IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
SMT. MADHUMITA ROY, JUDICIAL MEMBER

ITA No.963/Ahd/2019
Assessment Year : 2014-15

M/s.Laxmi Bachat Sharafi Sahkari Mandali Ltd, Bordi Bazar Over Mahalaxmi Temple At Viramgam Dist: Ahmedabad. PAN : AAATL 1173 D	Vs.	ITO, Ward-3(3)(6) Ahmedabad.
/ (Appellant)		/(Respondent)

Assessee by :	Shri Mehul Thakkar, CA
Revenue by :	Shri Alokkumar, CIT-DR

Date of Hearing : 27/06/2022
Date of Pronouncement: 31/08/2022

O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

Present appeal has been filed by the assessee against order passed by the ld.Pr.Commissioner of Income-Tax-3, Ahmedabad [hereinafter referred to as "Pr.CIT"] dated 20.3.2019 in exercise of his revisionary jurisdiction under section 263 of the Income Tax Act, 1961 ("the Act" for short) pertaining to Asst.Year 2014-15.

2. Brief facts relating to the case are that the assessee is a cooperative society engaged in the activity of providing loans and accepting deposits from its members. For the impugned year return of income had been filed by the assessee declaring Nil income after claiming deduction u/s 80P of the Act at Rs.24,87,788/- which was

accepted by the Assessing Officer (AO) in the assessment framed u/s 143(3) of the Act, wherein minor addition of Rs.35,138/- was made on account of excess deduction claimed u/s 80P(2)(c)(ii) of the Act. Subsequently, on verification of records the Ld.PCIT noted that the assessee had received substantial interest on Fixed deposits from various banks including ADC Bank and Mehsana Urban Bank which did not qualify for deduction u/s 80P(2)(d) of the Act since the banks from which interest had been earned did not qualify as cooperative society for the purpose of claiming deduction under section 80P(2)(d) of the Act. Finding that the assessing officer had failed to examine this issue and had as a consequence incorrectly allowed assesses claim of deduction of interest income earned from deposits/FDRs under section 80P of the Act, he initiated revisionary proceedings u/s 263 of the Act ,issuing show cause notice to the assessee in this regard. Due reply was filed by the assessee contending that he had claimed deduction of the said incomes u/s 80P(2)(a)(i) of the Act ,which he contended it qualified for, and not u/s 80P(2)(d) of the Act as noted by the Ld.PCIT. He also contended that his claim was allowable as per both the sections, 80P(2)(d)/(a)(i) of the Act. The Ld.PCIT however dismissed the contentions of the assessee discussing in detail the allowability of the claim u/s 80P(2)(a)(i) of the Act, holding that the assessee did not qualify for deduction under the said section. Accordingly he held the assessment order passed to be erroneous and prejudicial to the interest of the Revenue since the AO had allowed this claim of the assessee for deduction of interest income u/s 80P(2)(a)(i) of the Act. He thereafter set aside the order of the AO directing him to pass a fresh order as per law after examining the issue legally and after allowing assessee opportunity of hearing. The detailed findings of the

Ld.PCIT in this regard are at para 5 & 6 of his order which shall be referred to and reproduced by us wherever considered necessary. The assessee has challenged this order before us raising the following grounds:

> *"1. The Ld. PCIT-3, Ahmedabad has erred in issuing show cause notice u/s 263 of the IT •Act, 1961 dated 15/01/2019 without properly verifying the assessment order where deduction of Rs.24,87,788/- was granted u/s 80P(2)(a)(i) and not u/s 80P(2(d) of the IT Act, 1961 as noted by the office of PCIT-3, Ahmedabad.*
>
> *2. The Ld. PCIT-3, Ahmedabad further erred in assuming jurisdiction u/s 263 of the IT Act, without properly appreciating the facts of the case and the legal position placed before him that the order passed by the assessing officer is not erroneous in so far as prejudicial to the interest of revenue.*
>
> *3. The Ld. PCIT-3, Ahmedabad also erred in giving direction to the assessing officer to pass a fresh assessment order as per law after examining properly the legal position discussed by him in his order.*
>
> *4. The Ld. PCIT-3, Ahmedabad ought to have considered the plea of the appellant society that interest income is not out of investment made by the assessee society but out of its operational funds and therefore question of applying the ratio laid down by Supreme Court in case of M/s. Totgar Co-operative Society 322 ITR 283 does not arise.*
>
> *The Ld. PCIT-3, Ahmedabad ought to have considered the plea of the appellant society that interest income under dispute qualifies for deduction under section 80P(2) (d) of the Act as well."*

3. The primary arguments by the Ld.Counsel for the assessee against the of the impugned order of the Ld.PCIT being not in accordance with law, before us was that:

- the proceedings u/s 263 of the Act was initiated by the Ld.PCIT finding the assessment order erroneous on the premise of non allowability of claim of deduction of interest income earned as per section 80P (2)(d) of the Act, while it was held erroneous on a different premise of non allowability u/s 80P(2)(a)(i) of the Act.

