

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.10.2014

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

W.P.Nos.26929 to 26932 of 2014

The Katpadi Cooperative Township Ltd.,
Gandhi Nagar, Vellore 632 006.

Rep. by its Secretary Shri.A.Gopal ... Petitioner in all Writ Petitions

-VS-

1. The Assistant Commissioner of Income Tax Circle-I,
 No.2, Barracks Cross Street,
 Officers Line, Vellore.
2. The Commissioner of Income Tax-VIII,
 VI Floor, Kannammal Buildings,
 No.611, Anna Salai, Chennai-6.
3. The Income Tax(H.Qrs)
 O/o. Commissioner of Income Tax-VIII
 VI Floor, Kannammai Buildings,
 No.611, Anna Salai, Chennai 6.
4. The Commissioner of Income Tax (Appeals)-III,
 121, M.G.Road, Chennai 34. ... 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 3rd respondent in C.No.829(7) CIT

VIII/STAY/2014-15 dated 25.09.2014 and quash the same and consequently direct the 2nd respondent to grant stay of collection of tax and interest for the assessment years 2008-09, 2009-10, 2010-11 and 2011-12 till the disposal of appeal by the 4th respondent

For Petitioner : Mr.R.Vijayaraghavan
For Mr.Subbaraya Aiyar

For Respondents : Mr.Pramod Kumar Chopra

COMMON ORDER

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 Mr.R.Vijayaraghavan, learned counsel for Mr.Subbaraya Aiyar, learned counsel appearing for the petitioner and Mr.Pramod Kumar Chopra, 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"). It derives income from carrying on the business of

providing credit facility to its members and income from house property, selling of plots and dividend income. 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 four assessment years from 2008 to 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 4 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 25.04.2014 and the same is pending.

6. In the meanwhile, the petitioner also filed stay petitions before the 1st respondent for stay of collection of demand, on the ground that appeals have been filed against disallowance made in the assessment orders. The 1st respondent, vide order dated 01.09.2014, directed the petitioner to pay 25% of the demand immediately and balance in 10 installments. Aggrieved over the same, the petitioner again preferred stay petitions before the Commissioner of Income Tax - VIII / 2nd respondent herein. Vide order dated 18.09.2014, the 2nd respondent observed that no case has been made out as to why the stay of taxes need be given and filing of appeal before CIT (A) cannot be a valid ground for deferring the recovery proceedings. Hence, the petition for stay of collection filed could not be entertained and the petitioner was requested to remit the demand immediately.

7. Thereupon, the petitioner filed another stay application on

24.09.2014. In the said stay petition, 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).

8. The petitioner pointed out that during the course of assessment, the petitioner, vide letter dated 24.03.2014, 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 on housing needs and hence deduction under Section 80P(2)(a)(i) cannot be denied. Further, it was stated that the Assessing Officer had come to the wrong conclusion that the activities of collecting the cheques from customers, collecting cash and issuing receipts for the same is nothing, but banking and denied deduction under Section 80P. 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.

9. However, it was submitted that the provisions of the Banking Regulation Act, namely, Sections 5(b) and 22 were not taken note of at the time of assessment. 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.

10. 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.

11. The Income Tax Officer (Head Quarters), Chennai, vide impugned proceedings informed the petitioner the comments given by the Commissioner of Income Tax, Chennai-VIII, before whom the stay petition was filed and it was stated that in the stay petition, the petitioner has mentioned that the demand has arisen due to interpretation of law and case is pending before CIT(A), stay of demand cannot be granted unless there is a clear case of financial stringency and

also filing of appeal before the CIT(A) cannot be a valid ground for deferring the recovery proceedings. Hence, the petition for stay of collection filed was not entertained.

12. 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

- (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:-

(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

(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.

13. 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.

14 (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.

14(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.

14(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.

15. It is brought to the notice of this Court that pursuant to the impugned order, the Bank account of the Society is frozen. This would all the more cause great prejudice to the petitioner Co-operative Society.

16. 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.

17. 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 four assessment years till the disposal of the appeal by the Commissioner of Income Tax (Appeals). No costs. Consequently, connected miscellaneous petitions are closed.

13.10.2014

Index: Yes / No
Internet: Yes / No
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Note: Issue order copy on 14.10.2014

To

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T.S.SIVAGNANAM,J.

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