

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "E": NEW DELHI  
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
AND  
SHRI K. N. CHARY, JUDICIAL MEMBER  
(Through Video Conferencing)

ITA No. 5234/Del/2015  
(Assessment Year: 2012-13)

DCIT, Circle-1, Moradabad	Vs.	Moradabad Zila Sahkari Bank Ltd, Court Road, Moradabad PAN: AAABM0292N
(Appellant)		(Respondent)

Revenue by :	Shri Sohil Malik, Sr. DR
Assessee by:	Shri P. S. Kashyap, CA
Date of Hearing	31/03/2021
Date of pronouncement	21/06/2021

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the Id DCIT, Circle-1, Moradabad [ Ld AO] for Assessment Year 2012-13 against the order of the Pr. CIT, OSD (Appeals) [ Id CIT (A)] dated 09/06/2015 wherein the appeal filed by the assessee against the order passed by the Id DCIT, Circle-1, Moradabad dated 12/09/2014 u/s 143 of the Income Tax Act [ The Act] determined total income of the assessee at Rs. 2,20,03,610/- against the return income of Rs. 52,24,880/- was partly allowed.
2. The revenue has raised the following grounds of appeal:-
  1. *On the facts and the circumstances of the case and in law the Ld. Principal Commissioner of Income Tax (OSD)/(Appeal), Moradabad erred in deleting the addition of Rs.66.00,000/- made by the Assessing Officer on account of disallowance made u/s 43B of the Income Tax Act, 1961 with respect to Bonus not being credited/paid to the employees before due date of tiling of return of income.*
  2. *On the facts and the circumstances of the case and in law the Ld. Principal Commissioner of Income Tax (OSD)/(Appeal), Moradabad erred in accepting additional evidence/during the appellate proceedings in respect of addition made on account of the above disallowance u/s 43B of the Income Tax Act, 1961 without allowing a reasonable opportunity to the Assessing Officer to examine the correctness of the additional evidence as provided in Rule 46A(3) of the Income Tax Rule, 1962.*
  3. *On the facts and the circumstances of the case and in law the Ld. Principal Commissioner of Income Tax (OSD)/(Appeal), Moradabad erred in deleting the addition of Rs.92,070/- made by the Assessing Officer on account of excess provision made for Audit Fees.*
  4. *On the facts and the circumstances of the case and in law the Ld. Principal Commissioner of Income Tax (OSD)/(Appeal), Moradabad erred in deleting the*

*addition of Rs.36.640/- made by the Assessing Officer u/s 40(a)(ia) of the Income tax Act, 1961 on account of non deduction of tax at source on Audit Fees of Rs.36,640/-.*

5. *On the facts and the circumstances, of the case and in law the Ld. Principal Commissioner of Income Tax (OSD)/(Appeal), Moradabad erred in deleting the addition of Rs.77,00,000/- made by the Assessing Officer u/s 43B of the Income tax Act, 1961 with respect to Ex-Gratia/Bonus not being credited/paid before due date of filing of return of income.*
  6. *On the facts and the circumstances of the case and in law the Ld. Principal Commissioner of Income Tax (OSD)/(Appeal), Moradabad erred in deleting the addition of Rs. 1,90,01.000/- made by the Assessing Office) on account of disallowance of exemption claimed by the assessee u/s 80P(d) of the Income Tax Act, 1961 in respect of Dividend income received from other co-operative societies.*
  7. *On the facts and the circumstances of the case and in law the Ld. Principal Commissioner of Income Tax (OSD)/(Appeal), Moradabad erred in accepting additional evidence during the appellate proceedings in respect of addition made on account of the above disallowance of exemption claimed u/s 80P(d ) of the Income Tax Act, 1961 without allowing a reasonable opportunity to the Assessing Officer to examine the correctness of the additional evidence as provided in Rule 46A(3) of the Income Tax Rule, 1962.*
  8. *On the facts and the circumstances of the case and in law the Ld. Principal Commissioner of Income Tax (OSD)/(Appeal), Moradabad erred in directing the Assessing Officer to allow deduction to the assessee as provided u/s 36(1 )(viiia) of the Income tax Act, 1961 without considering the fact that the issue of deduction u/s 36(1)(viiia) of the Income tax Act. 1961 was neither involved in the assessment order nor it was claimed by the assessee in its return of income or during the assessment proceedings before the Assessing Officer.*
  9. *That the order of the Principal Commissioner of Income Tax(OSD)/(Appeal) is being erroneous in law and on facts may be cancelled and the order of the Assessing Officer may be restored.”*
3. Brief facts of the case shows that the assessee is cooperative society carrying on the business of banking finances. It filed its return of income on 30/09/2012 at Rs. 52,24,880/- and assessment order u/s 143(3) of the Act was passed on 12/09/2014 at total income of Rs. 2,20,03,610/-. Appeal preferred before the Ld CIT(A) was partly allowed. Thus, the Id AO aggrieved with the order of the Id CIT(A) preferred appeal before us.
  4. We have considered the argument of both the parties as well as the orders of the lower authorities and then adjudicate the grounds raised before us accordingly.
  5. The first ground of appeal is with respect to deletion of addition of Rs. 66 lakhs u/s 43B of the Act with respect to the bonus not credited or paid to the employees Account on or before the due date of filing return of income. The Id AO noted that assessee has made provision of Rs. 66 lakh for bonus payable to staff. The assessee submitted the ledger copy showing bonus payable and bonus paid in the subsequent years. According to the accounts bonus of Rs. 58,92,31,300/- was paid on 29/09/2012. The assessee submitted a certificate of Chartered Accountant to show that this sum was paid by assessee before the due date of filing of return of income. The Id AO rejected the certificate of the Chartered Accountant and held that the assessee could not submit anything to show that bonus was actually paid to