- that the ld.Pr.CIT while so changing track regarding the issue on which the assessment order was found erroneous, had not even confronted this change of track to the assessee and the assessee was not put to notice at all that the Ld.PCIT had found the order of the AO erroneous on account of claim of non allowability of claim of deduction u/s 80P(2)(a)(i) of the Act; Reliance was placed on the decision of the Hon'ble Bombay High Court in the case of PCIT vs Universal Music India Ltd. in Income Tax Appeal No. 238 of 2018 dated April 19, 2022, for the proposition that order passed u/s 263 without confronting the assessee with the issue on which assessment order was found erroneous was not sustainable in law being passed in contravention to the principles of natural justice. Copy of the order was placed before us.
- that in any case it had been demonstrated to the Pr.CIT, when the show cause notice was issued to the assessee under section 263 of the Act, that his claim was allowable even as per section 80P(2)(d) of the Act and the Ld.PCIT had held the assessment order erroneous without dealing with this alternate claim of allowability of deduction by the assessee. He pointed out from the communication to the Pr.CIT against the show cause notice, placed before us at P.B page no.25-26 and 27-33 that the assessee had stated that his claim was allowable even under section 80P(2)(d) of the Act ;
- that after giving a finding that the assessee had incorrectly claimed deduction under section 80P(2)(a)(i) on account of interest income earned on deposits/FDRs with various banks, the ld.Pr.CIT had still directed the AO to reconsider the issue afresh and pass fresh assessment order as per law after

examining the above legal position. He contended that it is clear, that even the Ld.Pr.CIT was not sure, whether the assessee's claim was in accordance with law or not. Therefore he contended there was no finding of error by the Ld.PCIT in the order of the AO even with regards to the claim of deduction u/s 80P(2)(a)(i) of the Act

4. The ld.counsel for the assessee contended that for the above reasons, the order passed under section 263 of the Act, without giving due opportunity of hearing to the assessee to explain its case, and when even the Ld.Pr.CIT was not sure of there being any error in the order of the AO in allowing the claim of deduction in respect of interest earned from the FDRs in the bank and without dealing with the claim of the assessee that the deduction was alternately allowable u/s 80P(2) (d) of the Act, was not in accordance with law and needed to be set aside.

5. The Ld DR per contra supported the order of the Ld.PCIT.

6. We have gone through the order of the Pr.CIT, have heard both the parties and carefully gone through the documents and case laws referred to before us.

As rightly pointed out by the ld.counsel for the assessee, proceedings in exercise of revisionary powers under section 263 of the Act in the present case had been initiated finding that the assessee had been wrongly allowed claim of deduction of interest income earned from the deposits/FDRs in bank as per section 80P(2)(d) of the Act, noting that bank from which interest income was earned did not qualify as "cooperative bank" for the purpose of

being eligible to claim deduction. This fact is clearly brought out in para-2 of the order of the Ld.Pr.CIT, which reads as under:

> *"2. On verification of records, it has come to notice that the assessee had received substantial interest on Fixed Deposits from various banks including ADC Bank and Mehsana Urban Bank. As per section 80P(2)(d) of the Act, in respect of any income of a Co-Operative society by way of interest or dividends from its investments with any other co-operative society is deductible while computing the total income. However, ADC Bank, Mehsana Urban Bank, etc where assesses had made investments, do not fall in the category of "Co-operative Society" for the purpose of section 80P(2)(d) of the Act. Hence, the said interest income was required to be disallowed by the Assessing Officer, not being eligible for deduction under that Section."*

7. The order also reveals, as pointed out by the Ld.Counsel for the assessee, that despite initiating the said proceedings finding the assessment order erroneous on account of the assessee being ineligible to claim deduction of interest income as per section 80(P)(2)(d) of the Act, the ld.Pr.CIT went on to hold the assessment order erroneous for the reasons that the assessee was not eligible to claim deduction of the said income as per section 80P(2)(a)(i) of the Act. Thus, facts before us confirm the contention of the ld.counsel for the assessee, that while revisionary proceedings were initiated finding the assessee ineligible for claim of deduction under section 80P on one premise, the order was ultimately found to be erroneous finding the assessee ineligible for claiming deduction on another premise.

8. Having found so, we are not in agreement with the Ld.Counsel for the assessee that the fact that the assessee was not put to notice by the Ld.PCIT about the premise on which the assessment order was ultimately found erroneous while assuming jurisdiction u/s 263 of the Act renders the order passed u/s 263 invalid. This issue stands settled by the Hon'ble apex court in the case of

Commissioner of Income Tax , Mumbai v Amitabh Bachchan 2016 (69) taxmann.com 170 (SC) wherein the Hon'ble apex court laid down the proposition that section 263 of the Act does not require prior notice to be given to the assessee for assuming jurisdiction to proceed under the section. It was held that all that the section requires is hearing the assessee before passing order u/s 263 of the Act ,as failure to afford an opportunity of hearing to the assessee would render the order passed legally fragile on the ground of violation of principles of natural justice. This argument of the Ld.Counsel for the assessee is therefore dismissed.

9. The next contention that the order of the Ld.PCIT needs to set aside being passed without giving opportunity of hearing to the assessee, we find, merits consideration. The contention of the Ld.Counsel for the assessee in this regard was that the specific ground on which the assesses claim of deduction u/s 80P of interest income earned from FD's etc in Banks was found incorrect, being not allowable as per section 80P(2)(a)(i) of the Act, was never confronted to the assessee.

