

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT. JUSTICE T.RAJANI

+ I.T.T.A. Nos.399, 400 and 401 of 2017

% 13-9-2017

M/s The Eluru Cooperative House Mortgage Society Ltd.,
Gopaluvvari Street, R.R. Pet, Eluru,
Rep. by its President

... Appellant

Vs.

\$ Income Tax Officer, Ward-2, KKS towers,
R.R. Pet, Eluru

... Respondent

! Counsel for Appellant: Mr. A.V. Krishna Koundinya,
Senior Counsel, representing
Mr. A.V.A. Siva Kartikeya

Counsel for Respondent: Mr. B.Narasimha Sarma,
Senior Standing Counsel

< Gist:

> Head Note:

? Cases referred:
Nil.

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
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I.T.T.A. Nos.399, 400 and 401 of 2017

Common Judgment: (per V.Ramasubramanian, J.)

These appeals are by the assessee viz., the Eluru Cooperative House Mortgage Society Limited, filed under Section 260A of the Income Tax Act, 1961.

2. Heard Mr. A.V. Krishna Koundinya, learned Senior Counsel appearing for the appellant and Mr. B.Narasimha Sarma, learned Senior Standing Counsel for the respondents/ Department.

3. The appellant is a Cooperative Society, established way back in the year 1963. Originally, the appellant was registered as The Eluru Cooperative House Mortgage Bank Limited. But the Reserve Bank of India as well as the Cooperative Department of the State refused to accord permission to the appellant to carry on the business of banking under the said name. Therefore, the word "Bank" was deleted from the name of the appellant, with effect from 19-02-2009. In other words, the appellant claimed that it is not a bank within the meaning of Section 80P(4) of the Income Tax Act, 1961.

4. The appellant filed its returns of income for the Assessment Years 2007-08, 2008-09 and 2009-10, declaring 'nil' income after claiming deduction under Section 80P(2),

on the ground that it was running on the principle of mutuality, dealing only with its own members.

5. However, the Assessing Officer issued show cause notices proposing to refuse deduction on the ground that the appellant was carrying on banking businesses and was accepting deposits from non-members. The objections filed by the assessee/appellant were overruled and the Assessing Officer passed orders of assessment.

6. As against the order of assessment passed in respect of all the three Assessment Years 2007-08, 2008-09 and 2009-10, the appellant filed statutory first appeals before the Commissioner of Income Tax (Appeals). The CIT (Appeals) accepted the claim of the appellant that they were not dealing with non-members, insofar as Assessment Years 2007-08 and 2009-10 are concerned and consequently allowed the appeals insofar as the deduction under Section 80P(2) is concerned. But the appeal filed by the assessee in respect of the Assessment Year 2008-09 was dismissed by CIT (Appeals), recording a contra finding to the effect that the appellant was dealing with non-members. It is interesting to note that the order of the CIT (Appeals) in respect of the Assessment Year 2008-09 was dated 25-01-2012 and the order of the CIT (Appeals) in relation to the Assessment Years 2007-08 and 2009-10 was dated 09-10-2012. Therefore, naturally it can be presumed that the Commissioner (Appeals) who dealt with the appeals in relation to the Assessment Years 2007-08 and

2009-10, had the benefit of the order of the CIT (Appeals) in relation to the Assessment Year 2008-09.

7. The assessee filed an appeal as against the order of the CIT (Appeals) dated 25-01-2012. The Department filed two appeals as against the order of the CIT (Appeals) dated 09-01-2012. There were also cross-objections in relation to certain other aspects, about which we are not concerned in the present batch of appeals.

8. The three appeals, one filed by the assessee in ITTA No.137 of 2012 in relation to the Assessment Year 2008-09 and the other two in ITTA Nos.473 and 474 of 2012 in relation to the Assessment Years 2007-08 and 2009-10 were taken up together by the Tribunal along with the cross-objections.

9. By a common order dated 23-12-2016, the Tribunal dismissed the appeal filed by the assessee in respect of the Assessment Year 2008-09, but allowed the two appeals of the Revenue in respect of the Assessment Years 2007-08 and 2009-10. Therefore, the assessee has come up with the above three appeals raising the following substantial questions of law:

1. Whether on facts and in circumstances of the case, the Hon'ble Tribunal was right in upholding the perverse conclusion of the Assessing Officer, that the Assessee was dealing with non-members, without bringing on record any specific instance of such dealings and referring to the Assessee's denial? and

2. Whether on facts and in circumstances of the case, the conclusion of the Hon'ble Tribunal, in holding that

the Assessee was dealing with non-members is not perverse, especially when it did not resolve the conflict on the point between the two 1st Appellate Authorities, nor it went into the factual arena, being the highest fact finding authority?

