IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, COCHIN

Before Shri George George K, Judicial Member

ITA No.258/Coch/2020 : Asst.Year 2011-2012

M/s. Arayoor Service Co-operative Bank Limited C/o.A.Kumar, 28/3085 – B,Parvathy Nivas, Tagore Nagar Kadavanthara Kochi – 682 020. [**PAN : AADAS8484N.**	Vs.	The Income Tax Officer Ward -2(2) Trivandrum.
(Appellant)		(Respondent)

Appellant by : Sri.Ajay V.Anand
Respondent by : Sri.Mritunjaya Sharma, Sr.DR

Date of Hearing : 16.07.2020		**Date of Pronouncement : 16.07.2020**

O R D E R

This appeal at the instance of the assessee is directed against the order of the CIT(A), dated 03.09.2019 passed u/s. 154 r.w.s. 250 of the I.T.Act. The relevant assessment year is 2011-2012.

2. There is a delay of 203 days in filing this appeal before the Tribunal. The assessee has filed a petition for condonation of delay and also an Affidavit of the Secretary of the assessee-bank stating therein the reasons for belated filing of the appeal. The Secretary of the assessee-society had stated in the Affidavit that the impugned order of the CIT(A) has been received by the staff and the same has not been brought to the notice of the Secretary of the assessee-society until garnishing notice was served on the assessee in the month of February 2020. It was stated that on receipt of the garnishing notice, the assessee filed a Writ Petition before the Hon'ble Kerala High Court on 10th February, 2020. Subsequently, the

Writ Petition was withdrawn and the appeal has been filed before the Tribunal in the month of June 2020. It was submitted that due to lockdown from March, the appeal before the ITAT could be filed only on 16.06.2020. Therefore, it was prayed the delay in filing this appeal may be condoned. The learned Departmental Representative strongly opposed the delay condonation petition.

2.1 I have heard rival submissions and perused the reasons stated in the Affidavit for belated filing of appeal before the Tribunal.The delay in filing the appeal cannot be attributed to any latches on the part of the assessee. There is sufficient cause for belated filing of this appeal. Hence, the delay of 203 days in filing this appeal is condoned and I proceed to dispose of the same on merits.

3. The brief facts of the case are as follow:

The assessee is a co-operative society registered under the Kerala Co-operative Societies Act, 1969. For the assessment year 2011-2012 under consideration, the return of income was filed after claiming deduction u/s 80P of the I.T.Act. The Assessing Officer passed order, disallowing the claim of deduction u/s 80P of the I.T.Act. The reasoning of the Assessing Officer to disallow the claim of deduction u/s 80P(2) of the I.T.Act was that the assessee was doing the business of banking, and therefore, in view of insertion of section 80P(4) of the I.T.Act with effect from 01.04.2007, the assessee will not be entitled to the deduction u/s 80P(2) of the I.T.Act.

4. Aggrieved by the order of assessment denying the claim of deduction u/s 80P(2) of the I.T.Act, the assessee preferred appeal to the first appellate authority. The CIT(A) allowed the appeal by holding that the assessee was eligible for deduction u/s 80P of the I.T.Act. The interest income received from other banks and treasury also was allowed as deduction u/s 80P(2)(a)(i) of the I.T.Act. In allowing the appeal of the assessee, the CIT(A) followed the judgment of the Hon'ble jurisdictional High Court in the case of *Chirakkal Service Co-operative Co-operative Bank Ltd. v. CIT [(2016) 384 ITR 490 (Ker.).*

5. Subsequently, the CIT(A) issued notice u/s 154 of the I.T.Act proposing to rectify his order passed, in view of the subsequent judgment of the Full Bench of the Hon'ble jurisdictional High Court in the case of *The Mavilayi Service Co-operative Bank Ltd. v. CIT [ITA No.97/2016 order dated 19th March, 2019].* The CIT(A) passed order u/s 154 of the I.T.Act, disallowing the claim of the assessee u/s 80P(2) of the I.T.Act.

6. Aggrieved by the order of the CIT(A), the assessee has filed this appeal before the Tribunal raising the following common grounds:-

> *"A. The order passed by the Learned Commissioner (Appeals) u/s 154 of the Act is erroneous without jurisdiction and illegal.*
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> *B. The order passed by the Learned Commissioner (Appeals) u/s 154 is without hearing the Appellant and is an ex-parte order and liable to be set aside on this ground alone.*
>
> *C. The order impugned is erroneous in law and on facts and is liable to be set-aside.*

D. The proceedings though commenced u/s.154 for rectification, the CIT (A) engaged in an exercise which results in a review. There is no power vested in the CIT (A) to review. And in any view, cannot be so done in a proceeding that admittedly was under a notice for a S. 154 proceeding.