10. A perusal of the order of the ld.Pr.CIT does not reveal any such opportunity being given to the assessee. The show cause notice issued by the Ld.PCIT to the assessee while assuming jurisdiction u/s 263 of the Act mentions the disallowability of the claim of deduction as per a different provision i.e 80P(2)(d) of the Act. The ld.DR was unable to demonstrate that the assessee was issued notice prior to holding the assessment order being erroneous on account of allowing deduction of interest income u/s 80P(2)(a)(i) of the Act. We have noted that the assessee in his reply filed to the Ld.PCIT in response to notice issued under section 263 of the Act

had pointed out that the Ld.PCIT had wrongly found the deduction claimed by the assessee u/s 80P(2)(d) of the Act and it was clarified that the assessee had claimed deduction u/s 80P(2)(a)(i) of the Act. The assessee we have noted had also pointed out thereafter that his claim was allowable under both circumstances and cited case laws in support of his contention. But thereafter the Ld.PCIT proceeded to discuss the allowability of the claim only as per section 80P(2)(a)(i) of the Act and finding it to be not allowable ultimately held the assessment order erroneous for allowing the claim of the assessee. While so discussing the allowability of claim of deduction u/s 80P(2)(a)(i) of the Act, the Ld.PCIT noted that the decisions relied upon by the assessee were to the effect that where operational funds were invested in Banks the interest earned thereon would qualify for deduction u/s 80P(2)(a)(i) of the Act. He thereafter analysized certain facts emanating from the balance sheet of the assessee relating to deposits in Banks made by it and the outstanding liabilities of the assesee and noted that the investments made in banks was 35.6% of its liabilities. From this analysis he derived that having small depositors there was no need to maintain such huge liquidity and even the bye laws of the society do not prescribe maintaining such huge liquidity . He accordingly derived from this analysis that the deposits were made in Banks with the motive of earning interest thereon and not for the purposes of maintaining liquidity. He thereafter went on to hold that the decisions relied upon by the assessee since did not consider this factual aspect they were of no assistance to the assessee. The relevant discussion of the Ld.PCIT is at para 5.3 to 6 of the order as under:

> *"5.3 The assessee has also placed reliance on the judgment by Hon'ble ITAT in the case of Jafari Monin Vikas Coop Credit Society Ltd (ITA No. 442 of 2013) citing similarity of issue with the present case. The judgment of Jafri*

Monin Vikas Co-operative Credit Society (Supra) in connection with the distinction between a Cooperative Credit Society and a Cooperative Bank in the context of exclusion conditions specified in Section 80P(4) of the Act. In case of Jafari Momin Vikas Co-operative Credit Society Ltd ("Jafari Momin Case"), the decision of the Hon'ble ITAT and Hon'ble High Court also takes into consideration the fact of that case where the investment was admittedly made "to meet any eventuality due to which the assessee society was required to maintain some liquid funds". The Hon'ble ITAT/High Court have distinguished Jafari Momin case from the case of Totgars (supra)on the ground that in the latter case, there was surplus fund with the assessee and the same was invested with a view to earn interest income. In the light of these observations, it was held in Jafari Momin's case that since only operational funds (and not surplus funds) were invested, Totgars will not apply

5.4 Let us now go through the facts of present case. It is pertinent to mention here as per the, society's balance sheet as at 31-03-2014, the assessee had made investments in following Fixed Deposit accounts:-

Fixed Deposit	*Amount (Rs.)*
ADC Bank Fixed A/c.	*2,98,85,128.00*
ADC Bank Head Office A/c.	*13,321.00*
Mehasan Urban Fixed A/c.	*60,88,615.00*
State bank of India A/c.	*34,449.00*
Tota/(in Rs.)	*3,40,21,513*

Besides above, a sum of Rs.7.50 lakhs was also deposited in current account of ADC bank and a sum of Rs.5,52,404/- was shown as cash in hand. As against the above, under the current liabilities, the assessee has shown the following as its current liabilities:-

Current Liabilities	*Amount (Rs.)*
Daily Saving A/c.	*2,29,88,630.00*
Fixed Deposit A/c.	*1 2,78,558.00*
Fixed Term Deposit A/c.	*5,60,97,154.00*
Medium Term Deposit A/c.	*32,25,000.00*
Recurring A/c.	*3,24,700.00*
Saving A/c.	*35,57,524.87*
Short Term Deposit A/c.	*1,30,56,124.00*

Voluntary Deposit A/c.	*1,30,500.00*
Yathashakti A/c.	*2,57,550.00*
Total(in Rs.)	*10,09,15,690.87*

It can be seen that against the Current liabilities of Rs. 10.09 Crore, the assessee has invested a total of Rs. 3.65 crore in other bank accounts. It is thus noticed that an investment of 35.69%(more than 1 /3rd) has been made by the assessee against its current liabilities, which according to the assessee, is tor the purpose of maintaining liquidity to serve the liability of its members by keeping funds in hand. Assessee had also submitted that instead of keeping these funds in current accounts, Fixed Deposits were made so as to earn additional interest income.

