 22/03/2017 / Date of Pronouncement: 31.03.2017 / PER RAJENDRA, AM-

Challenging the order dated 16/06/2014 of the CIT (A)-26, Mumbai, the Assessing Officer (AO) has filed the present appeal. Assessee, an AOP, filed its return of income on 13/09/2010, declaring total income at Rs. Nil, after claiming deduction u/s. 80P of the Act, amounting Rs. 44.50 lakhs. The AO completed the assessment u/s. 143 (3) of the Act, on 28/03/2013, determining its income at Rs. 44, 50, 811/-

2. Effective ground of appeal is about allowing deduction u/s. 80P of the Act. During the assessment proceedings the AO found that assessee is a registered co-operative Society, that its object was to enable its members to obtain loans and to save their income in a safe and convenient manner and to lengthen money, that it had passed certain bye laws in that regard, that it had paid-up capital of Rs. 95.70 lakhs, statutory reserves of Rs. 90.33 lakhs deposits of Rs. 838.65 lakhs from members and other liabilities, that on the asset side it had balances with various scheduled and co-operative banks, investments in fixed deposits maintained with Co-Operative Banks and loan/advances, that it had received interest on loans of Rs. 1 59.85 lakhs (including penalty), interest on investment of Rs. 12.01 lakhs. The AO examined the function of the society in the claim made by it u/s. 80P of the Act. He held that the assessee was carrying on the business of co-operative bank, that provision of section 80P (4) were applicable, that deduction claimed by it u/s. 80P was not admissible, that it was a primary co-operative bank. He 5268/M/14(10-11) M/s. Shivraj Sahakari Patsanstha Maryadit relied upon the cases of and held that the assessee fulfilled conditions laid down u/s. 56 (c) (ccv) of part V of the Banking Regulation Act, 1949, that it was a Co-Operative Bank.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). It made elaborate submissions and relied upon certain case laws. After considering the submission of the assessee and the assessment order, the FAA referred to section 56 of the Banking Regulation Act. He referred to section 2 (24) (viiia), 80P(2)(a)(i), 80P(4) of the Act as well as to the explanation to the section. He also analysed the meaning of Co-Operative Bank and Primary Agricultural Credit Society/Agricultural and Rural Development Bank and held that banking would

mean accepting deposits from public the payable on demand or otherwise for the purpose of lending or investment and withdrawal by check/draft/order or otherwise, that the assessee did not and could not accept deposits from anyone other than the members, that the membership of the society was limited only to permanent or quasi-permanent employees of the Department, that it did not conduct any business with public which was the essence of banking, that the primary object of the assessee could not be said to carry out the business of banking, that though the bye-laws permit admission of other Co-operative Society as member, that the other conditions of a Primary Co-Operative Bank were not fulfilled, that it was not a Primary Co-Operative Bank, that the principal object of the assessee did not include providing long-term credit for agriculture and rural development activities, that it was also not a Primary Co-Operative Agricultural and Rural Development Bank, that the provisions of section 80P (4) were not applicable. Referring to the provisions of section 80P (2) (a) of the Act, he further held that assessee was a co-operative Society, that it was not the case of the AO that it had provided credit facility to any person other than its member or that it had accepted and in deposits from a person other than its members, that the assessee was a co-operative Society providing credit facilities to its members, that it was eligible for deduction u/s. 80P read with section 80P (2) (a) (i) of the Act. Referring to the cases relied upon by the AO of the ITAT Jaipur (Kekri Sahakari Bhumi Vikas Bank Ltd.-54SOT64), ITAT Cochin (Kerala State Co- operative Agricultural Rural Development Bank Ltd.-139TTJ585), and ITAT Bangalore (Sri Laxminarayana Swamy Co-operative Society Ltd.-(4 ITR (Trib.)27), he held that facts of the case under consideration were totally different from the above referred cases. He referred to the judgment of Hon'ble Gujarat High Court delivered in the case of Jafari Momin Vikas Co-

