**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO.3332 OF 2019**

Reserve Bank Officers co-operative Credit
Society Ltd.
3rd floor, Amar Building, Sir P. M. Road,
Mumbai-400 001 ...Petitioner

Vs.

1. The Income Tax Officer- 17 (3) (1)
Room No.125, 1st Floor, Kautilya Bhavan,
C-41 to C-43, G Block, Bandra Kurla Complex,
Bandra (E), Mumbai- 400 051

2. The Jt. Commissioner of Income Tax-17 (3),
Kautilya Bhavan, Bandra Kurla Complex,
Bandra (E), Mumbai 400 051.

3. The Pr. Commissioner of Income Tax-17,
Aaykar Bhavan, M. K. Road, Mumbai-400 020

4. Union of India,
Aaykar Bhavan, Mumbai. ...Respondents

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Mr. Mandar Vaidya for Petitioner.
Mr. P. C. Chhotaray for Respondent.

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**CORAM : K. R. SHRIRAM AND**
**AMIT B. BORKAR, JJ.**

**DATE : 23 November 2021.**

**<u>ORAL JUDGMENT</u> : (Per Amit B. Borkar, J.)**

Rule. With the consent of both sides, Rule is made returnable forthwith.

2. By notice dated 14/3/2019, the Assessing Officer had sought to reopen the assessment under Section 148 of the Income Tax Act, 1961 (the Act) for Assessment Year 2014-2015. Objections that Petitioner submitted to reopen the assessment have been rejected by order dated 31/10/2019. Both the notice for reopening the assessment and the order disposing of the objections of Petitioner has been challenged in this petition under Article 226 of the Constitution of India.

3. Petitioner is a Co-operative Credit Society registered under the provisions of the Multi-State Co-operative Societies Act. Petitioner filed its return of income on 11/9/2014 for Assessment Year 2014-2015, declaring total income as 'Nil" after claiming deduction under Section 80P of the Act viz., deduction towards interest income received from co-operative Banks. Petitioner had received a sum of Rs.8,13,77,452/- as interest income from co-operative Banks in the relevant year. Petitioner in the said return had claimed deduction of Rs.3,40,12,354/- by confining the same to the gross total income as per Section 80P of the Act. Petitioner had also filed an audit

report in Form 3CA as contemplated by Section 44AB of the Act, which disclosed the amount of Rs.8,13,77,452/- being eligible and admissible for deduction under Section 80P of the Act.

4. Petitioner's return was picked up for scrutiny by issuing notice dated 9/5/2016 under Section 142 of the Act. Petitioner was called upon to explain and justify the deductions claimed under Chapter VIA of the Act in which Section 80P falls. In response to the said notice, Petitioner filed a reply dated 23/5/2016 explaining eligibility for deduction under Section 80P of the Act.

5. Respondent No.1 on 25/11/2016 issued further notice under Section 142 of the Act requiring Petitioner to justify the claim of deduction of Rs.3,40,12,534/- claimed under Section 80P of the Act. In response to the said notice, Petitioner filed a detailed reply dated 6/12/2016 explaining the eligibility of Petitioner for deduction under Section 80P of the Act by giving reconciliation of interest amount received from co-operative Banks. Respondent No.1 on 23/12/2016 passed an assessment order under Section 143(3) of the Act accepting Petitioner's claim for deduction under Section 80P of the Act by not making any additions to the income of Petitioner.

6. On 14/3/2019, respondent No.1 issued a notice under Section 148 of the Act seeking to reopen the assessment of Petitioner for Assessment Year 2014-2015. At the request made by Petitioner, respondent No.1 supplied reasons for such reopening. Reasons supplied by respondent No.1 disclosed that deduction under Section 80P is available only on income received from co-operative Society and not from a co-operative bank. Accordingly, respondent No.1 had reason to believe that the income to the extent of deduction allowed had escaped assessment. Upon receipt of the reasons, Petitioner submitted its objections to reopening of assessment by letter dated 15/10/2019. Petitioner stated in the objections that in the course of original assessment proceedings, the Assessing Officer had already examined the issue, which is the issue in reopening. Thereafter Assessing Officer accepted the claim of the Petitioner by not disallowing deduction towards Section 80P of the Act. Therefore, it was stated that the reopening of the assessment on the said issue amounted to a change of opinion. It was further stated that reopening of assessment was without any new material brought on record. Petitioner also stated, on merits, that the issue of deduction under Section 80P of the Act on income received from co-operative Bank was covered in favour of Petitioner by the decisions of various High Courts and Income Tax Appellate Tribunal.

7. Respondent No.1, vide order dated 31/10/2019 and served upon Petitioner on 4/11/2019, dismissed the objections. Therefore, Petitioner has filed the present petition challenging the notice of reopening of assessment and order of rejection of objections.

8. Mr. Vaidya, learned Advocate for Petitioner, submitted that

(i) There was no tangible material based on which the Assessing Officer could have formed reason to believe that income had escaped assessment. Reason to believe cannot be based on the same material.

(ii) Once the reason to believe has been formulated in pursuance to notice under Section 148 of the Act, no improvement is permissible at the behest of succeeding Assessing Officer, who disposed of the objections raised by Petitioner to the reopening of assessment.

(iii) The issue of deduction of interest received from co-operative Banks under Section 80P of the Act was raised by respondent No.1 in the course of original assessment proceedings. After he was satisfied, he made no addition or disallowance in respect of the said issue.

(iv) Specific query was raised by respondent No.1 during original proceedings by issuing notice under section 142 of the Act to show cause as to why such deductions are not to be disallowed, which was replied by Petitioner and the Assessing Officer had not dis-allowed the said deductions.

(v) If the stand of Revenue is to be accepted, the sanctity attached to proceedings under Section 143(3) would be done away with.