5.5 Before examining the applicability of Jafari Momin case to the facts of present case, it will be necessary to analyze the factual matrix of the present case. As can be seen from the above, the assessee has invested in fixed deposits more than one-third of its current liabilities. The twin purpose for this even as per assessee is - (submission dated 31.01.2019 & 01,02.2019, para 4)

(a) To ensure maintenance of liquidity .
(b) To earn interest income.

However, how the assessee society is required to maintain such a huge liquidity, when the amounts advanced by it to its members are only small amounts individually, has not been explained by the assessee. Even the by-laws of the society do not provide that the society should cornpulsorily put its funds in other bank fixed Deposits for meeting out the liability exigencies. The by-laws also do not prescribe what percentage of deposits should be kept invested in Fixed Deposits or even what should be the minimum amount to be kept in Fixed Deposits for the purpose of maintain liquidity. The society is cornpulsorily required to keep separate reserves for such purposes and it had already kept a sum of Rs. 7.50 lakhs in current account of ADC bank and a sum of Rs. 5,52,404/- is available as cash in hand, which is obviously for the purpose of managing liquidity. If the assessee society had decided keeping a huge amount of its funds in Fixed Deposits for alleged purpose of managing liquidity and also earning interest income on such funds that remain idle till such exigency arises, there is no doubt that motive of earning interest is as strong as keeping the deposits for future liquidity requirement. Had this not been the case, these funds would have been kept in current account.: Further, the assessee has not been able to justify its case that the funds kept in the said Fixed Deposits were its operational funds and not surplus funds, the crucial factor in Jafari Momin case. Even if assessee's plea that Fixed Deposits If were made for managing the liquidity is accepted, there is no doubt that / earning of interest on Fixed Deposits was an equally strong motive to keep funds in that form. The ITAT/High Court did not consider this aspect while adjudicating Jafari Momin case. Hence, it is clear that there is a definite motive of earning interest on the surplus funds invested in form of Fixed Deposits with other banks and therefore the Apex Court's judgment in Tofgar (supra) is

applicable and the interest earned on these FDRs needs to be bought to fax, which the Assessing Officer failed to do.

6. In view of above, I am of the opinion that the income by way of interest earned on deposits or in the form of FDRs with various banks has remained to be faxed in the hands of the assessee. Therefore, the assessment order passed by the A.O. u/s. 143(3) of the Act on 23/11/2016 is erroneous and prejudicial to the interest of the revenue as the Assessing Officer has failed to charge the interest income earned from various banks while computing the total income of the assessee and has wrongly considered these for deduction. By virtue of the powers vested in me u/s. 263 of the I T Act, I hereby set-aside the order u/s. 143(3) of the Act dated 23/11/2016 and direct the Assessing Officer to pass a fresh assessment order as per law after examining properly the above legal position after allowing assessee adequate opportunity of being heard, in accordance with law and following prescribed procedure.

7. It may be ensured that the fresh assessment order is passed within the prescribed time limit as stipulated under section 153(3) of the Act."

11. Considering the fact that the Ld.PCIT had analysed certain facts relating to the issue while arriving at his finding, it was imperative upon him to have confronted the facts and analysis to the assessee for his rebuttal thereon. Not doing so tantamount to taking an adverse view on facts at the back of the assessee, which is in clear violation of the principles of natural justice. The *suo moto* submissions made by the assessee regarding his eligibility to claim deduction on this ground cannot by any stretch be said to tantamount to having heard the assessee on this premise, more particularly when the Ld.PCIT brushed aside this contention on the basis of certain facts which the assessee was not even put to notice. Any submissions made without putting the assessee to notice relation to. The order passed by the Ld.PCIT is in clear violation of the principles of natural justice and needs to be set aside for this reason alone we hold.

12. We have also taken note of the decision of Hon'ble Bombay High Court in the case of Pr.CIT Vs. Universal Music India P.Ltd., Income Tax Appeal No.238 of 2018 dated 19.4.2022 wherein for identical reasons, where order passed under section 263 of the Act on an issue which was not even raised by the CIT and even show cause notice was silent about it, said order was found to be in violation of principle of natural justice and set aside. At para-5 of the said order, Hon'ble High Court has noted the fact and the issue raised under section 263,the issue for passing the order under section 263 not being raised by the CIT in the notice served upon the assessee, and not even being confronted by the CIT before the passing the order. Para-5 of the order is as under:

> *"5. On the issue of payments made to persons specified under Section 40A(2) (b) of the Act, the ITAT gave a finding of fact that no such issue was ever raised by CIT in the notice served upon the assessee and the assessee was not even confronted by the CIT before passing the Order dated 20th March, 2013. ITAT concluded that the said ground therefore cannot form the basis for revision of assessment order under Section 263 of the Act. It is only this finding of ITAT which is impugned in this Appeal. On the other two points, revenue has accepted the findings of ITAT that the Order under Section 263 was not warranted."*

