IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Income Tax Appeal No. 638-2009
Pronounced on : 11th November, 2016

The Commissioner of Income Tax-I, Chandigarh ..... Appellant

VERSUS

M/s Punjab State Cooperative Agricultural
Development Bank Ltd., Chandigarh ..... Respondent

CORAM: HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE DEEPAK SIBAL, JUDGE

Present: Ms.Urvashi Dhugga, Advocate, for the appellant-revenue.

Mr.Sanjay Bansal, Senior Advocate, with
Mr.Brij Mohan Monga, Advocate,
Mr.Rohit Kaura, Advocate, and
Mr.Amit Parsad, Advocate, for the respondent-assessee.

****

S.J.VAZIFDAR, CHIEF JUSTICE

This is an appeal against the order of the Income Tax Appellate Tribunal, partly allowing the appellant's appeal against the order of the Commissioner of Income Tax (Appeals) pertaining to the assessment year 2003-04.

2. By an order dated 12.07.2010 the Division Bench admitted the appeal on the following substantial questions of law: -

> "1.Whether the Tribunal is right in law in holding that income earned by the assessee on account of interest received from employees is eligible for deduction u/s 80P(2)(a)(i) of the Income-tax Act?
>
> 2. Whether the Hon'ble Tribunal is right in law in holding that deduction u/s 80P(2)(a)(i) of the Income-tax Act is allowable on the provision for non performing assets?
>
> 3. Whether the Tribunal is right in law in holding that the interest on

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

reserve funds is attributable to the business of providing credit facility to members and is eligible for deduction u/s 80P(2)(a)(i) of the Income-tax Act?

4. Whether the Hon'ble Tribunal is right in law in holding that interest on account of call deposits is attributable to the activity of providing credit facility to the members and is eligible for deduction u/s 80P(2)(a)(i) of the Income-tax Act?"

3. As is evident from the questions of law, the dispute essentially centers around Section 80P(2)(a)(i) which in so far as it is relevant to this appeal reads as under: -

> **"Deduction in respect of income of co-operative societies.**
>
> **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
>
> xxx xxx xxx
>
> the whole of the amount of profits and gains of business attributable to any one or more of such activities."

4. In view of the manner in which the matter proceeded before the authorities under the Act and before us it is necessary at the outset to mention that Mr. Sanjay Bansal, learned senior counsel appearing on behalf of the respondent-assessee, has contended that the assessee claims the deduction under Section 80P(2)(a)(i) both on the basis that it is

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

engaged in carrying on the business of banking as well as on the basis that it is engaged in providing credit facilities to its members.

The Tribunal, however, considered the assessee's case only on the basis that it is carrying on the business of providing credit facilities to its members. The Tribunal has not considered whether the assessee is also carrying on the business of banking.

We have not accepted the assessee's case based on it being engaged in carrying on the business of providing credit facilities to its members. The assessee must, therefore, have an opportunity of establishing its case that it is also engaged in carrying on the business of banking as well. We intend permitting the assessee to raise this contention before the Tribunal upon remand.

5. It is necessary, therefore, to deal with this appeal in two parts. The first is whether it is open to the assessee to contend in this appeal which is filed by the Revenue that it is carrying on the business of banking. The second is a consideration of the appeal on the basis of the Tribunal's order which as we mentioned is only based on the assessee's business of providing credit facilities to its members.

6. Ms.Urvashi Dhugga, learned counsel appearing on behalf of the Revenue contends that the assessee is not entitled to raise this contention as it had given up the same before the Tribunal. It is submitted that before the Tribunal even the assessee did not press its case that it was also carrying on the business of banking. It is necessary, therefore, firstly to determine whether the assessee gave up or did not press this contention before the Tribunal. In deciding this point, it will be

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

necessary to refer to what transpired before the authorities in the assessee's case for other assessment years.

7. In this appeal which pertains to the assessment year 2003-04, the assessee admittedly raised the contention that it is engaged in carrying on the business of banking. This is evident from the order of the CIT(A) which deals with the issue in considerable detail. That there are contradictory findings in this regard is another matter. The CIT(A) partly allowed the assessee's appeal. However, on the items which are the subject matter of this appeal, the CIT(A) held in favour of the assessee. It may only be noted that the CIT(A) held that the AO was not justified in assessing the income of interest on reserve fund under the head “income from other sources” as it is income from baking business and is exempt under Section 80P(2)(a)(i).

8. We now refer to what transpired in respect of the proceedings relating to the other assessment years which pertain to the period prior to the decision of the Tribunal in the present case which is dated 25.03.2009.

