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

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER)
AND
SHRI RAJESH KUMAR (ACCOUNTANT MEMBER)

I.T.A No.6029/Mum/2019
(Assessment year : 2011-12)

Shree Datta Prasad Sahakari Patsanstha Ltd, Patishakar Bhava C-11, Bandra Kurla Complex, Bandra (E), Mumbai-400 051 PAN : AABAS6993E	vs	Income-tax Officer-26(3)(2) Mumbai
APPELLANT		**RESPONDENT**

Appellant by	Shri.Rajendra Kandrekar, (AR)
Respondent by	Ms. Smita Verma and Shri Sanjay Sethi, (DR)

Date of hearing	06-08-2021
Date of pronouncement	-09-2021

O R D E R

Per : Saktijit Dey (JM):

This is an appeal by the assessee against order dated 21-05-2019 of learned Commissioner of Income Tax (Appeals), Mumbai pertaining to assessment year 2011-12.

2. The primary dispute arising in this appeal relates to denial of assessee's claim of deduction under section 80P(2)(a)(i) of the Income Tax Act, 1961. Of course, there is a secondary issue regarding assessee's status.

3. Briefly the facts are, as claimed by the assessee, it is a co-operative society having the status of 'Association of Persons' (AOP). However, for the assessment year under dispute, assessee filed its return of income electronically on 23-09-2011 showing the status as firm. Apparently, in the return of income so filed, the assessee did not claim any deduction under section 80P(2)(a)(i) of the Act. The return of income filed by the assessee was processed by the Central Processing Centre (CPC), Income Tax Department, Bangalore under section 143(1) of the Act on 09-02-2012 assessing the total income of Rs.27,29,032/-. After receiving the intimation issued under section 143(1) of the Act, assessee filed an application for rectification under section 154 of the Act seeking change of status from firm to AOP and to allow deduction under section 80P(2)(a)(i) of the Act. The assessing officer; however, rejected assessee's application. Being aggrieved, assessee filed an appeal before learned Commissioner (Appeals). Having found that the assessee had not claimed the deduction under section 80P(2)(a)(i) of the Act in the return of income, referring to section 80A(5) of the Act, learned Commissioner (Appeals) held that deduction claimed by the assessee cannot be allowed.

4. Before us, learned counsel for the assessee submitted, there is no dispute that the assessee is a co-operative society; therefore, the correct status of the assesee is of an AOP. He submitted, being a co-operative society, the assessee is also eligible for deduction Under section 80P(2)(a)(i) of the Act. He submitted, assessee's status as AOP as well as claim of deduction under section 80P(2)(a)(i) of the Act has been accepted by the Tribunal in its own case in assessment years 2010-11 and 2012-13. Thus, he submitted, assessee's claim of deduction under section 80P(2)(a)(i) of the Act has to be allowed. Further, he submitted, merely

because the assessee did not claim the deduction under section 80P(2)(a)(i) of the Act in the return of income due to inadvertent mistake, such deduction cannot be denied, as, the assessee has fulfilled the conditions of section 80P(2)(a)(i) Act. In this context, he relied upon the following decisions:-

(1) ITO vs MSEB Employees Co-operative Credit Society Ltd ITA 793/PN/2013 dated 18-07-2014

(2) CIT vs Indian Express (Madurai) Pvt Ltd (1983) 13 taxmann.441

(3) Qupem Urban Co-operative Credit Society Ltd vs ACIT (2015) 58 taxmann.com 113 (Bom)

(4) CIT vs Japari Monin Co-operative Credit Society Ltd Tax Appeal No.442, 443 & 863 of 2013 judgement dt 15-01-2014 (Guj HC)

5. The learned departmental representative submitted, since the assessee had not claimed the deduction in the return of income filed, the deduction cannot be allowed in view of the condition imposed under section 80A(5) of the Act.

6. We have considered rival submissions in the light of decisions cited before us and perused materials on record. Admitted factual position emanating from record makes it clear that neither in the original return of income nor in the revised return of income, the assessee had claimed deduction under section 80P(2)(a)(i) of the Act. It is evident, learned Commissioner (Appeals), referring to the provisions contained in section 80A(5) of the Act, has held that assessee's claim of deduction under section 80P(2)(a)(i) of the Act cannot be allowed. Before we proceed to deal with the issue on merit, it will be proper to examine the provision contained in section 80A(5) of the Act, which is reproduced below for better appreciation:-

> " 80A
> (a)xxxxxxxxxxxxxxx
> (1) to (4)xxxxxxxxxxxxxxxxxxxx
> (5) Where the assessee fails to make a claim in his return of income for any deduction under section 10A or section 10AA or section 10B or section 10BA or under any provision of this Chapter under the heading "*C.—Deductions in respect of certain incomes",* no deduction shall be allowed to him thereunder."