13. Hon'ble High Court thereafter distinguished the judgment of Hon'ble Apex court in the case of CIT Vs. Amitabh Bachchan, 69 taxmann.com 170 (SC) which was relied upon by the ld.counsel for the Revenue for the proposition that provisions of section 263 did not warrant any notice to be issued and what only required was to give the assessee an opportunity of being heard before reaching his decision and not before commencing the enquiry. Hon'ble High Court held that as per the judgment of Hon'ble Apex Court itself, the assessee needed to be heard before the Commissioner takes a decision on the issue, and in the present case no such opportunity

being given to the assessee before the Commissioner reached his decision; the revisionary order had rightly been set aside by the ITAT as in violation of principle of natural justice. The finding of the Hon'ble High Court had para 7 to 10 as under:

> *"7. It is true that the Apex Court in Amitabh Bacchan (supra) has held, all that CIT is required to do before reaching his decision and not before commencing the enquiry, CIT must give the assessee an opportunity of being heard. It is true that the Judgment also says no notice is required to be issued. But in the case at hand, there is a finding of fact by the ITAT that no show cause notice was issued and no issue was ever raised by the CIT regarding payments made to persons specified under Section 40A(2)(b) of the Act before reaching his decision in the Order dated 20th March, 2013. If that was not correct certainly the order of the CIT would have mentioned that an opportunity was given and in any case, if there were any minutes or notings in the file, revenue would have produced those details before the ITAT.*
>
> *8. In Amitabh Bachchan (supra), the Apex Court came to a finding that ITAT had not even recorded any findings that in the course of the suo motu revisional proceedings opportunity of hearing was not offered to the assessee and that the assessee was denied an opportunity to contest the facts on the basis of which the CIT had come to its conclusions as recorded in his order under Section 263 of the Act. It will be useful to reproduce paragraphs 10, 11 and 13 of Amitabh Bachchan (supra) and the same read as under :*
>
> > *"10. Reverting to the specific provisions of Section 263 of the Act what has to be seen is that a satisfaction that an order passed by the Authority under the Act is erroneous and prejudicial to the interest of the Revenue is the basic precondition for exercise of jurisdiction under Section 263 of the Act. Both are twin conditions that have to be conjointly present. Once such satisfaction is reached, jurisdiction to exercise the power would be available subject to observance of the principles of natural justice which is implicit in the requirement cast by the Section to give the assessee an opportunity of being heard. It is in the context of the above position that this Court has repeatedly held that unlike the power of reopening an assessment under Section 147 of the Act, the power of revision under Section 263 is not contingent on the giving of a notice to show cause. In fact, Section 263 has been understood not to require any specific show cause notice to be served on the assessee. Rather, what is required under the said provision is an opportunity of hearing to the assessee. The two requirements are different; the first would comprehend a prior notice detailing the specific grounds on which revision of the assessment order is tentatively being proposed. Such a notice is not required. What is contemplated by Section 263, is an opportunity of hearing to be afforded to the assessee. Failure to give such an opportunity would render the revisional order legally fragile*

not on the ground of lack of jurisdiction but on the ground of violation of principles of natural justice. Reference in this regard may be illustratively made to the decisions of this Court in Gita Devi Aggarwal vs. CIT [1970] 76 ITR 496 and in CIT v. Electro House [1971] 82 ITR 824 (SC). Paragraph 4 of the decision in Electro House (supra) being illumination of the issue indicated above may be usefully reproduced hereunder:

> *"This section unlike Section 34 does not prescribe any notice to be given. It only requires the Commissioner to give an opportunity to the assessee of being heard. The section does not speak of any notice. It is unfortunate that the High Court failed to notice the difference in language between Sections 33-B and 34. For the assumption of jurisdiction to proceed under Section 34, the notice as prescribed in that section is a condition precedent. But no such notice is contemplated by Section 33-B. The jurisdiction of the Commissioner to proceed under Section 33-B is not dependent on the fulfilment of any condition precedent. All that he is required to do before reaching his decision and not before commencing the enquiry, he must give the assessee an opportunity of being heard and make or cause to make such enquiry as he deems necessary. Those requirements have nothing to do with the jurisdiction of the Commissioner. They pertain to the region of natural justice. Breach of the principles of natural justice may affect the legality of the order made but that does not affect the jurisdiction of the Commissioner. At present we are not called upon to consider whether the order made by the Commissioner is vitiated because of the contravention of any of the principles of natural justice. The scope of these appeals is very narrow. All that we have to see is whether before assuming jurisdiction the Commissioner was required to issue a notice and if he was so required what that notice should have contained? Our answer to that question has already been made clear. In our judgment no notice was required to be issued by the Commissioner before assuming jurisdiction to proceed under Section 33-B. Therefore the question what that notice should contain does not arise for consideration. It is not necessary nor proper for us in this case to consider as to the nature of the enquiry to be held under Section 33-B. Therefore, we refrain from spelling out what principles of natural justice should be observed in an enquiry under Section 33- B. This Court in Gita Devi v. CIT, West Bengal ruled that Section 33-B does not in express terms require a notice to be served on the assessee as in the case of Section 34. Section 33-B merely requires that an opportunity of being heard should be given to the assessee and the stringent requirement of service of notice under Section 34 cannot, therefore, be applied to a proceeding under Section 33-B."*

