

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN “SMC” BENCH, COCHIN**

Before Shri George George K, Judicial Member

ITA No.148/Coch/2020 : Asst.Year 2011-2012

M/s. Enadimangalam Service Co-operative Bank Limited No.2151, VI/3, Elamannoor PO, Pathanamthitta – 691 524. PAN : AAAAT8280A.	Vs.	The Income Tax Officer Ward 4 Kollam.
(Appellant)		(Respondent)

Appellant by : --- None ---

Respondent by : Sri.Mritunjaya Sharma, Sr.DR

Date of Hearing : 19.03.2020	Date of Pronouncement : 20.04.2020
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ORDER

This appeal at the instance of the assessee is directed against the order of the CIT(A), dated 15.10.2019 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 60 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. I have perused the reasons stated in the affidavit for not filing the appeal on time. I find that there is sufficient cause for the delayed filing of this appeal and no laches can be attributed to the assessee. Hence, I condone the delay and 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 under consideration, the return of income

were 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 appeals 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 appeals 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 assessee objected to the issuance of notice. However, the CIT(A) rejected the objections raised by the

assessee and 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 grounds:-

"A. Against the assessment order, the appellant filed statutory appeal before the Commissioner (Appeals), Thiruvanthapuram and the appeal was allowed as per order dated 25.05.2018. The said order has become final and no further action was taken by the Revenue against the order issued by the appellate authority. So, the rectification order issued by the Appellate Authority is not legal, as there is no apparent error on the face of record of the order issued by the appellate authority.

B. The contention of the revenue is the rectification application that is that in view of the reference order of the full bench of Hon'ble High Court of Kerala in Mavilayi Service Co-operative Bank Ltd., 414 ITR 67, the appellant is not entitled to get deduction under Section 80P of the Act. The above view has been accepted by the Commissioner of Income Tax (Appeals), and held that there is "mistake apparent from records" in the appellate order as the appellant has not discharged the onus to prove that activities of the appellant is that of Primary Agricultural Credit Co-operative society and held that appellant is not eligible for deduction under Section 80P(2)(a)(i). The said finding is not legal. In fact, the application of the revenue under Section 154 itself is not maintainable and this fact was not considered by the appellate authority.

C. The appellant society is registered under Kerala Co-operative Societies Act. As per Section 2(1) of the Kerala Co-operative Societies Act, member of a society includes nominal member as well as associates member. The society is accepting deposits from the members and provides credit facilities to the members only and thereby the petitioner society is entitled to get the benefit of Sec. 80P(2)(a)(i) of the Act. This aspect was not considered by the authorities below in the proper perspective.

D. As per the dictum laid down by the Hon 'ble Supreme Court in COMMISSIONER OF INCOME TAX vs. NAWANSHAHAR CENTRAL COOPERATIVE BANK LTD. (2007) 289 ITR 6 (SC) held that investments made by a banking concern are part of the business of banking. The

income arising from such investments would, therefore, be attributable to the business of bank falling under the head "Profits and gains of business" and thus deductible under Section. 80P(2)(a)(i) of the Income Tax Act. It was also held that the said principle would cover a situation where a co-operative bank carrying on the business of banking is statutorily required to place a part of its funds in approved securities. So, the interest on deposit is a part of business of banking and the same is deductible Sec. 80P(2)(a)(i) of the Act. Without considering this aspect, the benefit available Sec. 80P(2)(a)(i) of the Act has been denied.

E. Section 80P(2)(d) of the Income Tax Act provides for deduction in respect of any income by way of interest or dividend derived by a cooperative society from its investment in another cooperative society. In the instant case, the interest is derived for deposits maintained with District Co-operative Bank and the interest income received from the above bank are eligible for deduction under section 80P (2)(d) of the Income Tax Act and cannot be assessed as income from other source. Hence, the order issued by the appellate authority is not legal.

F. By relying the dictum in Citizens Co-operative Society Limited Vs. ACIT reported in 397 ITR 1), the appellate authority declined the claim under Section 80P of the Act. The reasoning in the said judgment is that principle of mutuality which is the basis criterion for the society to claim deduction under 80(P) of the Act and if there is no identity between contributors and participators, mutuality failed and if there is no mutuality among the members of the petitioner society the benefit of Section 80(P) was denied to the petitioner. Actually the above judgment is not applicable and further, the said society was not registered as Primary Agriculture Credit Society and the said society was functioning contrary to the approved bye-law as well as the Act and Rules.

G. The Citizens Co-operative Society was established as per the Mutually Aided Cooperative Societies Act, 1995 as per the approved bylaw of the said society, it cannot admit 'nominal members'. But, most of the deposits were taken from the such category of persons, who cannot be members of the society and the on the basis of the above, it was find that the activities of the said society is clearly in violation to the Act and Rules and also the approved byelaw. Thus, the Citizen Co-operative Society case the Hon'ble Supreme Court was not considered about the eligibility of a Primary Agricultural Credit Society for deduction under section 80P of the Act. What was considered on the basis of the specific facts of the case held that the said society is not entitled for deduction under section

80P of the Act, since its functioning itself is contrary to the Act and Rules. Thus, Even after the amendment made to the provisions of Sec. 80P of the Act by insertion of section 80P(4) of the Act, the Primary Agricultural Credit Society is eligible for deduction under section 80P of the Act.