(A) Ms.Dhugga in support of her contention that that the assessee had abandoned the plea of banking before the Tribunal in the present case and in the other connected cases, relied upon the papers and proceedings in ITA-644-2009 which relates to the assessment year 2002-03. She firstly relied upon the following paragraphs in the order of the CIT(A) dated 03.03.2008 in that case which read as under: -

> “3. However, the assessee vide its letter dated 28/01/2008 has amended ground No.1 & 6 as under:
>
> Ground No.1:

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

> In A.Y. 2003-04, wherein the issues involve were same, the Ld. CIT (Appeals) held that assessee is engaged in providing credit facilities to its members and therefore the income arising therefrom is exempt from tax u/s 80P(2)(a)(i) though not as Bank. Ground No.1 is therefore amended accordingly and the income is claimed exempt u/s 80P(2)(a)(i) being providing credit facilities to its members.
>
> 9. The assessee in its amended grounds of appeal has accepted the position as held by the Assessing Officer that the assessee is not engaged in the business of banking. Since the assessee has accepted the stand of the Department, this ground of the assessee becomes infructuous."

(B). Paragraph 3 of the order of the CIT(A) quoted above does not state that the assessee had abandoned its plea that it carried on the business of banking. It appears to us that having succeeded before the CIT(A) in respect of the assessment year 2003-04 the assessee sought to have the appeals pending before the CIT(A) disposed of in terms of the order of the CIT(A) for the assessment year 2003-04 as in respect of the issues in question the assessee had even succeeded on the ground that it carried on the business of providing credit facilities to its members.

(C). What is stated in paragraph 9 is only an inference drawn by the CIT(A) on the basis of what is stated in paragraph 3. It is not a reference to a fact. It is in any event not clear if it is on the basis of the record. What is stated in paragraph 3 does not, at least unequivocally, indicate that the assessee had abandoned its case that it carries on the business of banking. The letter dated 20.01.2008 referred to in paragraph 3 is not available. Nor is the amended memorandum of appeal filed by the assessee before the CIT(A). The reliance to the amendment of ground

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

Nos.1 and 6 by the letter dated 20.01.2008 is admittedly in respect of the assessment year 2002-03.

(D). The original memorandum of appeal, however, is available and it was produced before us. In grounds No.1 and 6 the assessee had admittedly clearly contended that it is doing the business of banking and its entire income is, therefore, liable to be exempted under Section 80P(2)(a)(i). The original ground Nos.1 and 6 read as under: -

> "1. That the order of the learned Assessing Officer that the assessee is not doing the business of Banking is erroneous. Since inception for more than 30 years it is accepted by the Department that assessee is doing the business of Banking and its entire income has been held exempt under Section 80-P(2)(a)(i) has been held to be exempt not only by the learned Assessing Officer but also by Hon'ble Tribunal following Supreme Court judgments. The learned Assessing Officer was, therefore, not justified in not allowing its entire income of Rs.32,25,35,660/- (as computed) exempt under Section 80-P(2)(a)(i).
>
> 6. That the learned Assessing Officer was further not justified in assessing income of Rs.4,31,53,411/- under head "Other Sources". It is income from Banking business and is exempt under Section 80-P(2)(a)(i)."

(E). The case was, therefore, expressly pleaded in the appeal. The order of the Tribunal does not state that the assessee abandoned this plea. The amendment to the memorandum of appeal filed before the CIT(A) in respect of assessment year 2002-03 is not available. Paragraph 3 of the order of the CIT(A) does not state that the assessee abandoned its plea. These facts, therefore, in any event lean in favour of the assessee to the

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

effect that it had neither abandoned its case nor admitted that it did not carry on the business of banking.

(F). There is an important fact that militates against Ms.Dhugga's contention that the assessee had abandoned its case that it carried on the business of banking. In the present case, pertaining to assessment year 2003-04, as well, the impugned order of the Tribunal in the appeal before us records the contention on behalf of the Revenue as under: -

> "3....The claim of exemption u/s 80P(2)(a)(i), which is in dispute before us, relates to (i) Interest from employees = Rs.87,60,051/-, (ii) Interest on reserve funds = Rs.3,98,94,432/-, (iii) Interest on loans to non-members = Rs.25,07,307/-, (iv) Interest on call deposit account = Rs.5,84,41,396/- & (iv) Disallowance on provision of non-performing assets (NPA) = Rs.16,75,070/-.....
>
> 5. The stand of the Revenue is that the assessee is not eligible for the exemption u/s 80P(2)(a)(i) because the assessee is not doing the business of banking. The learned DR pointed out that the Assessing Officer has concluded that the Banking Regulation Act,1949 does not cover the assessee and therefor, it could not be said that the assessee was in the business of banking as defined in the Banking Regulation Act, 1949. According to the learned CIT DR, the objects of the assessee are merely to provide credit facility to its members and it is only on this basis that it can be considered that Section 80P(2)(a)(i) is admissible to the assessee. So, however, in so far as the afore-stated incomes are concerned, namely interest on loans given to employees, non-members, on call deposits and reserve funds, the same cannot be said to be as an activity of providing credit facilities to its members and, therefore, the Assessing Officer was justified in denying the exemption u/s 80P(2)(a)(i) to the said incomes....."