(Page 827- 828). [Note: Section 33-B and Section 34 of the Income Tax Act, 1922 corresponds to Section 263 and Section 147 of the Income Tax Act, 1961] 11. It may be that in a given case and in most cases it is so done a notice proposing the revisional exercise is given to the assessee indicating therein broadly or even specifically the grounds on which the exercise is felt necessary. But there is nothing in the section (Section 263) to raise the said notice to the status of a mandatory show cause notice affecting the initiation of the exercise in the absence thereof or to require the C.I.T. to confine himself to the terms of the notice and foreclosing consideration of any other issue or question of fact. This is not the purport of Section 263. Of course, there can be no dispute that while the C.I.T. is free to exercise his jurisdiction on consideration of all relevant facts, a full opportunity to controvert the same and to explain the circumstances surrounding such facts, as may be considered relevant by the assessee, must be afforded to him by the C.I.T. prior to the finalization of the decision. 13. The above ground which had led the learned Tribunal to interfere with the order of the learned C.I.T. seems to be contrary to the settled position in law, as indicated above and the two decisions of this Court in Gita Devi Aggarwal (supra) and M/s Electro House (supra). The learned Tribunal in its order dated 28th August, 2007 had not recorded any finding that in course of the suo motu revisional proceedings, hearing of which was spread over many days and attended to by the authorized representative of the assessee, opportunity of hearing was not afforded to the assessee and that the assessee was denied an opportunity to contest the facts on the basis of which the learned C.I.T. had come to his conclusions as recorded in the order dated 20 th March, 2006.

Despite the absence of any such finding in the order of the learned Tribunal, before holding the same to be legally unsustainable the Court will have to be satisfied that in the course of the revisional proceeding the assessee, actually and really, did not have the opportunity to contest the facts on the basis of which the learned C.I.T. had concluded that the order of the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. The above is the question to which the Court, therefore, will have to turn to."

9. In the case at hand, there is a finding by the Tribunal, as noted earlier, that no issue was raised by the CIT in respect of particulars of payment made to persons specified under Section 40A(2)(b) of the Act and even the show cause notice is silent about that.

14. Having said so, we further find that the order of the ld.Pr.CIT is liable to be set aside also for the reasons that though the assessee had canvassed that his claim of deduction under section 80P(2) qualified under sub-clause (d) thereof, the ld.Pr.CIT chose to dwell on the issue of its allowability under clause (a)(i) of section 80P(2) finding it to be not allowable under the said clause and as a consequence holding the assessment order to be erroneous for allowing the claim of the assessee and did not apply his mind at all, to the claim being alternatively allowable under sub-clause (d) of section 80P(2).

15. The reply filed by the assessee to the Ld.PCIT during the course of revisionary proceedings dated 01/02/2019, placed before us at P.B 27-28 ,reveals that the assessee had pleaded that cooperative banks qualified as cooperative societies and therefore interest received from cooperative banks by the assessee in the present case qualified for deduction u/s 80P(2)(d) of the Act. Reliance was placed on two decisions of the ITAT in this regard. The contents of the reply are as under:

> *"3. Without prejudice to above, interest income earned by co-operative society from the co-operative bank still qualifies for deduction under section 80 P(2)(d) of the Act as held by Surat ITAT in case of ITO Vs. Bardoli Vibhag Gram Vikas Co-op. Credit Society Ltd 49 CCH 573 (2017). Surat ITAT recorded its finding in para 5 of its order relying on the Judgment of Hon'ble Gujarat High Court in case of Surat Vankar Sahakari Sangh Ltd. V/s. Assistant Commissioner of Income Tax (2016) 72 taxmann.com 169*
>
> *Para 5 of the Hon'ble ITAT Surat in case of Surat Vankar Sahakari (supra):*
>
> > *"5. We have heard rival contentions. We have also gone through the paper book furnished by the Id. Counsel containing judicial pronouncements, written submission made before the Id. CIT(A), audit reports etc. We have noticed that the assessee has been statutorily investing its surplus fund from the year 1992 with other Co-operative Societies which include Co-operative Banks and on such investments, the appellant has been receiving interest and dividend which has been claimed as deduction u/s. 80P(2)(d) of the Act. We find that the provision of section 80P(4) are not applicable to the assessee, because section 80P(4) says that provision of this section shall not apply in relation to Co-op Bank other than Primary Agricultural Credit*

societies or a Primary Coop agricultural and Rural Development Bank. Regarding eligibility for receiving interest received from the co-operative bank we have noticed from the judicial pronouncement in the case of Surat Varvkar Sahakari .Sangh Ltd. v. Assistant Commissioner of Income Tax (2016)72 taxmann.com 169(Gujarat) in ~

> *"8. Section 80P(2)(d) of the Act allows whole deduction of an income by way of interest or dividends 'derived by the co-operative society from its investment with any other co-operative society. This provision does not make any distinction in regard to source of the investment because this Section envisages deduction in respect of any income derived by the co-operative society from any investment with a co-operative society. It is immaterial whether any interest paid to the cooperative society exceeds the interest received from the bank on investments. The Revenue is not required to look to the nature of the investment whether it was from its surplus funds or otherwise. The Act does not speak of any adjustment as sought to be made out by learned counsel for the Revenue. The provision does not indicate any such adjustment in regard to interest derived from the co-operative society from its investment in any other co-operative society. Therefore, we do not agree with the argument advanced by learned counsel for the Revenue. In our opinion, the learned Tribunal was right in law in allowing deduction under Section 80P(2)(d) of the Income- tax Act, 1961, in respect of interest of RS.4,00,919, on account of interest received from Nawanshain Central Co-operative Bank without adjusting the interest paid to the ' hank. Therefore, the reference is answered against the Revenue in the affirmative and in favour of the assessee."*