(vi) It is evident from the reasons supplied to Petitioner for reopening the assessment that no new material has been brought on record for respondent to have any reason to believe that any income had escaped assessment.

9. Mr. Chhotaray appearing on behalf of Revenue, submitted that

(i) Section 80P(2)(d) of the Act does not extend the benefit of the deduction for interest received from the investment made with co-operative Banks as co-operative Banks are not co-operative Society as defined under Section 2(19) of the Co-operative Societies Act.

(ii) From the tenor of the original assessment order, it is clear that the Assessing Officer had not applied his mind to the issue of eligibility of Petitioner to the deduction for interest received from the investment made with co-operative Banks.

(iii) The Assessing Officer was within his jurisdiction in reopening the assessment under Section 148 of the Act and had correctly rejected the objections preferred by Petitioner.

10. The rival submission now fall for determination. From the reasons supplied to Petitioner, it appears that assessment for the assessment year 2014-2015 is sought to be reopened principally on the ground that Petitioner claimed deduction under Section 80P (2) of the Act, which is clearly in contravention of the provisions of the Act and the income from Fixed Deposits was required to be shown under the head "income from other sources". Additionally, as per the provision of the Act, a co-operative Bank is an Urban Commercial Bank and does not fall under the term 'Co-operative Society' referred to under Section 80P(2)(d) of the Act.

11. Reading the reasons of the Assessing Officer, it is evident that there is absolutely no tangible material based on which he could have reopened assessment for the assessment year 2014-2015. It is not in dispute that Petitioner is a Multi-State Co-operative Society registered under the Multi-State Co-operative Societies Act. It is also not in dispute that the Assessing Officer raised a specific query during the original assessment proceedings by issuing notice under Section 142 of the Act

calling upon Petitioner to show cause as to why deduction under Section 80P of the Act cannot be disallowed. Undisputedly, Petitioner filed a reply to the said notice, and the original assessment order was passed. It is also not in dispute that Petitioner, during the original assessment, had filed an audit report in Form 3CA as mandated by Section 44AB of the Act stating the amount of Rs.8,13,77,452/- admissible for deduction under Section 80P of the Act.

12. Section 147 enables the Assessing Officer to assess or reassess any income chargeable to tax which he has reason to believe has escaped assessment for an assessment year. The proviso to section 147 imposes additional requirements where an assessment is sought to be reopened beyond a period of four years from the end of the relevant assessment year. In the present case, the exercise of power is within a period of four years and, therefore, the requirements of the proviso are not attracted. Where the Assessing Officer purports to exercise power under section 147 within a period of four years of the end of the relevant assessment year, the condition precedent to the exercise of the power, is the existence of a reason to believe that any income chargeable to tax has escaped assessment. We must keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the

power to reassess. The reassessment has to be based on the fulfillment of certain conditions. It is settled law that if the concept of change of opinion is removed, then in the guise of reopening the assessment, the review would take place. The concept of change of opinion has been built in the statute to check abuse of power by the Assessing Officer. The Assessing Officer has the power to reopen only when there is tangible material to come to the conclusion that there is escapement of income from the original assessment. The test of "tangible material" has been enunciated in a judgment of the Supreme Court in ***CIT* v. *Kelvinator of India Ltd.***[1] held thus (page 564):

> *"... one needs to give a schematic interpretation to the words 'reason to believe' failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of 'mere change of opinion', which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on the fulfillment of certain pre-conditions. If the concept of 'change of opinion' is removed, as contended on behalf of the Department, then the review would take place in the garb of reopening the assessment. One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the Assessing Officer. Hence, after April 1, 1989, the Assessing Officer has the power*

1 *[2010] 320 ITR 561*

*to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief…"*

13. Mr. Chhotaray, learned Counsel appearing for Revenue placed reliance on the proposition of law laid down by the Supreme Court in the three judgments viz., ***A. L. A. Firm vs. Commissioner of Income-Tax***[2]***, Rambagh Palace Hotels P. Ltd. vs. Deputy Commissioner of Income-Tax***[3] ***and Assistant Commissioner of Income-Tax vs. Rajesh Jhaveri Stock Brokers P. Ltd.***[4]

There cannot be a dispute about the proposition of law laid down in those judgments, but the judgments are distinguishable in the facts of the present case. Moreover, in the present case, the Assessing Officer raised a specific query in the original assessment proceedings, to which Petitioner replied. Therefore it is clear that Assessing Officer in the original assessment proceedings was conscious of the issue involved of the eligibility of Petitioner to claim deduction under Section 80P (2) of the Act.

14. The co-ordinate Bench of this Court has succinctly laid down the criteria for reopening of assessment within a period of 4 years in

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2 *(1991) 189 ITR 285 (SC)*
3 *(2013) 350 ITR 660 (Delhi)*
4 *(2007) 291 ITR 500 (SC)*

***Jainam Investments vs. Assistant Commissioner of Income Tax***[5] by holding that the Assessing Officer cannot reopen the assessment even within four years merely on the basis of change of opinion. The Assessing Officer had no power to review the assessment, which has been concluded unless he has tangible material to come to the conclusion that there is escapement of income from assessment.

For all these reasons, we are of the view that the exercise of jurisdiction under Section 148 of the Act in the present case is without any tangible material.

15. We, therefore, pass the following order:

**ORDER**

The impugned notice dated 14/3/2019 issued under Section 148 of the Act and order of rejection of Petitioner's objections dated 31/10/2019 are quashed and set aside.

16. Rule is made absolute in the above terms.

**(AMIT B. BORKAR, J)** **(K. R. SHRIRAM, J.)**

5 *Writ Petition No.2760 of 2019*

RAJESHWARI SUBODH KARVE
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Date: 2021.11.27 16:24:53 +0530