the employees on or before the due date of filing of the return. Therefore, he disallowed unpaid bonus u/s 43B of Rs. 66 lakhs. The Id CIT(A) deleted the above disallowances. The reason being that the assessee has paid the bonus to its employees of various branches based on the certificate of the Chartered Accountant which was issued after verification by the CA. Thus he deleted the disallowances. Before us the assessee has submitted the ledger account of the bonus payable, certificate of Chartered Accountant and further the names of each of the employee to whom the bonus was paid showing the names of the employees, designation, amount of bonus and Account No. of the employees to which the sum of the bonus was credited. On the basis of above evidences , it is clear that the above amount was paid on 29/09/2012 which is before the due date of the filing of return of income of the assessee. Hence, as the bonus is credited to the account of the employees before the due date of filing of return of income it cannot be disallowed u/s 43B of the Act. Accordingly, ground No. 1 of the appeal is dismissed.

6. Ground No. 2 is with respect to the admission of the additional evidence is by the CIT(A). However, Id DR could not show us that which additional evidence is admitted by the Id CIT(A) and what is irregularities if so admitted. On reading of the order of Id CIT(A) we could not find that the CIT(A) has admitted any additional evidences or any such additional evidence is produced before him. In view of this Ground No. 2 of the appeal is dismissed.
7. Ground No. 3 is with respect to the addition of addition of Rs. 92,070/- on account of excess provision made for audit fees. Brief facts shows that the assessee has made a provision of Rs. 3 lakhs of audit fees. Looking at the subsequent payment dated 21/08/2012 of Rs. 2,07,930/- the AO was of the view that Rs. 92,070/- is un paid and hence is disallowable. The AO was also of the view that on a sum of Rs. 36,640/- no tax is deducted and hence it is not allowable u/s 40a(ia). On appeal before the Id CIT(A) he allowed the claim in full. The fact shows that the assessee is a bank which is maintaining its book of account on mercantile basis for this year while closing its books of account it made a provision of Rs. 3 lacs as audit fees. However, only a sum of Rs. 2,07,930/- was actually paid to the auditor in subsequent period and balance of Rs. 92,070/- remained outstanding. Admittedly, there are several agencies who are auditing the books of accounts such as auditor appointed under the Cooperative Societies act, Chartered Accountants as per Reserve Bank of India and tax auditor u/s 44AB of the Act. Therefore, these three services rendered by three different agencies. The assessee made a provision based on the amount of advances and all other parameters for appointment and remuneration of auditors. Therefore, the provision is made based on working considering advances, and other circulars of RBI on estimated basis. So far as the issue of tax deduction at source is concerned the AO on the basis of amount of TDS made at Rs. 17,529/- proportionately allowed the amount and balance sum of Rs. 36,640/- was disallowed for non deduction of tax at source. Total expenditure incurred in respect of audit has been provided on above basis but subsequently payments are to be

made to separate persons and subject to prescribed limit with respect to each payee. In the case of assessee the prescribed limit exceeded only in one case of payment of Rs. 1,75,290/- and therefore to that extent TDS was made. Ld CIT(A) deleted the disallowances for non deduction of tax at source stating that there was no requirement of tax deduction at source on sum to the extent of Rs. 36,640/-. In fact the provision of audit fees was based on the advances of each of the branch and the fees is computed head wise for each branch based on the advances and required audit fees, the amount of out of pocket expenditure as per slab is also worked out. Further, on the amount of audit fee the provision of the services tax was also to be made. The fees for head office and consolidation of the branches in audit was also to be separately worked out. Based on this the assessee made the above provision. In view of this it cannot be said that the provision made by the assessee is unreasonable or without any basis. Anyway the excess provision made by the assessee for this year would also be reversed in the next year when the same is written back and new year's provision is made. Naturally for both the years the tax incidents on the sum is also at the same rate. Naturally, there has to be some estimation when provision is made, but it cannot be said that it is wayward and without any basis. In spite of this it cannot be said the provision made by the assessee for audit fee was not on the basis of which it was required to be paid. In view of this, we do not find any infirmity in the order of the Id CIT(A) in deleting the disallowances of Rs. 92,070/- in respect of the audit fees. Accordingly, ground No. 3 and 4 are dismissed.