6.1 A careful reading of the aforesaid provision makes it clear that unless the assessee claims the deduction allowable under section 10A, 10AA , 10B, 10BA or under any other provision in Chapter-VIA under the heading, "C.-Deductions in respect of certain incomes", no deduction shall be allowed to him. Undisputedly, section 80P comes within Chapter-VIA under the heading "C.-Deductions in respect of certain incomes".

6.2 The language used in section 80A(5) is very much clear and unambiguous. Thus, it is apparent, besides fulfilling the conditions of section 80P(2)(a)(i) of the Act, the assessee must also fulfill the condition contained in section 80A(5) of the Act. Therefore, the issue which arises for consideration is, whether the conditions of section 80A(5) is mandatory for claiming deduction under section 80P(2)(a)(i) or not.

7. At this stage, it would be relevant to observe, after the conclusion of hearing of the appeal initially on 29-06-2021, a decision of the Hon'ble jurisdictional High Court in case of EBR Enterprises vs UOI (2019) 107 taxmann.com 220 (Bombay) came to the notice of the Bench. In the interest of fair play and justice, the appeal was again fixed for hearing to provide an opportunity to the litigating parties to examine the aforesaid judgment of the Hon'ble jurisdictional High Court and make their submissions.

7.1 Learned authorized representative of the assessee submitted that even if a claim has not been made in the return of income, it can still be made before the appellate authorities. In this context, he relied upon the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd vs CIT 284 ITR 323 (SC). Thus, keeping in view the submissions of learned authorized representative of the assessee, we proceed to decide the issue.

8. Pertinently, in case of EBR Enterprises vs UOI (supra), the facts are, in the return of income filed for the assessment year 2008-09, the assessee did not claim deduction under section 80IB(10) of the Act, though, the assessee was eligible for such deduction. Since, the assessee had not claimed the deduction in the return of income, the assessing officer completed the assessment without computing deduction under section 80IB(10) of the Act. Against the assessment order so passed, assessee filed a revision application under section 264 of the Act, seeking a direction for allowance of deduction under section 80IB(10) of the Act. It was submitted by the assessee that since the assessee has fulfilled the conditions of section 80IB(10), merely because he did not fulfill the condition of section 80A(5) of the Act, claim of deduction cannot be disallowed. It was further submitted that in view of ratio laid down in the case of Goetze India Ltd vs CIT (supra), the assessing officer can disallow a claim of deduction not made in the return of income; however, there is no such restriction on the appellate/revisional authority. While dealing with the aforesaid contentions of the assessee, the Hon'ble jurisdictional High Court has held as under:-

> *"**4.** As is well-known, under Section 80-IB (10) of the Act, the Legislature has granted deductions in relation to income arising out of development of housing projects to the assessees the fulfilling conditions contained therein. This provision is contained in Chapter - VI - A of the Act. Section 80A of the Act which is also contained in the same Chapter, pertains to deductions to be made in computing total income. Sub Section (5)*

was inserted in Section 80A of the Act by Finance (No.2) Act, 2009 with retrospective effect from 1st April, 2003. Sub Section (5) of Section 80A of the Act, reads under :

'80A(5) - Where the assessee fails to make a claim in his return of income for any deduction under Section 10A or Section 10AA or Section 10B or Section 10BA or under any provision of this Chapter under the heading "C.-Deduction in respect of certain incomes", no deduction shall be allowed to him thereunder'.

***5.** As per this provision, where the assessee fails to make a claim in his return of income for any deduction under Section 10A or Section 10AA or Section 10B or Section 10BA or under any provision of the said Chapter - VI A under the heading "C.-Deduction in respect of certain incomes", no deduction would be allowed to him under the said provision. In plain terms, this Sub Section (5) of Section 80A of the Act imposes an additional condition for claim of deduction in relation to income under any of the provisions mentioned therein. Apart from the requirement of fulfillment of individual set of respective conditions for the purpose of claiming the concerned deduction, this plenary condition requires that the claim ought to have made in the return of income by the assessee and if the assessee fails to make such claim in the return of income, such deduction shall not allowed to him under the relevant provision. Admittedly, in the present case, the Petitioners had not raised any such claim in the return of income. In plain terms, the claim of the Petitioners under Section 80-IB (10) of the Act would be hit by Sub Section (5) of Section 80A of the act.*

