

ORDER SHEET

ITA 484 OF 2007

IN THE HIGH COURT AT CALCUTTA

Special Jurisdiction (Contempt)

ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, KOLKATA-X

Versus

SOUTH EASTERN RAILWAY EMPLOYEES CO-OP CREDIT SOCIETY LTD

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ARINDAM SINHA

Date : 15th July, 2016.

For Revenue : Mr.S.B.Saraf,Advocate

For Respondent/ Assessee: Mr.J.P.Khaitan,Sr.Advocate

Mr.P. Bag,Advocate

Mr. Siddharth Das and Mr. C. S. Das, ADvocates

The Court : The subject matter of challenge in the appeal is a judgement and order dated 29th December, 2006 passed by the learned Income Tax Appellate Tribunal "B" Bench, Kolkata in ITA 1758 and 1759/ Kol/2006 pertaining to the assessment years 2003-04 and 2004-05 by which an appeal preferred by the assessee was allowed. The aggrieved revenue has come up in appeal. The following question of law was formulated on 11th September, 2007 when the appeal was admitted.

“Whether in the facts and circumstances of the case, the Income Tax Appellate Tribunal by allowing deduction on income earned by the assessee from investment in banks and other financial institutions has rendered the provisions of Section 80P(2)(a)(i) nugatory as the said section of the Act allows deduction to a cooperative Society engaged in carrying on business of banking or providing credit facilities to its members ?”

below: Section 80P in so far as the same is material for our purpose is quoted

80P. (1) *Where, in the case of an assessee being a co-operative society, the gross total income includes any income referred to in sub-section (2), there shall be deducted, in accordance with and subject to the provisions of this section, the sums specified in sub-section (2), in computing the total income of the assessee.*

(2) *The sums referred to in sub-section (1) shall be the following, namely :—*

(a) *in the case of a co-operative society engaged in—*

(i) *carrying on the business of banking or providing credit facilities to its members or*

(ii) *a cottage industry or*

[(iii) *the marketing of agricultural produce grown by its members, or]*

(iv) *the purchase of agricultural implements, seeds, livestock or other articles intended for agriculture for the purpose of supplying them to its members, or*
(v) *the processing, without the aid of power, of the agricultural produce of its members, [or]*

[(vi) *the collective disposal of the labour of its members, or*

(vii) *fishing or allied activities, that is to say, the catching, curing, processing, preserving, storing or marketing of fish or the purchase of materials and equipment in connection therewith for the purpose of supplying them to its members,]*

the whole of the amount of profits and gains of business attributable to any one or more of such activities :

[Provided *that in the case of a co-operative society falling under sub-clause (vi), or sub-clause (vii), the rules and bye-laws of the society restrict the voting rights to the following classes of its members, namely:—*

(1) *the individuals who contribute their labour or, as the case may be, carry on the fishing or allied activities;*

(2) *the co-operative credit societies which provide financial assistance to the society;*

In the case before us, during the assessment year 2003-04, income arising out of credit facilities granted to its members was Rs.2.50 crores approximately and income arising out of investments was Rs.99 lakhs approximately. During the assessment year 2004-05, income arising out of providing loans to the members was a sum of Rs.2.37 Crores approximately and income arising from investments was Rs.1.12 Crores approximately. The Assessing Officer was of the opinion that the income arising from investments was not deductible under sub-section (2) of Section 80P of the Income Tax Act. The same view was taken by the CIT (A). The learned Tribunal was, however, of the opinion that *“the assessee is entitled to the deduction of interest income earned on the investment in banks and other financial institutions amounting to Rs.98,73,512/- in assessment year 2003-04 and Rs.1,11,53,228/- in assessment year 2004-05 u/s.80P(2)(a)(i) of the I.T.Act, 1961 and accordingly the common ground no.1 taken by the assessee is allowed.”* It is against this order of the learned Tribunal that the present appeal has been preferred.

Mr. Khaitan, learned Senior Advocate appearing for the assessee submitted that the word used by the legislature is income ‘attributable to’ and not ‘derived from’ any one or more of such activities. He contended that it is now firmly established by a long line of judicial decisions that the word ‘attributable’ is of wider amplitude. He submitted that the assessee in this case takes deposits from its members which are utilized for the purpose of lending money to the members. While accepting deposits, the assessee promises to pay interest at a specified rate. When money is lent to the members, interest is recovered also at a specified rate.

The difference between the two rates is the income earned by the assessee. There are, however, periods when the entire deposit received from the members cannot be lent because the members are not in need or there is no demand for loan. Whether the money is lent or not, the assessee continues to be liable for payment of interest to the depositors resulting in loss. In order to mitigate the loss the surplus funds have to be invested. So that the interest earned can be set off against the liability to pay interest to the depositors. He submitted that this is what the assessee has done. He drew our attention to the details of investments for the purpose of establishing that the major investments were for a period between 15 and 91 days which is a pointer to show that the money was invested only when the money was not in demand by the members. Therefore, the interest earned from such investments has to be treated as an income attributable to the business of providing credit facilities to the members of the assessee. In support of his submissions Mr. Khaitan relied upon a judgement of Karnataka High Court in the case of **Guttigedarara Credit Co-operative Society Ltd. vs. Income-Tax Officer**, reported in **[2015] 377 ITR 464 [Karn]** and a judgement in the case of **Bihar State Housing Co-operative Federation Ltd. vs. Commissioner of Income-Tax**, reported in **[2009] 315 ITR 286 [Patna]**.

