IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.10.2014

CORAM

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.26083 to 26087 of 2014

The Vellore District Government Employees
Co-operative Society,
Rep. by its Secretary,
Having Office at 49,
Bharathiar Salai, Fort Round,
Vellore-632 001. ... Petitioner in all Writ Petitions

-vs-

1. The Assistant Commissioner of Income Tax,
Circle-I, Vellore, Vellore District-632 001.

2. The Commissioner of Income Tax (Appeals)-III,
121, Nungambakkam High Road,
Chennai-600 034.

3. The Commissioner of Income Tax-VIII
6th Floor, Kannamai Buildings,
611, Anna Salai,
Chennai-600 006. ... Respondents in all Writ Petitions

Common Prayer: Writ petitions are filed under Article 226 of the Constitution of India for issuance of Writ of Certiorarified Mandamus, calling for the records of the 1st respondent culminating the order of demand made on 29.01.2014 served on the petitioner on 21.03.2014 with reference to the Assessment years 2007-2008, 2008-2009, 2009-2010, 2010-2011 and 2011-2012, quash the same and consequently direct the 2nd respondent to consider the appeal filed by the petitioner on 26.03.2014 under the provisions of the Income Tax Act.

For Petitioner : Ms.G.Thilakavathi

For Respondents : Mr.Pramod Kumar Chopra & Mr.P.Rajkumar Jhabakh

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C O M M O N O R D E R

By consent of the learned counsel on either side, these writ petitions are taken up for final disposal at the stage of admission itself.

2. Heard Ms.G.Thilakavathi, learned counsel appearing for the petitioner and Mr.Pramod Kumar Chopra along with Mr.P.Rajkumar Jhabakh, learned counsel for the respondents.

3. The petitioner is a Co-operative Society, registered under the provisions of the Tamil Nadu Co-operative Societies Act, 1983 (in short "the Act") and it derives income from carrying on the business of Banking or providing credit facilities to its members, who are the employees of the State Government. The Society has also been subjected

to Co-operative Audit as contemplated under the Act. The petitioner is assessed to tax on the files of the Assistant Commissioner of Income-Tax, Circle-I / 1st respondent.

4. The issue involved in these writ petitions relates to five assessment years from 2007-2008 to 2011-2012. Since the scope of these writ petitions is narrow, it may not be necessary to go into the factual details of each and every assessment order and the pattern of orders of assessment for 5 years are also identical.

5. The assessments were completed under Section 143(3) r/w Section 147 of the Income Tax Act, disallowing the claim of deduction under Section 80P(2)(a)(i) of the Income Tax Act, on the ground that the Co-operative Society provides credit facility to its members and the petitioner's Society is carrying on business of banking and hence, not eligible for deduction under Section 80P(4) of the Income Tax Act. Aggrieved by the disallowance, the petitioner Society preferred appeals before the Commissioner of Income Tax (Appeals)-III, Chennai on 26.03.2014 and the same is pending. In the said appeal, the petitioner, in

support of its contention that credit co-operative society is different from co-operative Bank and is eligible for deduction under Section 80P(2)(a)(i) of the Income Tax Act, 1961, placed reliance on the decision of the Gujarat High Court in the case of CIT vs. Jafari Momin Vikas Co-operative Credit Society Ltd., (Guj), reported in (2014) 362 ITR 331 (Guj).

6. In the meanwhile, the petitioner also filed stay petition before the Commissioner of Income Tax – VIII, Chennai / 3rd respondent for stay of collection of demand on 05.09.2014, on the ground that appeal has been filed against disallowance made in the assessment orders. It was also stated in the said application that inspite of petitioner's representation before the Assessing Officer for stay of demand of collection of tax based on Gujarat High Court's judgment and also CBDT instruction No.1914 dated 02.12.1993, the same were not taken into consideration by the said Officer. In the CBDT instruction No.1914 dated 02.12.1993, it has been clearly mentioned that the Assessing Officer could consider the stay of demand for collection of tax in the following cases:

i) Dispute has arisen due to interpretation of law by the AO and during the pendency of first appeal;

ii) if the demand in dispute relate to issues, which have been decided in favour of the assessee by the appellate authority.

7. However, the Commissioner of Income Tax – VIII / 3rd respondent herein, vide order dated 18.09.2014, observed that stay of demand cannot be granted unless there is a case of financial stringency and also filing of appeal before the CIT (A) cannot be a valid ground for deferring the recovery proceedings, which order was followed by the proceedings of the Joint Commissioner of Income Tax, Vellore Range, Vellore dated 11.09.2014, wherein the petitioner was directed to pay the entire demand immediately stating that mere filing of appeal is not an excuse for non payment of tax dues and if the appeal is decided in favour of the petitioner, the department would not hold the refund due to them as a result of order giving effect to the appellate order and the same would be granted to the petitioner with interest as per the provisions of the Income Tax Act, 1961.

