

IN THE HIGH COURT OF KERALAAT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

THURSDAY, THE 13TH DAY OF AUGUST 2015/22ND SRAVANA, 1937

ITA.No. 141 of 2014 ()

AGAINST THE ORDER IN ITA 547/Coch/2013 of I.T.A.TRIBUNAL,COCHIN BENCH
DATED 17.1.2014

APPELLANT(S)/RESPONDENT/ASSESSEE:

M/S.NILESWAR RANGE KALLU CHETHU VYAVASAYA THOZHILALI
SAHAKARANA SANGHAM,
PALLIKKARA, NILESHWAR, KASARAGOD DISTRICT.

BY ADV. SRI.S.ARUN RAJ

RESPONDENT(S)/APPELLANT/REVENUE:

COMMISSIONER OF INCOME TAX,
CALICUT.

R. BY ADV. SRI.JOSE JOSEPH, SC, FOR INCOME TAX
ADV.SRI.P.K.R.MENON (SR)

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 13-08-2015,
ALONG WITH ITA.145/14 AND 146/14, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

APPENDIX IN ITA.141/14

APPELLANT'S EXHIBITS:

ANNEXURE A: A TRUE COPY OF TE ASSESSMENT ORDER DATED 16.12.2011 PASSED BY THE ASSESSISNG OFFICER FOR THE AY 2008-09.

ANNEXURE B: A TRUE COPY OF ORDER DATED 18.2.2013 PASSED BY THE COMMISSIONER OF INCOME TAX (APPEALS) KOZHIKODE FOR THE AY 2008-09.

ANNEXURE C: A TRUE COPY OF THE ORDER DATED 17.1.2014 PASSED BY THE HON;BLE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN FOR THE AY 2008-09.

/TRUE COPY/

PS TO JUDGE

C.R.

ANTONY DOMINIC & SHAJI P. CHALY, JJ.

I.T.A.Nos.141, 145 & 146 of 2014

Dated this the 13th day of August, 2015

JUDGMENT

Antony Dominic, J.

1.The captioned appeals are filed by three co-operative societies registered under the Kerala Co-operative Societies Act, 1969, impugning the common order passed by the Income Tax Appellate Tribunal, Cochin Bench in ITA.547/13, 399/13 and 548/13 respectively. ITA.Nos.547/13 and 548/13 pertains to the assessment year 2008-09 while ITA.399/13 pertains to the assessment year 2009-2010.

2.In the returns filed by the societies, they claimed the benefit of deduction under section 80P (2) (a) (vi) of the Income Tax Act. Denying that claim, the Assessing Officer completed the assessments. Appeals were filed before the Commissioner of Income Tax (Appeals). The Commissioner, in Annexure B orders, upheld the claim of the societies for the deduction in question and set aside the orders of the Assessing Officer. The orders of the Commissioner were challenged by the Revenue in the appeals filed before

the Tribunal. The Tribunal, by its common order dated 17.1.2014, allowed the appeals and restored the orders of the Assessing Officer. It is in this background, these appeals are filed by the assesseees.

3. We heard the counsel for the appellants and learned senior standing counsel for the Revenue.

4. The main question of law framed for the consideration of this Court is whether, in the facts and circumstances of the case, the Tribunal was right in setting aside the order of the first appellate authority and in holding that the appellant societies cannot be considered as co-operative societies engaged in the collective disposal of labour of its members as contemplated under section 80P (2) (a) (vi) of the Act and therefore, ineligible for deduction under section 80P (1) of the Act.

5. Section 80P to the extent it is relevant reads thus:

"80P. Deduction in respect of income of co-operative societies

(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)

..... ..

(vi) the collective disposal of the labour of its members, or

(vii)

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

Provided that in the case of a co-operative society falling under sub-clause (vi), or sub-clause (vii), the rules and bye-laws of the society restrict the voting rights to the following classes of its members, namely:-

- (1) the individuals who contribute their labour or, as the case may be, carry on the fishing or allied activities;
- (2) the co-operative credit societies which provide financial assistance to the society;
- (3) the State Government;"

6. Reading of the above provision shows that in the case of a co-operative society, the gross total income includes any income generated out of the collective disposal of the labour of its members, such income shall be deducted in accordance with and subject to the condition in the proviso to the section in computing the total income of the society. The scope of this provision came up for consideration of the Orissa High Court in the judgment in Nilagiri Engineering Co-operative Society Ltd. v. Commissioner of Income Tax [(1994)208 ITR 326]. The appellant therein was a society, the membership of which was confined to unemployed diploma holders and graduates in Engineering. During the assessment year in question, the society had undertaken some contract works. But so far as the member engineers were concerned, their contribution to the execution of the contract works was only supervisory work confined to the office and the actual supervision of the works at the field was done by paid employees of the society and the members exercised only overall supervision.