3.1 The honourable ITAT Mumbai, Bench 'SMC' in case of Kaliandas Udyog Bhavan Premises Co-op. Society Ltd. v/s. 110-21(2), 94 taxmann.com 15 Mumbai had also reached to the finding in para 7 of its order that co-operative bank continues to be a co-operative society registered under Co-operative Societies Act, 1912 or under any other law for the time being in force in any State for registration of co-operative societies, and, therefore, interest income derived by a co-operative society from its investments held with a co-operative bank, would be entitled for claim of deduction under section 80P(2)(d).

Para 7 of the Hon'ble ITAT Mumbai in case of Kaliandas Udvog (supra):

"7. We have deliberated at length on the issue under consideration and are unable to persuade ourselves to be in agreement with the view taken by the lower authorities. Before proceeding further, we may herein reproduce the relevant extract of the said statutory provision, viz. Sec. 80P(2)(d), as the same would have a strong bearing on the adjudication of the issue before us,

> *"80P(2)(d)*
>
> *(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 subsection (2), in computing the total income of the assessee.*

> *(2) The sums referred to in sub-section (1) shall be the following, namely :— (a)to(c)***
>
> *(d) in respect of any income by way of interest or dividends derived by the cooperative society from its investments with any other co-operative society, the whole of such income;"*

Thus, from a perusal of the aforesaid Sec. 80P(2)(d) it can safely be gathered that income by way of interest income derived by an assessee co-operative society from its investments held with any other cooperative society, shall be deducted in computing the total income of the assessee. We'may herein observe, that what is relevant for claim of deduction under Sec. 80P(2)(d) is that the interest income should have been derived from the investments made by the assessee co-operative society with any other cooperative society. We though are in agreement with the observations of the lower authorities that with the insertion of Sub-section (4) of Sec. SOP, vide the Finance Act, 2006, with effect from 01.04.2007, the provisions of Sec. 80P would no more be applicable in relation to any co-operative bank, other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank, but however, are unable to subscribe to their view that the same shall also jeopardise the claim of deduction of a co-operative society under Sec. 80P(2)(d) in respect of the interest income on their investments parked with a co-operative bank. We have given a thoughtful consideration to the issue before us and are of the considered view that as long as it is proved that the interest income is being derived by a co-operative society from its investments made with any other co-operative society, the claim of deduction under the aforesaid statutory provision, viz. Sec. 80P(2)(d) would be duly available. We may herein observe that the term 'co-operative society1 had been defined under Sec. 2(19) of the Act, as under:—

> *'(19) "Co-operative society" means a cooperative society registered under the Cooperative Societies Act, 1912 (2 of 1912), or under any other law for the time being in force in any state for the registration of co-operative societies;'*

We are of the considered view, that though the co-operative bank pursuant to the insertion of Sub-section (4) of Sec. SOP would no more be entitled for claim of deduction under Sec. SOP of the Act, but however, as a co-operative bank continues to be a co-operative society registered under the Co-operative Societies Act, 1912 (2 of 1912), or under any other law for the time being enforced in any state for the registration of co-operative societies, therefore, the interest income derived by a co-operative society from its investments held with a cooperative bank, would be entitled for claim of deduction under Sec.80P(2)(d) of the Act."

3.2 The honourable Hyderabad ITAT in case of Assistant Commissioner of Income tax vs. Metrocity Criminals Courts 43 CCH 217 also had an occasion to consider the same issue wherein para 4 and 5of its order, assessee was allowed to take deduction of interest earned from co-operative banks under section 80P(2) (d) of the Act.

Para 4 of the Hon'ble ITAT Hyderabad in case of Metrocity Criminals (supra):

> *"4. After considering the rival contentions, we do not see any reason to interfere with the order of Ld.CIT(A). Obviously, assessee is a cooperative society engaged in the business of providing credit facilities to its Members. There is no dispute with reference to the transactions with the Members, as Assessing Officer has not considered that issue at all in the order. Therefore, assessee being a co-operative society registered under the APMACS Act is eligible for deduction u/s.80P(2)(a)(i) of the Act. Not only that, assessee is also eligible for deduction u/s.80P(2)(d) on the incomes received from other*

eligible co-operative societies/banks. Therefore, on the facts of the case, we do not see any reason to disallow the deduction u/s.80P. Revenue has raised the grounds that provisions of u/s.80P(4) were applicable to assessee. We do not see any reason to consider this ground as the restrictions brought out subsequently u/s.80P(4) is applicable in the case of a co-operative bank not a co-operative society. This issue is also discussed in the co-ordinate bench at Hyderabad decision in the case of "The Advocates Mutually Aided Coop Society, Hyderabad" pronounced on 20-02-2015 as under:

"22.1 The ground No.3 regarding deduction under section 80P(2)(d) is in respect of interest received from Cooperative Societies and the Cooperative Banks. We are unable to understand why the Cooperative Banks, are not considered as Cooperative Societies in Banking business. The sub-section (4) introduced by Finance Act, 2006 w.e.f. 1.4.2007 is as under :

(4) The provisions of this section shall not apply in relation to any cooperative bank other than a primary agricultural credit society or a primary cooperative agricultural and rural development bank.