5268/M/14(10-11) M/s. Shivraj Sahakari Patsanstha Maryadit Operative Credit Society Ltd., Dated 15/01/20146 and certain orders of the Tribunal including the order of Jankalyan Nagari Sahakari Pat Sanstaha Ltd.(54SOT60), Jayalakshmi Mahila Vividodeshagal Souharda Sahakari Ltd.(137ITD163) and Buldhana Urban Co-operative Credit Society Ltd.(85DTR410). Finally, he held that assessee was eligible for deduction u/s. 80P(2) and that the provisions of section 80P(4) were not applicable in the case under consideration.

4. During the course of hearing before us, the Departmental Representative (DR) stated that in the case of Jafari Momin (supra), the Hon'ble Gujarat High Court had used the word "if" and "that", that in that case the Hon'ble Court had decided the issue considering the peculiar facts of the case, that the cases relied upon by the AO were applicable to the facts of the case, the FAA had not given any finding as to whether the society was in the banking business or not. Supporting the order of AO, he stated that assessee was a co-operative bank. None appeared on behalf of the assessee, as stated earlier. In our opinion, the matter can be decided on the basis of the available material. So, we are adjudicating the issue of allowability of deduction claimed under section 80P of the Act.

5. We have heard the submissions of the DR and perused the material before us. We find that while deciding the appeal the FAA had distinguished the cases relied upon by the AO. In the case of Kekri Sahakari (supra), the assessee itself had claimed that it was a primary co-operative Agricultural and Rural Development Bank. Clearly, the assessee was not entitled to any deduction u/s. 80P(2) in light of the provisions of Section 80P(4). Similarly the Kerala State Co- operative Agricultural Rural Development Bank Ltd. (supra) was engaged in extending credit to rural sector including

agricultural and allied activities and that it was a state co-operative bank. Thus, it was not entitled to claim any deduction. As far as matter of Shri Laxminarayana (supra), is concerned, we find that it does not deal with the issue before us. The facts of the case are that the assessee is engaged in the business of banking/providing credit facilities to its members only. Therefore, such an assessee in absence of registration certificate cannot be treated as bank. We find that in the case of Jafari Momin revenue had raised the following question before the Hon'ble Gujarat High Court:

"Whether the hon'ble Tribunal is correct in allowing the deduction under section 80P(2)(a)(i) to the assessee's society even though the same is covered under section 80P(4) read with section 2(24)(viia) being income from providing credit facilities carried on by a co-operative society with its member?"

5268/M/14(10-11) M/s. Shivraj Sahakari Patsanstha Maryadit Deciding the matter, the Hon'ble Court held as under

3. The issue pertains to the interpretation of section 80P(2) and section 80P(4) of the Income-tax Act, 1961 ("the Act" for short). The respondent- assessee is a co-operative credit society and claims the benefit of deduction under section 80P(1) of the Act by virtue of the provisions contained in section 80P(2)(a)(i) of the Act. As is well known under sub-section (1) of section 80P certain co-operative societies are granted deductions of the sum specified in sub-section (2) in computing the total income. As per section 80P(2)(a)(i), the sums referred in sub-section (1) would be in the case of a co-operative society engaged in carrying on the business of banking or providing credit facilities to its members the whole of the amount of profits and gains of business attributable to any one or more of such activities. The Revenue, however, contends that by virtue of newly amended sub-section (4) of section 80P inserted with effect from April 1, 2007, by the Finance Act, 2006, section 80P would not apply to the respondent- assessee. Section 80P(4), in the present form, refers as under :

"(4) The provisions of this section shall not apply in relation to any co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank.

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

(a) 'co-operative bank' and "primary agricultural credit society" shall have the meanings respectively assigned to them in Part V of the Banking Regulation Act, 1949 (10 of 1949) ;

(b) 'primary co-operative agricultural and rural development bank' means a society having its area of operation confined to a taluk and the principal object of which is to provide for long-term credit for agricultural and rural development activities."