He also drew our attention to Section 63 of the Multi-State Cooperative Societies Act, 2002 which obliges every Multi-State Cooperative Society to transfer annually an amount of not less than 35% of its profits to the reserve fund. Section 64 provides for investments of such funds. He contended that the obligation on the part of the assessee, statutorily imposed, has to be performed by the assessee, in

the absence of which it is not possible for the assessee to carry on its business. Therefore, any income arising out such investment is also attributable to the business of providing credit facilities to the members of the assessee.

Mr. Saraf, learned advocate appearing for the revenue, submitted that the assessee has been contending before the statutory authorities below, that the assessee should be treated at par with the co-operative banks. He submitted that: [a] there is no provision in the Multi-State Co-operative Societies Act, 2002 that a Multi State Co-operative Society shall not be allowed to function or to carry on its business, if the reserve required to be maintained by Section 63 is not complied with; and [b] the amount transferred to reserve is about Rs.1.22 crores whereas the investment made for the purpose of earning interest is to the tune of Rs.25 crores.

We have not been impressed by the first submission advanced by Mr. Saraf. If the Multi State Co-operative Societies Act, 2002 does not provide for the consequences of an omission to act in accordance with Section 63 thereof, that is no valid reason why the mandate of law should not be followed. When law requires a business to be done in a particular manner, the business can be done only in that manner or not at all.

We are also not impressed by the submission advanced by Mr. Khaitan that the interest earned by the assessee from the investments made, to the extent of a sum of Rs.99 lakhs during the assessment year 2003-04 and a sum of Rs.1.12 crores during the assessment year 2004-05, should be attributable to the business of providing credit facilities to its members. Section 80P, it is true provides that, "*in the case of a cooperative society engaged in carrying on the business*

..... providing credit facilities to its members the whole of the amount of the profits and gains of business “attributable” to any such activity “shall be deducted”. But there is a caution appearing in sub-section (1) which provides that the gross total income of a cooperative society may include income from various activities. It is only an income falling under sub-section(2), which is deductible. The Supreme Court in the case of **Totgars Co-operative Sale Society Limited vs ITO** reported in **(2010) 322 ITR 283 (SC)** took the following view in para 10 of the report.

“10. At the outset, an important circumstance needs to be highlighted. In the present case, the interest held not eligible for deduction under s. 80P(2)(a)(i) of the Act is not the interest received from the members for providing credit facilities to them. What is sought to be taxed under s. 56 of the Act is the interest income arising on the surplus invested in short-term deposits and securities which surplus was not required for business purposes. Assessee(s) markets the produce of its members whose sale proceeds at times were retained by it. In this case, we are concerned with the tax treatment of such amount. Since the fund created by such retention was not required immediately for business purposes, it was invested in specified securities. The question, before us, is – whether interest on such deposits/securities, which strictly speaking accrues to the members’ account, could be taxed as business income under s. 28 of the Act? In our view, such interest income would come in the category of “income from other sources”, hence, such interest income would be taxable under s. 56 of the Act, as rightly held by the AO. In this connection, we may analyze s.80P of the Act. This section comes in Chapter

VI-A, which, in turn, deals with “Deductions in respect of certain income”. The headnote to s. 80P indicates that the said section deals with deductions in respect of income of co-operative societies. Sec. 80P(1), inter alia, states that where the gross total income of a co-operative society includes any income from one or more specified activities, then such income shall be deducted from the gross total income in computing the total taxable income of the assessee-society. An income, which is attributable to any of the specified activities in s. 80P(2) of the Act, would be eligible for deduction. The word “income” has been defined under s.2(24)(i) of the Act to include profits and gains. This sub-section is an inclusive provision. The Parliament has included specifically “business profits” into the definition of the word “income”. Therefore, we are required to give a precise meaning to the words “profits and gains of business” mentioned in s.80P(2) of the Act. In the present case, as stated above, assessee-society regularly invests funds not immediately required for business purposes. Interest on such investments, therefore, cannot fall within the meaning of the expression “profits and gains of business”. Such interest income cannot be said also to be attributable to the activities of the society, namely, carrying on the business of providing credit facilities to its members or marketing of the agricultural produce of its members. When the assessee-society provides credit facilities to its members, it earns interest income. As stated above, in this case, interest held as ineligible for deduction under s. 80P(2)(a)(i) is not in respect of interest received from members. In this case, we are only concerned with interest which accrues on funds not required immediately by the assessee(s) for its business purposes and which have been only invested in specified securities as

“investment”. Further, as stated above, assessee(s) markets the agricultural produce of its members. It retains the sale proceeds in many cases. It is this “retained amount” which was payable to its members, from whom produce was bought, which was invested in short-term deposits/securities. Such an amount, which was retained by the assessee-society, was a liability and it was shown in the balance sheet on the liability side. Therefore, to that extent, such interest income cannot be said to be attributable either to the activity mentioned in s. 80P(2)(a)(iii) of the Act. Therefore, looking to the facts and circumstances of this case, we are of the view that the AO was right in taxing the interest income, indicated above, under s. 56 of the Act.”