Had the assessee in fact abandoned its case that it was engaged in the business of carrying on banking or had conceded that it

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

was not carrying on the business of banking, this contention would never have been raised by the Revenue. In that event, it would not have been necessary for the Revenue to have raised this contention. On the contrary, it would have been contented on behalf of the Revenue, as it was before us, that the assessee had abandoned its case or had in fact conceded this point.

9. It is difficult to imagine the assessee having abandoned its case that it also carried on the business of banking. It is even more difficult to accept the contention that the assessee admitted that it did not carry on the business of banking. Apart from the order of the CIT(A) which we have quoted above, our attention was not invited to any other material which could be of assistance in deciding this issue. Considering the facts and circumstances of the case, we would lean in favour of permitting a party, be it the Revenue or the assessee, of having its case decided on merits rather than on a concession.

10. To us it appears obvious that the Tribunal decide the appeal on the present issue in favour of the assessee on the basis that it was engaged in carrying on the business of providing credit facilities to its members and, therefore, did not consider it necessary to deal with the assessee's claim on the basis that it was also engaged in carrying on the business of banking.

11. The contention that the assessee abandoned its case that it was engaged in carrying on the business of banking or that it had admitted that it was not engaged in carrying on the business of banking is therefore, rejected.

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

12. Faced with this, Ms.Dhugga contended that even this aspect cannot be gone into in the present appeal as the appellant has not filed an appeal or cross-objections in this appeal. This submission is not well founded.

13. Section 260A(7) of the Act and Order XLI, Rule 22 of the Code of Civil Procedure, 1908, read as follows: -

> **"Appeal to High Court.**
>
> **260A. ....**
>
> [(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.]"
>
> **"Order XLI : Appeals from Original Decrees.**
>
> **..... ....**
>
> **Rule 22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.-**(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the court below in respect of any issue ought to have been In his favour; and may also take any cross objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one months from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow:
>
> Explanation: A respondent aggrieved by a finding of the court in the judgment on which the decree appealed against is based may, under this rule, file cross objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or In part, in favour of that respondent.
>
> **(2) Form of objection and provisions applicable thereto**—Such cross objection shall be in the form of the memorandum, and the

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Omitted

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the court thinks fit,

(5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable, apply to an objection under this rule."

14. Mr.Bansal's reliance upon the following observations in judgment of the Supreme Court in *Ravinder Kumar Sharma v. State of Assam*, (1999) 7 SCC 435 is well founded. Paragraphs 20, 21, 22 and 23 of the judgment read as follows: -

> **"20.** So far as the explanation was concerned, the Law Commission stated (p. 298) that it was necessary to "empower" the respondent to file cross-objection against the adverse finding. That would mean that a right to file cross-objections was given but it was not obligatory to file cross-objections. That was why the word "may" was used. That meant that the provision for filing cross-objections against a finding was only an enabling provision.
>
> **21.** These recommendations of the Law Commission are reflected in the Statement of Objects and Reasons for the amendment. They read as follows:
>
> > "Rule 22 [i.e. as it stood before 1976] gives two distinct rights to the respondent in appeal. The first is the right of upholding the decree of the court of first instance on any of the grounds on which that court decided against him; and the second right is that of taking any cross-objection to the decree which the respondent might have taken by way of appeal. In the first case the respondent supports the decree and in the second case he attacks the decree. The language of the rule, however, requires some modification because a person cannot support a decree on a ground decided against him. What is meant is that he may *support the decree by*

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

asserting that the matters decided against him should have been decided in his favour. The rule is being amended to make it clear.

An explanation is also being added to Rule 22 *empowering* the respondent to file cross-objection in respect to a finding adverse to him notwithstanding that the ultimate decision is wholly or partly in his favour." (emphasis supplied)

Mookerjee, J. observed in *Nishambhu Jana case* [(1984-85) 86 CWN 685] (see p. 689) that "the amended Rule 22 of Order 41 of the Code has *not brought any substantial change* in the settled principles of law" (i.e. as accepted in *Venkata Rao case* [AIR 1943 Mad 698 : ILR 1944 Mad 147 (FB)]) and clarified (p. 691) that

"it would be *incorrect* to hold that the explanation now inserted by Act 104 of 1976 has made it *obligatory* to file cross-objections even when the respondent supports the decree by stating that the findings against him in the court below in respect of any issue ought to have been in his favour".

22. A similar view was expressed by U.N. Bachawat, J. in *Tej Kumar Jain* v. *Purshottam* [AIR 1981 MP 55] that after the 1976 Amendment, it was not obligatory to file cross-objection against an adverse finding. The explanation merely empowered the respondent to file cross-objections.

23. In our view, the opinion expressed by Mookerjee, J. of the Calcutta High Court on behalf of the Division Bench in Nishambhu Jena's case (supra) and the view expressed by U.N.Bachawat, J. in Tej Kumar's case (supra) in the Madhya Pradesh High Court reflect the correct legal position after the 1976 Amendment. We hold that the respondent-defendant in an appeal can, without filing cross-objections attack on adverse finding upon which a decree in part has been passed against the respondent, for the purpose sustaining the decree to the extent the lower Court had dismissed the suit against the defendants-respondents. The filing of cross-objection, after the 1976 Amendment is purely optional and not mandatory. In other words, the law as stated in Venkata Rao's case (supra) by the Madras Full Bench and Chandre Prabhuji's case (supra) by this Court is merely clarified by the 1976 Amendment and there is no change in the law after the Amendment."