Explanation - For the purposes of this sub-section,-(a) 'co-operative bank' and 'primary agricultural credit society' shall have the meanings respectively assigned to them in Part V of the Banking Regulation Act, 1949 (10 of 1949).

(b) "Primary Cooperative agricultural and rural development bank" means a society having its area of operation confined to a taluk and the principal object of which is to provide for long term credit for agricultural and rural development activities."

22.1. As per this section, the exemption provided under sub-section (2) or sub-section (3) does not apply to the incomes of the Cooperative Bank other than a primary agricultural Cooperative Society or a primary Cooperative Agricultural and Rural Development Bank. However, the above provision applicable in the case of Cooperative Bank is not in respect of interest received from Cooperative Banks by a Cooperative Credit Society/Cooperative Society. Section 80P(2)(d) is applicable to the assessee society in respect of incomes by way of interest or dividends received by the cooperative society from its investments with any other cooperative society. Therefore, in the case of the assessee society, sub-section (4) is not applicable and deduction under section 80P(2)(d) is certainly eligible to assessee. In the assessment of a Cooperative Bank, the incomes may not be exempt after 01.04.2007 by virtue of sub-section (4), but assessee is not a Cooperative Bank. Therefore, the Revenue ground is not only illogical but also not supported by the facts of the case. Moreover as seen, the recommendation made by the A.O. to the Ld. CIT in their internal correspondence is extracted as a ground. This also indicates non-application of mind either by the A.O. or by higher authority like CIT. This sorry state of affairs should come to an end and Officers should act responsibly while preferring second appeal on the orders of the senior officer like Ld. CIT(A). Revenue appeal is dismissed".

5. In view of the above, we do not see any merit in the Revenue's grounds. Accordingly, Revenue's appeals are dismissed."

3.3 The Hon'ble Gujarat High Court in case of Suarat Vankar Sahakari Sangh Ltd. V/s. Assistant Commissioner of Income tax 72 taxmann.com 169 had an occasion to consider following question of Law:

> *"Whether the assessee co-operative society was entitled under sec. 80P(2)(d) of the entire interest of Rs.10,17,976/- received by it from the co- operative Bank?"*

While answering the above question of law in favour of assessee, Hon'ble Gujarat High Court held as under:

> *"8. Section 80P(2)(d) of the Act allows whole deduction of an income by way of interest or dividends 'derived by the co-operative society from its investment with any other co-operative society. This provision does not make any distinction in regard to source of the investment because this Section envisages deduction in respect of any income derived by the co-operative society from any investment with a co-operative society. It is immaterial whether any interest paid to the cooperative society exceeds the interest received from the bank on investments. The Revenue is not required to look to the nature of the investment whether it was from its surplus funds or otherwise. The Act does not speak of any adjustment as sought to be made out by learned counsel for the Revenue. The provision does not indicate any such adjustment in regard to interest derived from the co-operative society from its investment in any other co-operative society. Therefore, we do not agree with the argument advanced by learned counsel for the Revenue. In our opinion, the learned Tribunal was right in law in allowing deduction under Section 80P(2)(d) of the Income- tax Act, 1961, in respect of interest of RS. 4,00,919 on account of interest received from Nawanshaln Central Co-operative Bank without adjusting the interest paid to the hank. Therefore, the reference is answered against the Revenue in the affirmative and in favour of the assessee."*

> *4. In view of the factual submission and judicial view of the Jurisdictional High Court and various ITATs, it is respectfully submitted that the order passed by assessing officer is not erroneous in so far as prejudicial to the interest of revenue."*

16. Since the assessee had demonstrated his claim being allowed alternatively under another clause of section 80P(2), the ld.Pr.CIT ought to have dealt with this claim of the assessee before arriving at a finding of error in the assessment order holding the claim of deduction u/s 80P of the Act as being incorrectly allowed by the AO. It is only after dealing with this alternative claim and finding it to be incorrect that it could be said that the allowance of deduction of interest income had resulted in prejudice to the Revenue, which condition also needs to be satisfied alongwith finding the assessment order erroneous for exercising revisionary jurisdiction u/s 263 of the Act. In the circumstance that the assesses claim is found allowable under section 80P(2)(d) of the Act, the allowance of deduction u/s 80P(2)(a)(i) of the Act by the AO cannot be said to be to the prejudice

of the Revenue since in any case the assesses claim of deduction was allowable.

Having not so dealt with alternative claim of the assessee, there could not be said to be any finding of the error causing prejudice to the Revenue in the order of the AO and for this reason also the order passed by the ld.Pr.CIT needs to be aside.

17. For the above reasons, we hold that the order passed under section 263 of the Act is not accordance with law. The same is hereby set aside, and order of the AO is restored.

18. In the result, appeal of the assessee is allowed.

Order pronounced in the Court on 31st August, 2022 at Ahmedabad.

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Ahmedabad, dated 31/08/2022