4. As per section 80P(4), the provisions of section 80P would not apply in relation to any co- operative bank other than primary agricultural credit society or primary co-operative agricultural and rural development bank. As per the Explanation, the terms "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.

5. The Assessing Officer held that by virtue of section 80P(4), the respondent-assessee would not be entitled to the benefits of deduction under section 80P. The Commissioner (Appeals) as well as the Tribunal reversed the decision of the Assessing Officer on the premise that the respondent- assessee not being a bank, exclusion provided in sub-section (4) of section 80P would not apply. This, irrespective of the fact that the respondent would not fall within the expression "primary agricultural credit society".

6. Had this been the plain statutory provisions under consideration in isolation, in our opinion, the question of law could be stated to have arisen. When, as contended by the assessee, by virtue of sub-section (4) only co- operative banks other than those mentioned therein were meant to be excluded for the purpose of deduction under section 80P, a question would arise why then the Legislature specified primary agricultural credit societies along with primary co-operative agricultural and rural development banks for exclusion from such exclusion and, in other words, continued to hold such entity as eligible for deduction. However, the issue has been considerably simplified by virtue of the Central Board of Direct Taxes Circular No. 133 of 2007, dated May 9, 2007. Circular provides as under :

"Subject : Clarification regarding admissibility of deduction under section 80P of the Income- tax Act, 1961.

1. Please refer to your letter No. DCUS/30688/2007, dated March 28, 2007, addressed to the Chairman, Central Board of Direct Taxes, on the above given subject.

2. In this regard, I have been directed to state that sub-section(4) of section 80P provides that deduction under the said section shall not be allowable to any co-operative bank other than a primary agri cultural credit society or a primary co-operative agricultural and rural 5268/M/14(10-11) M/s. Shivraj Sahakari Patsanstha Maryadit development bank. For the purpose of the said sub-section, co-oper ative bank shall have the meaning assigned to it in Part V of the Banking Regulation Act, 1949.

3. In Part V of the Banking Regulation Act, 'co-operative bank' means a State co-operative bank, a Central co-operative bank and a primary co-operative bank.

4. Thus, if the Delhi Co-op. Urban Thrift and Credit Society Ltd. does not fall within the meaning of 'co-operative bank' as defined in Part V of the Banking Regulation Act, 1949, sub- section (4) of section 80P will not apply in this case.

5. This is issued with the approval of the Chairman, Central Board of Direct Taxes."

7. From the above clarification, it can be gathered that sub-section (4) of section 80P will not apply to an assessee which is not a co-operative bank. In the case clarified by the Central Board of Direct Taxes, the Delhi Co-op. Urban Thrift and Credit Society Ltd. was under consideration. The circular clarified that the said entity not being a co-operative bank, section 80P(4) of the Act would not apply to it. In view of such clarification, we cannot entertain the Revenue's contention that section 80P(4) would exclude not only the co-operative banks other than those fulfilling the description contained therein but also credit societies, which are not co-operative banks. In the present case, the respondent-assessee is admittedly not a credit co- operative bank but a credit co-operative society. The exclusion clause of sub-section(4) of section 80P, therefore, would not apply. In the result, the tax appeals are dismissed."

We also find that the issue has been deliberated upon by the Tribunal delivered in the case of Kulswami Co-operative Society(supra).We are reproducing the relevant portion of the order and it reads as under:

"The Revenue has raised following Ground of appeal:-

"On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 1,14,64,254/- by holding that the assessee being Co-operative Credit Society is not a Co-operative bank and hence is entitled for deduction u/s 80P of the I.T. Act."

3. The assessee before us is a Co-operative society, which is, inter alia, engaged in the business of providing credit facilities to its members. For the assessment year under consideration i.e. assessment year 2009-10, it filed a return of income declaring total income at Nil on account of claim of exemption u/s 80P of the Act. In the revised return of income filed by the assessee, the gross total income as per the Income and Expenditure Account was declared at Rs. 1,14,64,524/-, which was also claimed as exempt in terms of section 80P of the Act and accordingly, the returned income was declared at Nil.