15. The assessee's case is stronger for there is no finding by the Tribunal against it on the issue as to whether it is engaged in the business of carrying on banking. The Tribunal, as we noted earlier, did not think it

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

necessary to decide this issue as it found that the assessee was entitled to succeed on another basis. There is in fact, therefore, nothing in the order of the Tribunal on this issue. In such a situation, there is no question of requiring the assessee to file cross-objections or an independent appeal. It often happens that certain issues are not dealt with by a Court or Tribunal although they may have been pressed especially where the Court holds in favour of a party on a different basis. This, as is apparent, is what has happened in the present case. The submission, therefore, that the assessee is not entitled to raise this point in the absence of cross-objections or a separate appeal is rejected.

16. Whether the assessee was at the relevant time engaged in carrying on the business of banking or not is a mixed question of law and of fact. Considering the manner in which the proceedings have been dealt with it may be necessary to consider leading additional evidence. We refrain, therefore, from deciding this issue and would leave it to the Tribunal to decide the same.

17. This brings us to a consideration of the questions of law on the admitted basis that the appellant is engaged in carrying on the business of providing credit facilities to its members.

18. The four questions of law indicate the four sources of income namely interest from the amounts advanced to the assessee's employees, interest on reserve funds invested by the assessee, interest on the loans advanced by the assessee to non-members and interest on call deposits made by the assessee. There is also the issue of disallowance on the provision of non-performing assets (NPA).

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

19. It would be convenient to deal with question No.1 last.

Re: Question No.2: -

20. As far as the disallowance on provision of non-performing assets (NPA) is concerned, it is admitted that the assessee would be entitled to the same only in the event of it being found that it is also engaged in carrying on the business of banking. It does not arise under Section 80P(2)(a)(i) on account of the business of providing credit facilities to the assessee's members.

21. Question No.2 is, therefore, answered against the assessee insofar as the claim is based only on the assessee being engaged in carrying on the business of providing credit facilities to its members.

Re: questions No.3 and 4: -

22. Ms.Dhugga's submissions in support of her case on these two questions of law were essentially the same. We, therefore, deal with them together.

23. The assessee earned interest income of about Rs.3.99 crores on the investment of its reserve funds. The AO disallowed the claim on the basis that the interest was not earned on account of providing credit facilities to the assessee's members but was earned on surplus funds kept by the assessee in banks to earn income. The CIT(A) allowed the claim on the ground that interest invested out of reserve funds is to be treated as arising on account of the activity attributable to the assessee's business of providing credit facilities to its members. The Tribunal dealt with the term “attributable” in Section 80P(2)(a)(i) and held that the income may be said to be incidental and in proximity to the business of the assessee of

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

providing credit facilities to its members. The Tribunal relied upon its earlier judgment including the judgment of the Special Bench of the Tribunal. The Tribunal rejected the department's contention that the surplus funds had been invested not for providing further credit to their members but to maximize profits for utilization in other areas.

24. The assessee also earned interest income of about Rs.5.84 crores from call deposits made with various banks. This income was also earned by the assessee placing its surplus funds as deposit with banks for short terms with a view to ensure that the funds did not remain idle. The AO declined this claim also on the ground that interest was not earned from the business of providing credit facilities to the assessee's members. The CIT(A), however, allowed the claim. The Tribunal upheld the decision holding that such interest was attributable to the business of providing credit facilities to the assessee's members.

25. Ms.Dhugga submitted that after the decision of the Tribunal dated 25.03.2009, the Supreme Court delivered the judgment in *Totgar's Co-operative Sale Society Ltd. vs. Income Tax Officer* (2010) 3 SCC 223. She submitted that the judgment covers the case in favour of the Revenue. In that case, the assessee was also a Cooperative Credit Society which provided credit facilities to its members and also marketed the agricultural produce of its members. The society had surplus funds which it invested in short term deposits with banks and in Government securities on interest. The question before the Supreme Court was whether such interest income would qualify for deduction as business income under section 80P(2)(a)(i) of the Act. The Court was only

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

concerned with interest income on short term bank deposits and securities. Paragraphs 15, 16, 17, 18, 20 and 21 of the judgment read as under:-

> **"15.** At the outset, an important circumstance needs to be highlighted. In the present case, the interest held not eligible for deduction under Section 80-P(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 Section 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*. The assessee(s) markets the produce of its members and wholesale 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 Section 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 Section 56 of the Act, as rightly held by the assessing officer.
>
> **16.** In this connection, we may analyse Section 80-P of the Act. This section comes in Chapter VI-A, which, in turn, deals with "Deductions in respect of certain incomes". The headnote to Section 80-P indicates that the said section deals with deductions in respect of income of cooperative societies. Section 80-P(1), inter alia, states that where the gross total income of a cooperative 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 Section 80-P(2) of the Act, would be eligible for deduction. The word "income" has been defined under Section 2(24)(*i*) of the Act to include profits and gains. This sub-section is an inclusive provision. Parliament has included specifically "business profits" into the definition of the word "income". Therefore, we are required to give a precise

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

meaning to the words “profits and gains of business” mentioned in Section 80-P(2) of the Act.