8. Ground No. 5 is with respect to deletion of addition of Rs. 77 lakhs towards ex gratia bonus u/s 43B of the Act which according to the AO was not credited or paid before the due date of filing of the return. The fact shows that the assessee made provision of Rs. 77 lakhs as ex gratia payment to its employees. The payment is made as per policy of the bank on regular basis to its employees from year to year basis. The ex-gratia payment is calculated on the basis of salary of 45 days and considering it as a salary or incentives. The Id AO treated it as a 'bonus' and held that as the same is not paid before the due date of filing of the return of income it is disallowed u/s 43B of the Act. On appeal before the Id CIT(A) assessee submitted that there is a difference between the ex gratia incentives paid to the assessee to its employees and bonus. It was stated that it is an incentive and therefore it is allowable u/s 37(1) of the Act. The Id CIT(A) agreed with the same and held that ex gratia payment is different from bonus which is deductible u/s 36 of the Act. He held that ex-gratia payment is like salary/ incentive which is allowable u/s 37(1) itself and therefore provision of section 43B does not apply to it. Assessee has submitted the copy of the resolution of Board of Directors of the assessee dated 27/09/2012 based on which the ex-gratia payment was paid. It is in the form of allowances to the various employees. The resolution also shows that these ex-gratia was paid in view of the higher banking operation and increase in the work load of the staff. The board also decided that the incentive would be paid to the performing

employees only and would not be paid to the employees whose performance is not satisfactory. The bonus is a statutory liability according to the Payment Of Bonus Act. Thus, ex-gratia payment therefore do not partake the character of bonus. Therefore according to us the Id CIT(A) has correctly held that the provision of section 43B of the Act does not apply to ex-gratia payment and deleted the disallowance. . In view of this Ground No. 5 of the appeal is dismissed.

9. Ground No. 6 is with respect to deletion of addition of Rs. 19,01,000/- on account of exemption/ deduction u/a 80P(2) (d) in respect of dividend income received from other cooperative societies. The assessee is a cooperative society which has contributed its funds towards shares of some other cooperative societies in which assessee is a member and received dividend income from such member societies. The assessee claimed deduction of dividend income but the Id AO denied it. The assessee also pleaded that as dividend is received from member societies it is also not chargeable to income tax under the concept of mutuality. According to the provision of section 80P there are certain income of cooperative societies which are granted deductions. According to section 80P(2)(d) any income by way of interest or dividend derived by the cooperative societies from its investment with any other cooperative societies is not chargeable to tax under that section. The whole of the income of dividend would be exempt in case of cooperative societies carrying on the business of banking or providing credit facilities to its members. Though the Id CIT(A) held that the dividend income is also tainted with mutuality. However, without discussing this aspect we hold that dividend under the provisions of section 80P(2)(d) the above sum is deductible in the hands of the assessee. Therefore the claim of the assessee is otherwise allowable but for different reasons. Thus, in substance Ground No. 6 and 7 of the appeal of the AO is dismissed.
10. Ground No. 8 of the appeal is it with respect to the deduction u/s 36(1)(viiia) of the Act which was not involved in the assessment order and nor it was claimed by the assessee in its return of income or allowed by the Id AO. Before Id CIT(A) the assessee contested that the AO may be directed to allow deduction u/s 36(1)(viiia) at the rate of 7.5 % of the total income and 10% of average rural advance. The Id CIT(A) directed to allow the above claim of the assessee. We find that no such claim was made by the assessee before AO and AO did not have any occasion to examine such claim. Even on reading of the order of the Id CIT(A) we find that he has decided the issue on the basis of judicial precedents only. For the purpose of allowances of the claim u/s 36(1)(viiia) though assessee being a cooperative banking society qualifies for the above deduction in respect of provision of bad and doubtful debts made. However, the claim of the assessee is always restricted by the aggregate average aggregate advance made by the rural branches of the bank. The rural branches of the bank are defined in explanation 1 of that section. Therefore, it would be imperative for the assessee to show that the branches of the assessee are 'rural branches' and what is

aggregate average advance to be computed in the prescribed manner of those branches. Unless this is computed the deduction to the assessee cannot be allowed. The Id CIT (A) has allowed the claim of the assessee without verification of these details. Even before us there are no details produced with respect to rural branches. In view of this, we set aside this ground of appeal back to the file of the Id CIT(A) with direction to the assessee to show the rural branches of the assessee and compute their average rural advance as prescribed. Thereafter after giving proper opportunity of hearing to the assessee as well as to the AO, the claim of the assessee may be decided on the merits. Accordingly, Ground No. 8 of the appeal is allowed with above direction.

11. In the result the appeal of the Id AO is partly allowed.  
Order pronounced in the open court on 21/06/2021.

Sd/-  
( K. N. CHARY )  
JUDICIAL MEMBER

Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated : 21/06/2021  
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi

Date of dictation	21.06.2021
Date on which the typed draft is placed before the dictating member	21.06.2021
Date on which the typed draft is placed before the other member	21.06.2021
Date on which the approved draft comes to the Sr. PS/ PS	21.06.2021
Date on which the fair order is placed before the dictating member for pronouncement	21.06.2021
Date on which the fair order comes back to the Sr. PS/ PS	21.06.2021
Date on which the final order is uploaded on the website of ITAT	21.06.2021
date on which the file goes to the Bench Clerk	21.06.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	