10. A careful look at the order of assessment passed by the Assessing Officer would show that insofar as the claim for deduction under Section 80P(2) is concerned, the Assessing Officer held the appellant ineligible, for the following reasons:

(i) that the assessee earlier carried a name that had a word “Bank” which came to be deleted only on 19-02-2009;

(ii) that in the original certificate of incorporation issued on 19-6-1963, the assessee’s name included the word “Bank”;

(iii) that assessee is a Mutual Benefit Society registered under Section 10 of the Andhra Pradesh Cooperative Societies Act, 1932 on the basis of limited liabilities, and the same was reflected in the Bye-laws of the Society; and

(iv) that the profits and gains of any business of banking including the provision of credit facilities, carried on by a cooperative society with its members, shall be treated as income as per the provisions of Section 2(24)(viiia).

11. The Assessing Officer also drew inspiration from the Bye-laws of the appellant/Society to come to the conclusion that one of the objects of the appellant/assessee was to function as a bank and to borrow funds from members and others. Additionally the Assessing Officer invited a reference to the audit report of the assessee for the Financial Year

2007-08, wherein it was reported in the “defects part” that the appellant was collecting deposits from members and non-members.

12. Therefore, on the basis of the above findings, the Assessing Officer came to the conclusion that the appellant was carrying on banking business.

13. The CIT (Appeals), while dealing with the appeal relating to the Assessment Year 2008-09, primarily went by the objects clause incorporated in the Bye-laws of the appellant/Society and the cooperative audit report, to come to the conclusion that the assessee was carrying on banking business. Additionally, the CIT (Appeals) held in his order dated 25-01-2012 relating to the Assessment Year 2008-09 that a Primary Cooperative Bank would also include a cooperative society, in view of the provisions of Section 56(ccv) of the Banking Regulations Act, 1949.

14. However, another CIT (Appeals), who dealt with the appeals relating to the Assessment Years 2007-08 and 2009-10 recorded a factual finding in para-5.2 of his order that there are no transactions with persons outside the society. The CIT (Appeals) in the said order, also pointed out that the appellant was directed to drop the word “Bank” from its name by a mandate of law and that therefore the denial of the benefit was not proper.

15. When all the three appeals, two passed in favour of the assessee and one passed in favour of the Revenue became

the subject matter of second appeal before the Tribunal, the Tribunal first took up the Assessment Year 2008-09 for consideration.

16. In paragraphs-8 to 11 of its common order, the Tribunal observed that the deletion of the word “Bank” from the name of the appellant in the year 2009; and the objects of the society which included acceptance of deposits from non-members are all pointers to the effect that they were carrying on banking business. In other words, on the sole basis that the name of the appellant/Society carried the word “Bank” up to 19-02-2009 and also on the basis that the objects clause in the Bye-laws of the Society indicated dealings with non-members, the Tribunal reversed the findings of the CIT (Appeals) in relation to the Assessment Years 2007-08 and 2009-10. After doing so in the first part of the order, the Tribunal took up for consideration the appeal in respect of the Assessment Year 2008-09 and followed the same logic in para-19.

17. A careful look at the entire order of the Tribunal would show that not even a single piece of evidence was produced either before the Assessing Officer or before the CIT (Appeals) to show that the appellant was in fact dealing with non-members. The fact that the name of the assessee carried the word “Bank”, up to the year 2009 by itself cannot be a pointer to the fact that the appellant was carrying on banking business. Similarly, the inclusion of some business

in the objects clause of a company or a society, cannot be the sole basis to decide that the company or society was actually carrying on business as per the said objects clause. Unfortunately, the Assessing Officer did not record a single transaction that the appellant had with a non-member. This is why the CIT (Appeals) was compelled to allow the appeals in respect of the Assessment Years 2007-08 and 2009-10. But another officer in respect of the Assessment Year 2008-09 followed the same logic that the Assessing Officer followed, to hold that the appellant was dealing with the non-members.

18. The entitlement of an assessee to the benefit of deduction under Section 80P(2), does not depend upon either the name of the assessee or the objects for which the assessee was established. The entitlement to deduction under the said provision would depend upon the actual carrying on of the business activity viz., banking. The fact that all cooperative banks would necessarily be cooperative societies, cannot lead to the presumption that all cooperative societies are also cooperative banks. There are different types of cooperative societies, many of whom may not be transacting any banking business. Let us take for instance an agricultural society. They may be indulging in the buying and selling of agricultural produce or seeds. In a way, the same could also be termed as a commercial or banking activity. But the same

would not make such societies banks within the meaning of the Banking Regulations Act, 1949.

19. The place where the Tribunal went wrong was that without reference to a single transaction that the appellant had with any non-member, the Tribunal upheld the findings of the Assessing Officer merely on the basis of the name of the appellant and one of the objects clause in the Bye-laws of the appellant/Society. Therefore, the finding of the Tribunal is obviously perverse and such a finding could not have been recorded on the basis of the material available on record. Hence, the questions of law are to be answered in favour of the appellant/assessee. Accordingly, they are answered in their favour and the appeals are allowed. The miscellaneous petitions, if any, pending in these appeals shall stand closed. No costs.

V.RAMASUBRAMANIAN, J.

T.RAJANI, J.

13th September, 2017.
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AND
HON'BLE SMT. JUSTICE T.RAJANI

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(per VRS, J.)



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