17. In the present case, as stated above, the 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 Section 80-P(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”.

18. Further, as stated above, the 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 Section 80-P(2)(*a*)(*i*) of the Act or in Section 80-P(2)(*a*)(*iii*) of the Act. Therefore, looking to the facts and circumstances of this case, we are of the view that the assessing officer was right in taxing the interest income, indicated above, under Section 56 of the Act.

20. A number of judgments were cited on behalf of the assessee(s) in support of its contention that the source was irrelevant while construing the provisions of Section 80-P of the Act. We find no merit because all the judgments cited were cases relating to cooperative banks and the assessee Society is not carrying on banking business. We are confining this judgment to the facts of the present case. To say that the source of income is not relevant for deciding the applicability of Section 80-P of the Act would not be

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

> correct because we need to give weightage to the words “the whole of the amount of profits and gains of business” attributable to one of the activities specified in Section 80-P(2)(*a*) of the Act.
>
> **21.** An important point needs to be mentioned. The words “the whole of the amount of profits and gains of business” emphasise that the income in respect of which deduction is sought must constitute the operational income and not the other income which accrues to the society. In this particular case, the evidence shows that the assessee Society earns interest on funds which are not required for business purposes at the given point of time. Therefore, on the facts and circumstances of this case, in our view, such interest income falls in the category of “Other income” which has been rightly taxed by the Department under Section 56 of the Act.”

26. The judgment cannot be restricted to cases where the amount invested was the sale proceeds of the produce of an assessee's members marketed by the assessee. The judgment applies to funds not immediately required for business purposes. Funds not immediately required for business purpose include the amounts received towards the sale price of the produce. However, it is not such funds alone that can be said to be not immediately required for business purposes. An assessee such as the respondent may have funds from other sources which are not immediately required for business purpose as well. They would include advances from other entities for the purpose of the assessee in turn using the same for its business of providing credit facilities to its members. If such funds instead of being advanced to the assessee's members are invested with banks the income from such investments equally cannot be said to be attributable to the assessee's business of providing credit facilities to its members. Thus, the income in the present case is not from providing credit facilities to the assessee's members but from the

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

investment with non-members including commercial banks.

27. The judgment of a Division Bench of this Court dated 10.05.2011 in *Commissioner of Income Tax-II, Chandigarh Vs. M/s Punjab State Cooperative Federation of Housing Building Societies Ltd.*, (ITA-643-2010) supports this view. In that case also, the assessee was a Cooperative Federation and claimed a deduction under the same section. The Tribunal held that the interest income was incidental to the business of the assessee of providing credit facilities to its members. In that appeal, the following question of law were raised and the Division Bench answered the same as follows: -

> "Whether on the facts and in the circumstances of the case and in law the order of the Hon'ble Tribunal is perverse in holding that interest income from commercial banks being attributable to the business activity of the assessee, qualifies for deduction u/s 80P(2)(a)(i) of the Act, ignoring the facts that direct source of income is not the loans advanced to the members of the society and it is only the interest income from commercial banks in the form of fixed deposits and saving banks accounts?"
>
> "4. Plea on behalf of the revenue is that interest received by the assessee from commercial banks was not covered by Section 80P(2)(a)(i). It has nothing to do with the interest income on the loan advanced to the members. Reliance has been placed on the judgment of the Hon'ble Supreme Court in **The Totgars Cooperative Sale Society Ltd. v. I.T.O., 2010 (35) DTR 25** holding that interest on bank deposits or Government securities derived by a Cooperative Society could not be attributed to the activities of the Society of providing various facilities to its members and was taxable under Section 56 being income from other sources. It appears that since the judgment of the Tribunal is prior to the judgment of the Hon'ble Supreme Court relied upon on behalf of the revenue, the Tribunal

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

> did not have advantage of the law laid down therein. The matter is, thus, covered in favour of revenue by the judgment of Hon'ble Supreme Court. Contrary view of the Tribunal cannot be sustained.
>
> 5. In view of above, following the judgment of the Hon'ble Supreme Court in **The Totgars Cooperative Sale Society Ltd. case (supra)**, we decide the question in favour of the revenue. The appeal is allowed."

28. By an order dated 03.09.2012, the Supreme Court granted leave to appeal against this judgment in Petition(s) for Special Leave to Appeal (Civil) No(s). 22745/2011 but declined to grant any stay. We are bound by this judgment. It is not open to us to refuse to follow it on the ground that it has not considered the judgment of the Supreme Court in its correct perspective. We are, in any event, in respectful agreement with the interpretation of the Division Bench of Totgar's case.