***6.** We are conscious that in absence of the provision contained in Section 80A (5) of the Act, the Petitioners could have maintained the claim of deduction even before the CIT for the first time in Revision Application, though no such claim was made before the Assessing Officer, if from the facts on record, the Petitioners could sustain the said claim in law. This is very clear from the series of Judgments of various High Courts. Reference can be made to the decision of High Court of Gujarat in case of C. Parikh & Co. v. CIT [1980] 4 Taxman 224/122 ITR 610 In the said decision, the Court held that:*

'it is clear that under Section 264, the CIT is empowered to exercise revisional powers in favour of the assessee. In exercise of this power, the CIT may, either of his own motion or on an application by the assessee, call for the record of any proceeding under the Act and pass such order thereon not being an order prejudicial to the assessee, as the thinks fit. Sub - ss. (2) and (3) of Section 264 provide for limitation of one year for the exercise of this revisional power, whether suo motu, or at the instance of the assessee. Power is also conferred on the CIT to condone delay in case he is satisfied that the assessee was prevented by sufficient cause from making the application within the prescribed period. Sub-s. (4) provides that the CIT has no power to revise any order under S. 264 (1) : (i) while an appeal against the order is pending before the AAC, and (ii) when the order has been subject to an appeal to the Tribunal. Subject to the above limitation, the revisional powers conferred on the CIT under S. 264 are very wide. He has the discretion to grant or refuse relief and the power to pass such order in revision as he may think fit. The discretion which the CIT has to exercise is undoubtedly to be exercised judicially and not arbitrarily according to his fancy. Therefore, subject to the limitation prescribed in S. 264, the CIT in exercise of his revisional power under the said section may pass such order as he thinks ft which is not prejudicial to the assessee. There is nothing in S. 264 which places any restriction on the CIT's revisional power to give relief to the assessee in a case

where the assessee detects mistakes on account of which he was over assessed after the assessment was completed. We do not read any such embargo in the CIT's power as read by the CIT in the present case. It is open to the CIT to entertain even a new ground not urged before the lower authorities while exercising revisional powers. Therefore, though the Petitioner had not raised the grounds regarding under-totalling of purchases before the ITO, it was within the power of the CIT to admit such a ground in revision. The CIT was also not right in holding that the over-assessment did not arise from the order the assessment. Once the Petitioner was able to satisfy that there was a mistake in totaling purchases and that there was under- totalling of purchases to the tune of Rs.20,000, it is obvious that there was over-assessment. In other words, the assessment of the total income of the assessee is not correctly made in the assessment order and it has resulted in over-assessment The CIT would not be acting de hors the IT Act, if he gives relief to the assessee in a case where it is proved to his satisfaction that there is over-assessment, whether such over-assessment is due to a mistake detected by the assessee after completion of assessment or otherwise. In our opinion, the CIT has misconstrued the words "subject to the provisions of this Act" in S. 264 (1) and read a restriction on his revisional power which does not exist. The CIT was, therefore, not right in holding that it was not open to him to give relief to the Petitioner on account of the Petitioner 's own mistake which it detected after the assessment was completed. Once it is found that there was a mistake in making an assessment, the CIT had power to correct it under S. 264 (1). In our opinion, therefore, the CIT was wrong in not giving relief to the Petitioner in respect of over-assessment as a result of under-totalling of the purchases to the extent of Rs.20,000.'

***7.** This was reiterated in case of Ramdev Exports v. CIT [2002] 120 Taxman 315/[2001] 251 ITR 873 (Guj.) This Court also in case of Danny Denzongpa v. CIT [2010] 7 taxmann.com 81/194 Taxman 415 [2012] 344 ITR 166 has taken a similar view.*

***8.** However, the Petitioners are faced with the statutory provision contained in Sub Section (5) of Section 80A of the Act. The Petitioners' claim cannot therefore be accepted de hors the said statutory provision and ordinary principle of the wide powers of the CIT exercising revisional jurisdiction under Section 264 of the Act cannot be imported. What Sub Section (5) of Section 80A of the Act mandates is that, if the assessee fails to make a claim in his return of income for any deduction under the provisions specified therein, the same would not be granted to the assessee. This condition or restriction is not relatable to the Assessing Officer or the Income Tax Authority. This condition attaches to the claim of the assessee and has to be implemented by the Assessing Officer, CIT or the Appellate Tribunal as the case may be. There is no indication in Sub Section (5) of Section 80A of the Act as to why the restriction contained therein amounts to limiting the power of Assessing Officer but not that of Commissioner.*