7. The claim of the society for the benefit of section 80P(2)(a)(vi) of the Act was declined by all the authorities. On being challenged before the High Court in a writ petition, after referring to the statutory provisions, the court held thus:

"This brings us to the consideration of the proper meaning of the provision of section 80P(2)(a)(vi). It is candidly admitted by learned counsel for both sides that there are no decided cases on the question. The eligibility to earn exemption is where the whole amount of profits and gains of a business is attributable to the collective disposal of the labour of its members. The words are very clear and only mean that the earning of the society must have been through utilisation of the actual labour of its members. We agree with learned counsel for the petitioner that the labour need not always be manual. But then, be it manual or otherwise, the guiding factor must be that the earning of the society must be through utilisation of the particular kind of labour in which the members are specialised. An example would illustrate this. If there is a co-operative society of unemployed mathematics graduates who form a society, write out text books of mathematics and earning is made out of the text books, the earning may be said to be attributable to dispensation of labour of the members directly. Similarly, if the members belong to any other discipline, the work

executed in actual application of the discipline would be disposal of labour of the members. On the other hand, if the members are manual labourers as in a labour contract service co-operative society, and the work undertaken is executed by the manual labour of the members, the whole of its income would be exempted. A power of disposal always pre-supposes the possession of something to be disposed of. It is only when collective disposal is made of such a disposable commodity over which the society has control as inhering in its members that the income is directly attributable and to such disposal by the society the benefit is earned. The society cannot be said to have at its disposal, in that manner, the labour of paid employees as they are not its members. Since the members themselves did not exert their own labour in the execution of the work but as has been found by the statutory forums, they only confined themselves to overall supervision mostly at the office like any other prudent businessmen, it has to be taken that the speciality of their discipline was never put to labour in the execution of the work. In other words, as has been rightly submitted by Mr.Roy, learned standing counsel, there has been no direct proximate connection between the work executed and the speciality of the members of the society as diploma holders or graduate engineers. Mr.Dash has brought to our notice that the question was raised before the two-member Tribunal even earlier to the order, annexure-3, in

the appeals relating to the assessment years 1974-75 to 1978-79. The order is annexure-2 to the writ petition. There the two-member Tribunal held that section 80P(2)(a)(vi) would restrict the exemption to the income earned from the labour of its members. It further explained:

" . . . In other words, if besides the labours of its members the income has been earned from labour employed by the society or out of the benefit of any capital available with the society it would not come under clause (vi) though it may fall under any other clause so that in the present case, the income actually derived from the labour of the members of the assessee would be exempt but not any income derived as a result of investment of capital or execution of any jobs by employed labour."

The decision, according to us, indicated the correct position of law."

8. This Court also had occasion to consider the scope of this provision in the judgment in Commissioner of Income Tax v. M/s. Uralungal Labour Contract Cooperative Society [2010 KHC 59]. The respondent herein is a co-operative society and its members are all workers. The society was engaged in construction work and was also engaged in purchase and sale of

construction materials like sand. The claim of the society was upheld and that order was challenged by the Revenue before this Court. Repelling the challenge, this Court held thus:

“ However, after going through the Tribunal's order and after considering the constitution and nature of activities of the respondent - Society, we feel the Society is entitled to deduction under S.80P(2)(vi) on the entire income because in the first place, all the members of the Society are workers and they engage themselves in the execution of civil works undertaken by them. There is no case for the department that Society consists of any member other than construction worker and there is also no case that all the member - workers are not engaged in the activities of the Society which is execution of civil construction work. A workers' Society undertaking civil construction work and executing the work by themselves rightly answers the activity referred to in S.80P(2)(vi) i.e. Collective disposal of labour of the members of the Society. If members of the Society are engaged in construction activities, then the Society itself should be held to be engaged in collective disposal of labour of its members. Therefore, the income earned from construction work qualifies for deduction under S.80P(2)(vi) of the Act. The remaining issue is only with regard

to the trading done in construction materials like sand which are stated to have been purchased and sold by the Society. Here again, the transactions are incidental in nature and the members themselves are engaged in handling of the goods in the course of purchase and sale of the same. Construction material involved is also sand where the labour involved is substantial and the income earned is also not found to be attributable to profit in trading and not attributable to labour inputs."

9. Although reference was also made to the judgment of the Gujarat High Court in Gora Vibhag Jungle Kamdar Mandali v. Commissioner of Income Tax [(1986) 161 ITR 658], this Court in Commissioner of Income Tax v. Palghat Food Corporation of India Labour Contract Co-operative Society Ltd. [(2004) 266 ITR 315] and Madras High Court in Commissioner of Income Tax v. Salem District Printers Service Industrial Co-operative Society Ltd. [(2007) 290 ITR 371], we find that the controversies resolved in these cases are not helpful for the purpose of disposal of these appeals and therefore, we are not making any reference to those judgments.

10. Reading of the judgments of the Orissa High Court and this Court make it clear that the earning of the society must be through utilisation of the particular kind of labour in which the members are specialised. It is also clear that it is only when collective disposal of a disposable commodity over which the society has control is made, the benefit is earned by the society. Such disposal shall be of the labour of the members of the society. This position is also clear from the judgment of this Court in M/s.Uralungal Labour Contract Cooperative Society (supra).