29. Our view is also supported by a judgment of the Gujarat High Court in the case of *State Bank of India (SBI) vs. Commissioner of Income Tax (Guj.)*, (2016) 142 DTR (Guj.). (The name of the appellant in the reported case is incorrectly shown as *State Bank of India (SBI)*. Even the website of the Gujarat High Court indicates the wrong name in the title. Through the Gujarat High Court, we verified that in the original proceedings the name of the appellant is correctly shown as "*State bank of India Employees Co-op. Credit & Supply Soc. Ltd., Main Branch, Bhadra, Ahmedabad.")*

One of the questions in that case was "Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that interest income of Rs.16,14,579/- on deposits placed with SBI was exempt under s. 80P(2)(a)(i) of the IT Act?" In that case, the appellant

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

was a Cooperative Society registered under the Gujarat Cooperative Societies Act, 1961 and had as its object the acceptance of deposits from salaried persons of the State Bank of India with a view to encourage thrift of providing credit facilities. The appellant earned interest income from the State Bank of India. It contended that interest income was business income and was exempt under Section 80P(2)(a)(i). The CIT in proceedings under Section 263 rejected the contention. The Tribunal was of the view that both the deposits were made in banks so that the funds are not kept idle. The motive for making the deposit cannot change the character of the interest income earned on deposits made to one arising from the business of providing credit facilities to the assessee's members. The Division Bench of the Gujarat High Court referred inter-alia to the judgments referred to by Mr.Bansal before us. The Division Bench dealt with Section 80P(2)(a)(i) and the judgment of the Supreme Court in Totgar's case (supra) and held as follows: -

> "12. ...Thus, in the case of a co-operative society engaged in carrying on the business of banking or providing credit facilities to its members, what is deductible under section 80P of the Act is the whole of the amount of profits and gains of business attributable to any one or more such activities. The Supreme Court in ***Totgars Co-operative Sale Society*** (supra) has, while giving a precise meaning to the words "profits and gains of business" mentioned in section 80P (2) of the Act, observed that the assessee in that case regularly invested funds not immediately required for business purposes and was of the view that interest on such investments, therefore, cannot fall within the meaning of the expression "profits and gains of business". It was held that such interest income cannot be said 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 to its members. The court further held that

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

the words “the whole of the amount of profits and gains of business” emphasise that the income in respect of which deduction is sought must constitute the operational income and not the other income which accrues to the society. The court observed that in that particular case, the evidence showed that the assessee-society earned interest on funds which were not required for business purpose at the given point of time. Therefore, in the facts and circumstances of the case, the court was of the view that, such interest income falls in the category of “Other income” which had rightly been taxed by the Department under section 56 of the Act.

13. In the opinion of this court, in case of a society engaged in providing credit facilities to its members, income from investments made in banks does not fall in any of the categories mentioned under section 80P(2)(a) of the Act. In the case of ***Totgars Co-operative Sale Society*** (supra), as rightly submitted by the learned counsel for the respondent, the court was dealing with two kinds of activities: interest income earned from the amount retained from the amount payable to the members from whom produce was bought and which was invested in short-term deposits/securities; and the interest derived from the surplus funds that the assessee therein invested in short-term deposits with the Government securities. This is further clear when one peruses the decision of the Karnataka High Court from which the matter travelled to the Supreme Court wherein it was the case of the assessee that it was carrying on the business of providing credit facilities to its members and therefore, the appellant-society being an assessee engaged in providing credit facilities to its members, the interest received on deposits in business and securities is attributable to the business of the assessee as its job is to provide credit facilities to its members and marketing the agricultural products of its members. This court is, therefore, of the view that the above decision is not restricted only to the investments made by the assessee therein from the retained amount which was payable to its members but also in respect of funds not immediately required for business purposes. The Supreme Court has held that interest on such investments, cannot fall within the meaning of the expression “profits and gains of business” and that such interest income cannot be said to be attributable to the activities of the

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

society, namely, carrying on the business of providing credit facilities to its members or marketing of agricultural produce of its members. The court has held that when the assessee society provides credit facilities to its members, it earns interest income. The interest which accrues on funds not immediately required by the assessee for its business purposes and which has been invested in specified securities as "investment" are ineligible for deduction under section 80P(2)(a)(i) of the Act. For the above reasons, this court respectfully does not agree with the view taken by the Karnataka High Court in ***Tumkur Merchants Souharda Credit Cooperative Ltd. v. Income Tax Officer Ward-V, Tumkur*** (supra) that the decision of the Supreme Court in ***Totgars Co-operative Sale Society*** (supra) is restricted to the sale consideration received from marketing agricultural produce of its members which was retained in many cases and invested in short term deposit/security and that the said decision was confined to the facts of the said case and did not lay down any law.