4. In the course of assessment proceedings, the Assessing Officer show-caused the assessee as to why the claim of exemption u/s 80P of the Act be not disallowed in view of the provisions of sub- section (4) of section 80P of the Act, inserted w.e.f 01.04.2007. In terms of sub-section (4) of section 80P of the Act, the provisions of section 80P of the Act were made inapplicable to a Co-operative Bank other than primary agricultural credit society or primary co-operative agricultural and rural

development banks. The stand of the Assessing Officer was that since the assessee was a Co-operative Society registered under the Maharashtra State Co-operative Societies Act, 1960 and was engaged in providing credit facilities to its members, such an assessee would be covered by the provisions of sub-section (4) of section 80P of the Act. Accordingly, assessee's claim for exemption u/s 80P was denied in toto and the gross total income of Rs. 1,14,64,254/- was determined as the final taxable income.

5. In appeal before the CIT(A), the pertinent plea of the assessee was that a Co-operative Society engaged in the activity of providing credit facilities to its members is quite different from a Co-

operative Bank, which falls under the restriction placed in sub-section (4) of section 80P of the Act. Therefore, as per the assessee, the provisions of sub-section (4) of section 80P of the Act did not disentitle the assessee from claim of exemption u/s 80P of the Act. The CIT(A) found that 5268/M/14(10-11) M/s. Shivraj Sahakari Patsanstha Maryadit similar issue came up in the case of assessee for assessment year 2008-09, wherein, the predecessor CIT(A) had upheld assessee's claim for exemption u/s 80P of the Act. Following the precedent in the assessee's own case, by way of the order of predecessor CIT(A) for assessment year 2008-09, the CIT(A) held the assessee entitled for claim of exemption u/s 80P of the Act.

6. Before us, it was a common point between the parties that identical controversy has been considered by the Tribunal in the assessee's own case for assessment years 2007-08, and 2008-09 vide ITA Nos. 3223/Mum/2011 & 505/Mum/2012 dated 28.03.2014, whereby it has been held that assessee Co-operative Society does not fall within the restriction placed in sub-section (4) of section 80P of the Act. The following discussion in the order of the Tribunal dated 28.03.2014 (supra) is relevant:-

"4. Having heard both the sides and perused the material on record, it is pertinent to mention that the only issue arising out of both the appeals relate to the allowability of the exemption/deduction claimed by the assessee u/s 80P of the Income Tax Act. The allowability of exemption of the said income depends on whether the assessee/cooperative credit society is a co-operative bank or not for the purposes of section 80P(4) of the Act since according to the said provision, deduction under section 80P shall not be available to any co-operative bank other than primary agricultural society or primary co-operative agricultural and rural development bank.

4.1 It is the case of the Revenue that the assessee has been functioning as a cooperative bank and by virtue of section 80P(4), the assessee is not entitled for the benefit of section 80P and also the assessee is not coming within the purview of primary agricultural society or primary co-operative agricultural and rural development bank. It is the case of the assessee that it is not a cooperative bank but only a cooperative society to which clause (4) of section 80P is not applicable.