We are prepared to agree with Mr. Khaitan to the extent that the interest earned from out of the investments made under Section 64 read with Section 63 of the Multi State Co-operative Societies Act, 2002 is attributable to the business of providing credit facilities to its members. But we are not able to agree with Mr. Khaitan that the rest of the interest earned by the assessee from the investments is also attributable to the business of providing credit facilities to its members. We have not been impressed by the judgements cited by Mr. Khaitan.

We are unable to agree with the views of Patna High Court in the case of **Bihar State Housing Coop Federation Ltd.** (supra). The Division Bench in that case relied on the judgement of the Apex Court in the case of **CIT vs. Karnataka State Co-operative Apex Bank** reported in **(2001) 251 ITR 194**. That was a case of a co-operative bank. A co-operative bank and a co-operative society do not stand on the same footing. The whole of the income of co-operative bank is

deductible whereas in the case of a society the income attributable to any one or more of the activities laid down in Sub-section (2) is deductible. The Division Bench did not give any independent reasoning. The Division Bench proceeded on the basis that the view taken by them was supported by the Judgement in the case of **Karnataka State Co-operative Apex Bank** (supra) which, with respect, was not a correct impression. The other judgement cited by Mr. Khaitan in the case of **Guttigedarara Credit Co-operative Society Ltd.** (supra) is not applicable because the caution appearing in sub-section (1) of Section 80P, that only an income referred to in sub-section (2) was deductible, was not taken into account. The sub-section (2) provides for only the income attributable to the business of advancing credit facilities to its members. Income arising from any other source including investment of capital “if not immediately required to be lent to the members” was not contemplated. The assessee cannot claim any deduction which is not provided for by the section. Moreover the judgement in the case of **Totgars Co-operative Sale Society Ltd.** (supra) is a binding authority for the proposition that “interest income arising on the surplus invested in short-term deposits and securities.....would come in the category of income from other sources.”

Realising his difficulty, Mr. Khaitan submitted that the assessee was under the impression that the income arising out of investments is also attributable to the business of providing credit facilities to its members and on that basis, the assessee did not separately provide for the expenditure incurred for the purpose of earning Rs.99 lakhs during the assessment year 2003-04 and Rs.1.12 crores during the assessment year 2004-05, from investments. Those investments were

obviously made from out of the funds deposited by the members and for such deposits, interest has been paid to those members by the assessee. The interest paid to those members on account of such deposits should, therefore, have been separately accounted for, which exercise was not undertaken. The result thereof was that the expenditure was artificially enhanced and the income arising out of the business of providing credit facilities to its members got reduced. When the income got reduced, the amount of deduction also got reduced. He, therefore, submitted that the matter should be remanded to the Assessing Officer for the purpose of working out the amount of expenditure incurred in earning the approximate sums of Rs.99 lakhs and Rs.1.12 crores respectively. The expenditure incurred for earning those two amounts of income is the amount of interest paid for that money to the members which has to be ascertained and that has to be deducted from the expenditure of the eligible business so that the eligible amount of deduction can be worked out. At the same time, the Assessing Officer has to be directed, according to him, to treat the amount of interest arising out of investments of the funds created under Section 63 as an income attributable to the business.

Mr. Saraf submitted that this is a new case made out by the assessee before the High Court. This was never the plea before any of the authorities. He is no doubt correct in his submission. But Court cannot refuse to give a person what is due to him. As a matter of fact, only that is a good judgement which renders every person his due. Whether the assessee claimed the amount or did not claim the amount, is not of much importance. What is of importance is whether the benefit is

allowable in law? If an answer to that question is in the affirmative, then that benefit has be allowed.

In that view of the matter, the question raised for decision is answered in the affirmative and in favour of the revenue to the extent as indicated above. The appeal is allowed. The matter is, however, remanded to the Assessing Officer (a) to work out the interest earned under Sections 63 and 64 of the Multi State Co-operative Societies Act, 2002 and to allow benefit under Section 80P and (b) to ascertain the interest paid to the members for the purpose of earning the sums of Rs.99 lakhs and 1.2 crores on account of interest from investments. Such interest shall be deducted from the expenses of eligible business. Consequent increased amount of profits of eligible business as discussed above shall be the amount of deduction available to the assessee under Section 80P.

The appeal is thus disposed of.

[GIRISH CHANDRA GUPTA, J.]

[ARINDAM SINHA, J.]