8. The petitioner contended that vide Finance Act, 2006 with effect from 01.04.2007, the benefit of deduction available to certain co-operative banks were withdrawn by insertion of new sub-section(4) to provide that the provisions of this section will 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. The petitioner relied upon the circular issued by the Central Board of Direct Taxes (CBDT) under Circular No.6 of 2010 dated 20.09.2010, wherein it was stated that Section 80P was amended by the Finance Act, 2006 with effect from 01.04.2007 introducing Sub-section (4), which lays down specifically that the provisions of Section 80P will not apply to any co-operative bank other than a primary agricultural credit society or a Primary Co-operative Agricultural and Rural Development Bank. Accordingly, deduction under Section 80P was no more available to any Regional Rural Bank from assessment year 2007-2008 onwards. It was contended that the expressions "co-operative bank", primary agricultural credit society" have been taken as per the definition given in Part V of the Banking Regulation Act, 1949 (10 of 1949) and the primary co-operative agricultural and rural development bank have also been

defined in the Act to bring clarity. The petitioner placed reliance on the decision of the Gujarat High Court in the case of CIT vs. Jafari Momin Vikas Co-operative Credit Society Ltd., (Guj), reported in (2014) 362 ITR 331 (Guj). The petitioner pointed out that during the course of assessment, the petitioner has submitted that it is a co-operative credit society, providing credit facilities to its members and not a Bank under Banking Regulation Act. It does not have license to act as Bank and the object of society is to help its members only and hence deduction under Section 80P(2)(a)(i) cannot be denied. By relying upon Section 5(b) of the Banking Regulation Act, it was contended that the petitioner Society is not a Bank and they do not hold license as required under Section 22 of the Banking Regulation Act. Therefore, it was reiterated that the object of the Society is to help its members on housing needs and hence, Section 80P(4) will not be applicable in the case of the petitioner.

9. The petitioner placed reliance on the clarification issued by the CBDT, while granting stay of demand and reliance was also placed on Clause C to the guidelines, more particularly Sub-Clauses (a) to (c). By placing reliance on the above said clarification, it was submitted that the

High Court of Gujarat in the case of CIT vs. Jafari Momin Vikas Co-operative Credit Society Ltd., (supra) has held that Section 80P(4) applies only to the co-operative bank and not to co-operative credit societies and submitted that the said decision fully supports the case of the petitioner and therefore, the petitioner would fall within Clause (c) of the CBDT notification and thus, requested for grant of stay. Further, it was submitted that Section 2(14)(viia) of the Act only applies to co-operative societies, carrying on business of banking and it does not apply to the present case, since the petitioner is not carrying on the business of banking, as it does not hold the mandatory license from the RBI to carry the business of banking. It was also submitted that merits of the petitioner's case was not properly considered at the time, when the stay petition was rejected. It was further stated that if the petitioner is called upon to pay the entire demand, it would cripple their financial position and all the members will be put an irreparable hardship and therefore, requested for grant of stay.

10. It is to be noted that the petitioner in the stay petition has specifically raised that the decision of the Hon'ble Gujarat High Court is

fully in their favour. Therefore, they have raised the issue to establish prima facie case. That apart, the specific case of the petitioner is that they are not doing banking activities and they do not fall within the definition of banking as defined under Section 5(b) of the Banking Regulation Act, nor do they possess license under Section 22 of the said Act, which is the mandatory requirement. As per the clarification issued by the CBDT dated 01.12.2009, detailed instructions have been given as to how and under what circumstances, stay of demand could be granted. In fact, guidelines for staying demand have been specifically stated as under:

> "C. Guidelines for Staying Demand
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> (i) A demand will be stayed only if there are valid reasons for doing so. Mere filing an appeal against the assessment order will not be sufficient reason to stay the recovery of demand. A few illustrative situations where stay could be granted are:-
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> (a) if the demand in dispute relates to issues that have been decided in assessee's favour by an appellate authority or Court earlier; or
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> (b) if the demand in dispute has arisen because the Assessing Officer had adopted an interpretation of law in respect of which there exist conflicting decisions of one or more High Courts (not of the High Court under whose jurisdiction the Assessing Officer is working); or

(c) if the High Court having jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgment.

11. Undoubtedly, the guidelines are binding upon the Officer, while considering the application for grant of stay. The case on hand clearly falls within Clause-C (i) (c) of the above guidelines. That apart, three cardinal principles to be adopted for grant of interim order are that;

i) prima facie case;

ii) balance of convenience;

iii) irreparable loss or hardship.

11 (i). When the petitioner has placed reliance on the decision of the Hon'ble Gujarat High Court, that can very well be considered. Since the said decision has not been considered, the petitioner has duly established the prima facie case.

11 (ii) The next aspect to be considered is whether balance of convenience is in favour of the petitioner Society. If the decision of the Hon'ble Gujarat High Court is said to be applicable to the case of the petitioner, then obviously balance of convenience is in their favour. Further contention is that the petitioner Society is not doing banking

business and therefore, they do not fall within the definition of banking as defined under Section 5(b) of the Banking Regulation Act, nor do they possess license for carrying on business. It is also a good ground to consider the balance of convenience in their favour.

11(iii). The next aspect for consideration is as to whether pending appeal, if the demand is to be enforced, would it cause irreparable hardship to the petitioner. At this stage, we have to note that the petitioner is the Co-operative Society registered under the provisions of the Tamil Nadu Co-operative Societies Act. The bye-laws of the Society have been produced before this Court, which clearly shows that the Society has to work and function for the benefit of its members. Unlike any other private organization, the Society operates on the strict parameters in accordance with the provisions of the Tamil Nadu Co-operative Societies Act, 1983 and the Tamil Nadu Co-operative Societies Rules, 1988. Therefore, if the entire tax levied is directed to be remitted, it would undoubtedly cause severe financial hardship and it would also cripple their entire activities. Ultimately, the members of the Society would be put to irreparable hardship.

12. In such circumstances, this Court is of the view that the

petitioner has made out a case for grant of interim stay till the appeal is heard, disposed of by the Commissioner of Income Tax (Appeals). However, it is open to both the parties to request the Commissioner of Income Tax (Appeals) for early hearing of the appeal.

13. In the result, all these writ petitions are allowed and the impugned orders are set aside. There shall be an order of interim stay of collection of tax from the petitioner in respect of the five assessment years till the disposal of the appeal by the Commissioner of Income Tax (Appeals). No costs. Consequently, connected miscellaneous petitions are closed.

28.10.2014

Index: Yes / No
Internet: Yes / No
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