***9.** This issue can be looked from slightly different angle. In absence of the provision contained in Sub Section (5) of Section 80A of the Act has held by various decisions of the High Courts noted above, the CIT could entertain a fresh claim in Revision Application even if the claim was not made previously before the Assessing Officer. Provision contained in sub-section (5) of Section 80A is a statutory interdict which would prevent the CIT from granting any such claim in exercise of his revisional jurisdiction under Section 264 of the Act. As is often times stated, even High Court in exercise of Writ jurisdiction under Article 226 of the Constitution of India would not issue directions*

> *contrary to statutory provisions. Width of the powers of the CIT under Section 264 of the Act would not permit him to ignore the requirement of Section 80A(5) of the Act or allow the claim of an assessee in breach of the condition contained therein. We are therefore not in agreement that the expression given by the Income Tax Tribunal in case of Madhav Construction (supra) holding that the restriction contained in Sub Section (5) of Section 80A of the Act is to restrict the power of Assessing Officer and not higher Income Tax Authorities.*
>
> ***10.*** *The Petitioners having given up the challenge to the constitutionality of the retrospectivity to Section 80A (5) of the Act, cannot bring in the concept of the reading down of the provision in order to save it from unconstitutionally. In plain terms, our duty would be to enforce the provision contained in Sub Section (5) of Section 80A of the Act, as it is stands in the statue book. The decision in case of Goetze (India) Ltd. (supra) was rendered in different background. The Supreme Court did not have any occasion to interpret the provision of Section 80A (5) of the Act in the context of the power of the CIT or the Appellate Tribunal."*

9. Thus from the aforesaid observations of the Hon'ble jurisdictional High Court, it is very much clear that even though the assessee might be fulfilling the conditions of the particular deduction provision; however, the mandatory conditions of section 80A(5) of the Act has to be fulfilled for claiming deduction. While laying down the aforesaid ratio, the Hon'ble jurisdictional High Court took note of the ratio laid down by the Hon'ble Apex Court in case of Goetze India Ltd vs CIT(supra). Thus, the ratio laid down in the aforesaid decision of the Hon'ble jurisdictional High Court would squarely apply to the facts of the present appeal.

10. Though, it may be a fact that the assessee is otherwise eligible to claim deduction under section 80P(2)(a)(i) of the Act; however, the provision contained in section 80A(5) of the Act stands as a bar in allowing such deduction to the assessee. For the sake of completeness, we must observe, having carefully gone through the decisions cited by learned authorized representative of the assessee, we are of the view that in none of these decisions, the provision contained in section 80A(5) of the Act was taken note of. We are conscious of the fact that in case of ITO vs MSEB Employees Co-operative Credit Society Ltd (supra), the co-ordinate bench has held that even if the assessee has not claimed a deduction in

the return of income, the appellate authorities have power to allow deduction which is allowable under the provisions of the Act. However, as it appears form a reading of the said decision, provision contained in section 80A(5) was not brought to the notice of the Tribunal. Further, the Tribunal did not have the benefit of the decision of the Hon'ble jurisdictional High Court in case of EBR Enterprises vs UOI (supra) which was subsequently rendered.

11. It may be a fact that the Tribunal has allowed assessee's claim of deduction under section 80P(2)(a)(i) of the Act in assessment years 2010-11 and 2012-13. However, there is nothing on record to suggest that there was any violation of section 80A(5) of the Act. Therefore, the factual position based on which the decisions were rendered in assessment year 2010-11 and 2012-13 are different from the impugned assessment year. Thus, respectfully following the ratio laid down in the decision of the Hon'ble jurisdictional High Court in EBR Enterprises vs UOI (supra), we hold that the assessee cannot be allowed deduction under section 80P(2)(a)(i) of the Act, insofar as, the impugned assessment year is concerned due to non fulfillment of conditions contained in section 80A(5) of the Act.

12. As regards the correction of status of the assessee from firm to AOP, the assessing officer is directed to rectify the same after verifying all relevant facts.

13. In the result, appeal is partly allowed.

Order pronounced on 08 /09/2021.

Sd/- sd/-

(RAJESH KUMAR)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dt : 08/09/2021

Pavanan

Copy to :

1. Appellant
2. Respondent
3. The CIT concerned
4. The CIT(A)
5. The DR, ITAT, Mumbai
6. Guard File

/True copy/ By Order

Asstt. Registrar, ITAT, Mumbai