H. As per the Kerala Co-operative Societies Act, 'member' is defined in Section 2(1) of the Act which includes a nominal member also. Sec. 2 (1) of the said Act read that "Member" means a person joining in the application for the registration of a co-operative society or a person admitted to membership after such registration in accordance with this Act, the Rules and the Bye law and includes a nominal or associate member" The 'normal member' is defined under 2(M) of the KCS Act, which reads that a 'nominal or associate member' means a member who possesses only such privileges and rights of a member and who is subject only to such liabilities of a member as may be specified in the bye-laws;" Hence, the nominal members are also the members of the society in accordance with the provisions itself and the deposits from such nominal members cannot be considered as deposits from the non-members or from public. In short, the deposits from nominal members cannot be said that deposits from non-members, since, the nominal members are also members of the society in accordance with the KCS Act and Rules and the approved byelaw of the society. Hence, the order issued by the assessing authority and also the appellate authority are not legal and the same are liable to be set aside.

I. In Mavilayi's case. the Hon'ble Court has not considered the issue regarding the entitlement of the Primary Agricultural Credit Societies for deduction under Section 80(P) of the Act. So, whether, the petitioner society is entitled to get deduction under Section 80(P) of the Income Tax Act or not yet to be considered by the assessing authority in accordance with the directions contained in the order referred above. That is, a fresh adjudication at the hands of the assessing authority is necessary so as to consider whether the petitioner society is entitled to get deduction or not and then only proceeding can be initiated for realization of the alleged tax and hence, there is no justification in dismissing the appeal on the ground that the Full Bench in Mavilayi's case.

J. The appellant society is not liable to pay any amount as Income Tax and the appellant is entitled to obtain deduction under section 80(P)(2) of the Income Tax Act, since, the same is society is Primary Agricultural Credit Society. There is no dispute with respect to the entitlement of the Primary Agricultural Credit Societies get deduction under 80(P)(4) of the Act. In Mavilayi case, the Hon'ble High Court has not

considered the merit of the each case and thereby there is no justification for denying the benefit under Section 80 (P)(4) of the Act and hence, there orders passed by the assessing authority and the appellate authority are liable to be set aside.

K. Against the reference order in Mavilayi's case, the said co-operative bank has filed appeal [SLP (Civil) Diary No. 27628/2019] before the Hon'ble Supreme Court. The appeal has been admitted by the Hon'ble court and registered as SLP (C) No. 22491 of 2020 and the said appeal is pending. Thus, whether it is eligible for deduction under Section 80P of the Income Tax Act 1961 or will it be hit by Section 80P(4) is a matter to be decided by the Hon'ble Supreme Court in the above said appeals. Hence, in the above circumstance, it is highly improper to decide the matter and deny the benefit of Section 80P of the Income Tax Act 1961 to the appellant. And such act amounts to judicial indiscipline also.

L. The Commissioner (Appeals) as well as the assessing Officer ought to have appreciated that even if the appellant is not a Primary Agricultural Credit Co-operative Society the appellant is not a Co-operative Bank and hence eligible for deduction u/s 80P of the Income Tax Act 1961 in the light of the clarification No.133/06/2006-07 dated 19-05-2007 issued by CBDT, New Delhi, which is binding on the Assessing Officer.

M. When there is large number of decisions of various High Courts and ITATs in India in which detailed discussions were made and conclusion arrived on the subject matter of eligibility for deduction u/s 80P, disallowance of claim under the said Section made by the Assessing Officer and the C.I.T. (Appeals) relying on unrelated decisions is denial of natural justice to the appellant. Hence, the finding of the assessing authority as well as the appellate authority are bad in law.

N. The decisions of various High courts and ITATs across the country on the disallowance of claim for deduction under section 80(P), adopted on the basis of CBDT clarification No.133/06/2006-07 dated 19-05-2007 has to be considered by the authorities in the proper perspective. But, the authorities under the statute proceeded the matter with a pre-determined view and declined the benefit of Section 80P of the Act.

So, the impugned orders issued by the assessing authority as well as the appellate authority may be interfered and the said orders may be set aside in the interest of justice."

7. None appeared on behalf of the assessee, hence, I proceed to dispose of this appeal on merits after hearing the learned Departmental Representative.

8. I have heard the learned DR 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.*

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.*

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 appeals of the assessee and granted deduction u/s 80P(2) of the I.T.Act.

Subsequently, the CIT(A) passed orders 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), we 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. The Assessing Officer shall also examine whether the assessee is entitled to deduction u/s 80P(2)(d) of the I.T.Act, provided, facts are already available on record for such deduction. It is ordered accordingly.

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

Order pronounced on this 20th day of April, 2020.

Sd/-
(George George K)
Judicial Member

Cochin, dated 20th April, 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