11. Understanding the scope of the provisions in the above line, we shall now refer to the facts of these appeals. Facts of these cases are all similar. In the assessment order produced as Annexure A in I.T.A.141/14, the Assessing Officer has entered the following finding:

"8. The members of the society are also working as employees and are being paid remuneration based on their output of toddy. The assessee is not a labour contract co-op

society. The main objectives of the Society as per registered bye laws are to run toddy shops under license from Excise Department; purchase implements for tapping toddy for use of members; arrange buildings, furniture and vehicles for setting up toddy shops etc. There is no mention about the collective disposal of labour of the members. The assessee is collecting toddy from members and also purchasing toddy from outside. The compensation by way of wages paid to members depends on the quantity of toddy supplied by them to the society. Toddy is also purchased from outside. The difference between the purchase price per litre of toddy and the compensation per litre of toddy procured from members is marginal. The main activity of the assessee is doing business of procuring and selling toddy and thereby making profit. The profit is not seen utilized for the immediate benefit of the members. For all these reasons the assessee cannot be considered to be a Society engaged in the collective disposal of labour of its members or in any other activity as is mentioned in section 80P(2)(a). Accordingly the claim of deduction u/s.80P(2) is not allowable."

12.The Tribunal has also discussed the factual position and after referring to the precedents cited, held in paragraphs 13.3 and 13.4 thus:

"13.3 However, we notice that the assessee herein have used the labour of its members for tapping the toddy on payment of wages to them. If members were not available, these assessee would have employed non-members as workers for tapping the toddy. We have already noticed that the toddy has been purchased from non-members also. Though, there is some merit in the contention that there was collective disposal of labour while tapping the toddy, yet the fact remains that the tapping of the toddy, per se, has not generated any income to these societies. Thus these assessee societies have not generated income from the activity of tapping of toddy, which might involve collective disposal of labour. In fact, these societies have generated income only through sale of toddy. There should not be any dispute that the activities of tapping of toddy and the activities of sale of toddy are two different activities. As contended by the Ld D.R, the main objective of these societies is to run toddy shops. Accordingly, we notice that the incidental object of these societies appear to be to ensure that their members earn reasonable wages on tapping of toddy. Hence, in order to achieve the said objectives, these societies have only utilized the labour of its members for the activity of tapping the toddy and through that process, these societies have only ensured that the members earn reasonable wages. Thus, in our view, these societies have only generated only employment opportunities to its members.

13.4 It is not the case that these societies have engaged themselves in the business of tapping of toddy by utilizing the labour of its members and in that process they have earned income, in which case, it can be said that they have earned income on "Collective disposal of labour". On the contrary, these societies have been carrying on the business of sale of toddy and in that process they have only generated employment opportunities to its members and have ensured that the members get reasonable amount as wages. Thus, in our view, the employment opportunity generated to its members cannot be considered as "Collective disposal of labour". Further, the "Collective disposal of labour", per se, has not generated any income to these societies. On the contrary, these societies have earned income only on sale of toddy, which is a naturally obtained product from coconut trees."

13. We have also gone through the bye-laws of the society. The factual findings of the Assessing Officer, which was confirmed by the appellate Tribunal show that though membership of the society is confined to persons who are enrolled as members of the Toddy workers welfare Fund Board and are toddy tapers, for the toddy that are tapped and delivered by them to the society, they are paid remuneration

based on the quantity of toddy delivered. On similar terms, toddy is collected from non-members also. The bye-laws of the society shows that the main object of the society is establishment and management of the toddy shops. The activity of the society is therefore purchase of toddy from its members and non-members on payment of the agreed remuneration and its sale through the toddy shops established by the society itself.

14. This, therefore, shows that the collective disposal of the labour of the members of the society is not resulting in the generation of any income to the society. On the other hand, toddy tapped and delivered by the members of the society and non-members are purchased by it and remuneration is paid to them at agreed rates. The toddy thus purchased is sold through the Toddy shops established by the society. Therefore, the income of the society has nothing to do with the collective disposal of the labour of its members, but is entirely from out of the price realised by it for the sale of toddy through the society's own toddy shops. When that is

the activity of the society, it cannot be said that the sum referred to in section 80P(1) entitling the society for deduction is generated out of the collective disposal of the labour of the appellant societies.

15. The society does not dispute the correctness of the factual finding that toddy is collected from non-members also. Though this was attempted to be explained by the learned counsel by pointing out that there are persons who supplied toddy till they became eligible for admission to the Toddy Workers Welfare Fund Board, the fact that at least until then, the suppliers of toddy are non-members of the societies, remain undisputed. However, even if this contention of the Revenue is accepted, the societies would not be totally deprived of the benefit of deduction, but would have been entitled to proportionate deduction.

16. For the aforesaid reasons, the Tribunal is fully justified in holding that the appellant societies are not eligible for the benefit of section 80P(2)(a)(vi) of the Act.

17. We do not find any illegality in the view taken by the Tribunal.

In the aforesaid circumstances, answering the question of law framed against the assessee and in favour of the Revenue, the appeals are dismissed.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
SHAJI P. CHALY, Judge.

kkb.