14. Thus, in the light of the principles enunciated by the Supreme Court in ***Totgars Co-operative Sale Society*** (supra), in case of a society engaged in providing credit facilities to its members, income from investments made in banks does not fall within any of the categories mentioned in section 80P(2)(a) of the Act.... ....

15. On behalf of the appellant, reliance has been placed upon bye-law 7 of its Bye-laws, which as translated into English reads thus: "*When the funds of the society are not in use, the same shall be invested or kept in deposit in accordance with the provisions of section 71 of the Co-operative Societies Act.*" The objects of the society as stated in the Bye-laws are:

(1) to encourage thrift, self-sufficiency and co-operation amongst members of the society;

(2) to inculcate the concept of savings amongst the members;

(3) to give credit to the members at reasonable rates when the occasion arises; and

(4) to carry out all activities for achieving the objects of the society.

Thus, the objects of the appellant society do not contemplate investment of surplus funds received from its members. Insofar as Bye-law 7 is concerned, it may be noted that the same falls under the

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

> heading "fund" and not under the objects of the society. Thus, the object of the society is to provide credit facilities to its members and it is the income earned out of the credit advanced to the members that is allowable as a deduction under section 80P(2)(a)(i) of the Act. The learned counsel for the appellant has relied upon various decisions wherein the assessee was a banking company. In the opinion of this court, since the appellant admittedly does not carry on any banking business, the said decisions would not be applicable in the facts of the present case." (emphasis supplied)

30. We are entirely in agreement with the judgment of the Gujarat High Court especially the observation that the judgment of the Supreme Court is not restricted only to the investments made by the assessee from the amounts retained by it which were payable to its members and that the judgment also applies in respect of other funds not immediately required for business purposes.

We reproduced paragraph 15 of the judgment only to indicate that we uphold the appellant's case only on the ground that the assessee is not entitled to the said deduction on the basis that it is engaged in carrying on the business of providing credit facilities to its members. We do not express any opinion as to whether the appellant would be entitled to the said benefit in the event of it being held that the assessee is also engaged in carrying on the business of banking. That is an issue that the Tribunal would decide upon remand pursuant to this order.

31. Mr.Bansal relied upon the judgment of the Andhra Pradesh High Court in *Commissioner of Income Tax vs. Andhra Pradesh State Cooperative Bank Ltd.* [2011] 336 ITR 516 (AP). The judgment is distinguishable. In that case, the respondent-assessee was a Cooperative

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

Society engaged in the business of banking and it was held that the assessees were subject to the regulations of the Reserve Bank of India Act, 1934 and the Banking Regulation Act, 1949. The Division Bench distinguished the judgment of the Supreme Court in Totgar's case (supra) on the ground that the Supreme Court was not dealing with the case relating to cooperative banks. The present appeal is not being considered on the basis that banking is the assessee's business either.

32. Mr.Bansal relied upon the judgment of the Karnataka High Court in *Tumkur Merchants Souharda Credit Cooperative Ltd. vs. Income-tax Officer, Word-V, Tumkur* [2015] 55 taxmann.com. 447 (Karnataka). In that case, the assessee-Cooperative Society provided credit facilities to its members and earned interest from short term deposits with banks and from savings bank accounts. The interest income earned by the assessee by providing credit facilities to its members was deposited in banks for a short duration which earned interest. The question was whether this interest was attributable to the business of providing credit facilities to the members. The Division Bench held as follows: -

> "8. Therefore, the word "attributable to" is certainly wider in import than the expression "derived from". Whenever the legislature wanted to give a restricted meaning, they have used the expression "derived from". The expression "attributable to" being of wider import, the said expression is used by the legislature whenever they intended to gather receipts from sources other than the actual conduct of the business. A Cooperative Society which is carrying on the business of providing credit facilities to its members, earns profits and gains of business by providing credit facilities to its members. The interest income so derived or the capital, if not

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

immediately required to be lent to the members, they cannot keep the said amount idle. If they deposit this amount in bank so as to earn interest, the said interest income is attributable to the profits and gains of the business of providing credit facilities to its members only. The society is not carrying on any separate business for earning such interest income. The income so derived is the amount of profits and gains of business attributable to the activity of carrying on the business of banking or providing credit facilities to its members by a co-operative society and is liable to be deducted from the gross total income under Section 80P of the Act.

9. In this context when we look at the judgment of the Apex Court in the case of M/s. Totgars Cooperative Sale Society Ltd., on which reliance is placed, the Supreme Court was dealing with a case where the assessee-Cooperative Society, apart from providing credit facilities to the members, was also in the business of marketing of agricultural produce grown by its members. The sale consideration received from marketing agricultural produce of its members was retained in many cases. The said retained amount which was payable to its members from whom produce was brought, was invested in a short-term deposit/security. 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 Section 80P(2)(a)(i) of the Act or under Section 80P(2)(a)(iii) of the Act. Therefore in the facts of the said case, the Apex Court held the assessing officer was right in taxing the interest income indicated above under Section 56 of the Act. Further they made it clear that they are confining the said judgment to the facts of that case. Therefore it is clear, Supreme Court was not laying down any law.