E. It is settled law that in a purported exercise of a invoking a rectification power, the entire order cannot be sought to be recalled. The Rectification order falls purely in the realm of a review as it seeks setting aside of the entire order.

F. It is obvious hence that the rectification itself was in a disarray The proceedings for rectification were misconceived, wholly without jurisdiction. The rectification is bad as it replaces another with a wrong order. It is presumable under the circumstances of the case that whole of the final order originally passed order is replaced for the reason that no partial reconstruction of the order would be possible as any such order would be frowned upon.

G. Without prejudice it is submitted that the rectified order itself is not in terms of the judgment of the full bench for various reasons. The Full Bench decision in Mavilayi Service Co-operative Bank Ltd. does not in any way prejudice the case of the Appellant on facts. The issues are open, even if the Full bench is followed and has to be considered de novo. This has not been done and hence the order cannot carry and hold as such with a demand.

H. The decision in Mavilayi Service Co-operative Bank Ltd. is pending before the Hon'ble Supreme Court and is for consideration on merits. The appeal has been admitted. In this regard, it is respectfully submitted that once the appeal is admitted the decision of the lower court is in jeopardy notwithstanding the fact that is binding inter se parties as held by the Hon'ble Supreme Court in Kunhayammed & Ors., vs. State of Kerala & Anr., (200) 6 SCC 359.

I. The rectification was initiated as though the issue has attained finally and there is no lis as on the judgment in Mavilayil Service Co-operative Bank's case. The rectification is therefore illegal and misconceived.

For these and other grounds to be urged at the time of hearing it is prayed that the Hon'ble Income Tax Appellate Tribunal may be pleased to set aside the orders of the authorities below."

7. The learned AR relied on the grounds raised.

7.1 The learned Departmental Representative, on the other hand, strongly supported the orders of the Income-tax authorities.

8. I have heard the rival submissions and perused the material on record. The Hon'ble Kerala High Court in the case of *Kil Kotagiri Tea & Coffee Estates Co. Ltd. v. ITAT reported in 174 ITR 579* had held that when an authority has decided on the basis of a decision of the High Court which is subsequently reversed, there would be a rectifiable mistake coming within the section 154 of the Income-tax Act. The Larger Bench of the Hon'ble Kerala High Court has reversed the dictum laid down by the judgment of the Hon'ble Kerala High Court in the case of *Chirakkal Service Co-operative Bank Ltd. (supra)* by holding that the activities of the assessee has to be examined to determine whether the assessee is Co-operative society or cooperative bank. In the light of the Larger Bench judgment of the Hon'ble Kerala High Court, the earlier CIT(A) order's granting deduction u/s. 80P(2) of the I.T. Act have been rightly recalled by the CIT(A). Therefore the grounds raised by the assessee that the CIT(A) has erred in passing order u/s. 154 of the I.T. Act are dismissed

8.1 The Hon'ble jurisdictional High Court in the case of *Chirakkal Service Co-operative Co-operative Bank Ltd. v. CIT [(2016) 384 ITR 490 (Ker.)]* had held that when a certificate has been issued to an assessee by the Registrar of Co-operative Societies characterizing it as primary agricultural credit society, necessarily, the deduction u/s 80P(2) of the

I.T.Act has to be granted to the assessee. However, the Full Bench of the Hon'ble Kerala High Court in the case of The Mavilayi Service Co-operative Bank Ltd. v. CIT (supra) had reversed the above findings of the Hon'ble Kerala High Court in the case of *Chirakkal Service Co-operative Co-operative Bank Ltd. v. CIT (supra)*. The Larger Bench of the Hon'ble Kerala High Court in the case of *The Mavilayi Service Co-operative Bank Ltd. v. CIT (supra)* held that the Assessing Officer has to conduct an inquiry into the factual situation as to the activities of the assessee society to determine the eligibility of deduction u/s 80P of the I.T.Act. It was held by the Hon'ble High Court that the Assessing Officer is not bound by the registration certificate issued by the Registrar of Kerala Co-operative Society classifying the assessee-society as a co-operative society. The Hon'ble High Court held that each assessment year is separate and eligibility shall be verified by the Assessing Officer for each of the assessment years. The finding of the Larger Bench of the Hon'ble High Court reads as follows:-

> *"33. In view of the law laid down by the Apex Court in Citizen Co-operative Society [397 ITR 1] it cannot be contended that, while considering the claim made by an assessee society for deduction under Section 80P of the IT Act, after the introduction of sub-section (4) thereof, the Assessing Officer has to extend the benefits available, merely looking at the class of the society as per the certificate of registration issued under the Central or State Co-operative Societies Act and the Rules made thereunder. On such a claim for deduction under Section 80P of the IT Act, the Assessing Officer has to conduct an enquiry into the factual situation as to the activities of the assessee society and arrive at a conclusion whether benefits can be extended or not in the light of the provisions under sub-section (4) of Section 80P.*