4.2 In this connection, it is pertinent to mention that the assessee has brought on record before the lower authorities, the letter of the CBDT bearing No. F. No. 133/06/2007-TPL dated 09.05.2008 addressed to the Delhi Urban T&C Society Ltd., stating that for the purposes of subsection 4 of section 80P, 'cooperative bank' shall have the same meaning as assigned to it in part V of the Banking Regulation Act 1949, according to which 'cooperative banks' means a State Co-operative Bank, a Central Co-operative Bank and Primary Co-operative Bank. Though the said clarification is given by the CBDT in connection with some other assessee, the crux of the matter pertains to the clarification of 'co-operative bank' for the purpose of subsection 4 of section 80P. It is observed that the said clarification has also been relied by the Tribunal in many cases. Therefore, 'cooperative banks' mentioned in the said subsection indicates only the State, Central and Primary Co-operative Banks only. 4.3 Moreover, for commencing a banking business by the co-operative society, due license has to be obtained from the Reserve Bank of India and in the assessee's case, there is no such license obtained for commencing any banking business. The mere fact that the assessee has been providing credit facilities to its members and thereby earns interest and dividend cannot make the 'society' into a 'bank' for the purposes of section 80P(4) of the Act. If the intention of the legislature was not to grant deduction to cooperative societies carrying on the business of providing credit facilities to its members, then this section would have been deleted. This proposition is supported by various decisions including the decision of the Gujarat High Court in the case of CIT Vs. Jafari Momin Vikas Cooperative Credit Society Ltd and the decision of the Tribunal in the case of DCIT Vs. Jayalakshmi Mahila Vividodeshagala Souharda Sahakari Ltd. [2012] 137 ITD 163.

4.4 In addition to the aforementioned discussion, the distinction between cooperative society registered under the Banking Regulation Act 1949 and the cooperative society registered under the Maharashtra State Cooperative Societies Act 1960 as brought out by the Ld.CIT(A) on the basis of the submission of the assessee is extracted hereunder:

5268/M/14(10-11) M/s. Shivraj Sahakari Patsanstha Maryadit XXXX The above distinction makes it very clear that the assessee is not a co-operative bank for the purposes of section 80P(4) of the Act.

4.5 As regards the claim of the revenue that for the Assessment Year 2007-08, the assessee has not claimed the deduction of the section 80P of the Act in the return of income but claimed the same only during the course of the assessment proceedings and hence the claim of the assessee is not admissible in view of the findings of the Hon'ble Apex Court in the case of Goetze India Ltd. [284 ITR 323 (SC) (2006)], it is pertinent to mention that the Hon'ble Bombay High Court in the case of the CIT Vs. Pruthvi Brokers and Shareholders P. Ltd. [(2012) 349 ITR 336 (Bom)] has held that the appellate authorities have the power to consider the claim not made in return of income. The Ho'ble Bombay High Court while deciding so, has considered the

judgment of the Hon'ble Apex Court in the case of Goetze India Ltd. (supra). In view of that matter, the Ld.CIT(A) giving relief to the assessee at the appellate stage on the claim of deduction not made in the return of income is justified. 4.6 Considering the entire facts and position of law, we are of the considered opinion that the Ld.CIT(A) is justified in directing the AO to allow the deduction claimed by the assessee u/s 80P of the Act on the reason that the assessee, a cooperative credit society is not a bank for the purposes of section 80P(4) of the Act. Thus the orders of the Ld.CIT(A) dated 11.02.2011 and 29.11.2011 for the Assessment Years 2007-08 and 2008- 09 respectively are upheld.

7.Following the aforesaid precedent, which has been rendered in assessee's own case under identical circumstances, we hereby affirm the order of CIT(A) upholding assessee's claim for exemption u/s 80P of the Act. Thus the Revenue fails in its appeal."

Considering the above discussion,we hold that the order of the FAA does not suffer from any legal or factual infirmity.All the grounds raised by the AO have been dealt by the Tribunal in its order,So,confirming the order of the FAA,we decide the issue against the AO.

As a result,appeal filed by the AO stands dismissed.

Order pronounced in the open court on 31st March, 2017.

31 , 2017

Sd/-

Sd/-

(/ Amarjit Singh)
/ Rajendra)

(

/ JUDICIAL MEMBER

/ ACCOUNTANT MEMBER

Mumbai; /Dated : 31.03.2017.
Jv.Sr.PS.

/Copy of the Order forwarded to :
1.Appellant /

2. Respondent /

3.The concerned CIT(A)/ , 4.The concerned CIT /

5.DR " E " Bench, ITAT, Mumbai / ,

6.Guard File/ //True Copy// / BY ORDER, / Dy./Asst. Registrar , /ITAT, Mumbai.