10. In the instant case, the amount which was invested in banks to earn interest was not an amount due to any members. It was not the liability. It was not shown as liability in their account. In fact this amount which is in the nature of profits and gains, was not immediately required by the assessee for lending money to the members, as there were no takers. Therefore they had deposited the money in a bank so as to earn interest. The said interest income is

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

attributable to carrying on the business of banking and therefore it is liable to be deducted in terms of Section 80P(1) of the Act. In fact similar view is taken by the Andhra Pradesh High Court in the case of **COMMISSIONER OF INCOME-TAX III, HYDERABAD vs. ANDHRA PRADESH STATE COOPERATIVE BANK LTD.,** reported in **(2011) 200 TAXMAN 220/12**. In that view of the matter, the order passed by the appellate authorities denying the benefit of deduction of the aforesaid amount is unsustainable in law. Accordingly it is hereby set aside. The substantial question of law is answered in favour of the assessee and against the revenue. Hence, we pass the following order.

Appeal is allowed."

(The reproduction is from the original website of the Karnataka High Court).

There is an important distinction. The Division Bench expressly held in paragraph 10 that interest income was attributable to the business of banking and, therefore, liable to be deducted under Section 80P(2)(a)(i) of the Act. At the cost of repetition, we have not considered whether the assessee carries on the business of banking. If it is established upon remand that the assessee carries on the business of banking the result may be different. In any event assuming that the judgment is not distinguishable on this ground, we would with respect disagree with the same in view of the judgments that we have already referred to and on the basis of our interpretation of Totgar's case. In any event, we are with respect unable to agree with the observations that the Supreme Court in Totgar's case (supra) did not lay down any law.

33. For the same reason, the judgment of the Karnataka High Court in *Guttigedarara Credit Co-operative Society Ltd. vs. Income-tax Officer, Ward 2(2), Mysore*, [2015] 60 taxmann.com 215 (Karnataka) is

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

of no assistance to the respondent-assessee.

34. In these circumstances, questions No.3 and 4 are answered in favour of the Revenue and against the assessee. The judgment of the Tribunal in that regard is set aside.

Re: question No.1 : -

35. The assessee would be entitled to the benefit of Section 80P (2)(a)(i) in respect of the interest earned on advances to its employees only if employees fall within the ambit of the term “members” in that section. We reiterate that in the event of it being held that the assessee carries on the business of banking it may be a different matter even if the employees are not members as we have in fact held.

36. The assessee's employees cannot be said to be members. The term “members” is not defined in the Income Tax Act, 1961. In *U.P. Co-operative Cane Union Federation Ltd. vs. Commissioner of Income Tax* [1999] 237 SC 574, the Supreme Court considering the claim again under Section 80P(2)(a)(i) held: -

> “The expression “members” is not defined in the Act. Since a co-operative society has to be established under the provisions of the law made by the State Legislature in that regard, the expression “members” in section 80P(2)(a)(i) must, therefore, be construed in the context of the provisions of the law enacted by the State Legislature under which the co-operative society claiming exemption has been formed. It is, therefore, necessary to construe the expression “members” in section 80P(2)(a)(i) of the Act in the light of the definition of that expression as contained in section 2(n) of the Co-operative Societies Act....”

37. We must, therefore, turn to the provisions of the Punjab

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

Cooperative Societies Act, 1961 which we were informed, applies to the assessee. Section 2(g) of the Punjab Cooperative Societies Act, reads as follows:-

> "**2. Definitions**.
>
> ... ...
>
> (g) "members" means a person joining in the application for the registration of a cooperative society and a person admitted to membership after such registration in accordance with this Act, the rules and the bye-laws and includes a nominal and an associate member and the Government when it subscribes to the share-capital of a society."

The definition of members does not include employees.

38. In the circumstances, question No.1 is also answered in favour of the Revenue and against the assessee.

39. In these circumstances, the order of the Tribunal is set aside. The questions of law are decided in favour of the assessee but only on the basis that the assessee is engaged in carrying on the business of providing credit facilities to its members. The Tribunal shall decide the appeal afresh only on the question as to whether the assessee is also engaged in carrying on the business of banking. In the event of the finding being against the assessee, it would not be entitled to succeed on the issues before us, in any event. However, in the event of the Tribunal finding that the assessee is engaged in carrying on the business of banking, the Tribunal shall decide as to whether on that basis the assessee is entitled to the benefit of Section 80P(2)(a)(i) or under any other provision in respect of the claims that are the subject matter of this appeal.

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh

The appeal is accordingly disposed of.

[S.J. VAZIFDAR]
CHIEF JUSTICE

11th November, 2016

[DEEPAK SIBAL]
JUDGE

shamsher

Whether reasoned/speaking : Yes / No

Whether reportable : Yes / No

Shamsher Singh
2016.11.23 17:26
I attest to the accuracy and
authenticity of this document
Chandigarh