> *33. In Chirakkal [384 ITR 490] the Division Bench held that the appellant societies having been classified as Primary Agricultural Credit Societies by the competent authority under the KCS Act, it has necessarily to be held that the principal object of such societies is to undertake agricultural credit activities and to provide loans and advances for agricultural purposes, the rate of interest on such loans and advances to be at the rate to be fixed by the Registrar of Co-operative Societies under the KCS Act and having its area of operation confined to a Village, Panchayat or a Municipality and as such, they are entitled for the benefit of sub-section (4) of Section 80P of the IT Act to ease themselves out from the coverage of Section 80P and that, the authorities under the IT Act cannot probe into any issues or such matters relating to such societies and that, Primary Agricultural Credit Societies registered as such under the KCS Act and classified so, under the Act, including the appellants are entitled to such exemption.*
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> *34. In Chirakkal [384 ITR 490] the Division Bench expressed a divergent opinion, without noticing the law laid down in Antony Pattukulangara [2012 (3) KHC 726] and Perinthalmanna [363 ITR 268]. Moreover, the law laid down by the Division Bench in Chirakkal [384 ITR 490] is not good law, since, in view of the law laid down by the Apex Court in Citizen Co-operative Society [397 ITR 1], on a claim for deduction under Section 80P of the Income Tax Act, by reason of sub-section (4) thereof, the Assessing Officer has to conduct an enquiry into the factual situation as to the activities of the assessee society and arrive at a conclusion whether benefits can be extended or not in the light of the provisions under sub-section (4) of Section 80P of the IT Act. In view of the law laid down by the Apex Court in Citizen Co-operative Society [397 ITR 1] the law laid down by the Division Bench Perinthalmanna [363 ITR 268] has to be affirmed and we do so.*
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> *35. In view of the law laid down by the Apex Court in Ace Multi Axes Systems' case (supra), since each assessment year is a separate unit, the intention of the legislature is in no manner defeated by not allowing deduction under Section 80P of the IT Act, by reason of sub-section (4) thereof, if the assessee society ceases to be the specified class of societies for which the deduction is provided, even if it was eligible in the initial years."*

8.2 The CIT(A) had initially allowed the appeal of the assessee and granted deduction u/s 80P(2) of the I.T.Act.

Subsequently, the CIT(A) passed order u/s 154 of the I.T.Act, wherein the claim of deduction u/s 80P of the I.T.Act was denied, by relying on the judgment of the Larger Bench of the Hon'ble jurisdictional High Court in the case of *The Mavilayi Service Co-operative Bank Ltd. v. CIT (supra).* The CIT(A) ought not to have rejected the claim of deduction u/s 80P(2) of the I.T.Act without examining the activities of the assessee-society. The Full Bench of the Hon'ble jurisdictional High Court in the case of *The Mavilayi Service Co-operative Bank Ltd. V. CIT (supra)* had held that the A.O. has to conduct an inquiry into the factual situation as to the activities of the assessee society to determine the eligibility of deduction u/s 80P of the I.T.Act. In view of the dictum laid down by the Full Bench of the Hon'ble jurisdictional High Court (supra), I restore the issue of deduction u/s 80P(2) to the files of the Assessing Officer. The Assessing Officer shall examine the activities of the assessee and determine whether the activities are in compliance with the activities of a co-operative society functioning under the Kerala Co-operative Societies Act, 1969 and accordingly grant deduction u/s 80P(2) of the I.T.Act.

8.3 As regards the interest on the investments with Co-operative Banks and other Banks, the co-ordinate Bench order of the Tribunal in the case of *Kizhathadiyoor Service Co-operative Bank Limited in ITA No.525/Coch/2014 (order dated 20.07.2016),* had held that interest income earned from investments with treasuries and banks is part of banking activity of the assessee, and therefore, the said interest income was eligible to be assessed as `income from business' instead of `income from other sources'. However, as regards the grant of deduction u/s 80P of the I.T.Act on such interest income, the Assessing Officer shall follow the law laid down by the Larger Bench of the Hon'ble jurisdictional High Court in the case of *The Mavilayi Service Co-operative Bank Ltd. V. CIT (supra)* and examine the activities of the assessee-society before granting deduction u/s 80P of the I.T.Act on such interest income. Needless to state, the assessee shall co-operate with the A.O. and shall furnish the necessary details called for. Further, the assessee shall not seek unnecessary adjournment. It is ordered accordingly.

9. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced on this 16th day of July, 2020.

Sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

Cochin, dated 16th July, 2020
Devadas G*

Copy to :
1. The Appellant
2. The Respondent
3. The CIT(A), Thiruvananthapuram.
4. The Pr.CIT, Thiruvananthapuram.
5. The DR, ITAT, Kochi
6. Guard File.

Asst.Registrar/ITAT/Kochi