IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH : 'C' NEW DELHI)

BEFORE SHRI I.P. BANSAL , JUDICIAL MEMBER AND
SHRI K.D. RANJAN, ACCOUNTANT MEMBER

I.T.A. Nos. 3350/Del./2009 &1194/Del./2011
(Assessment Years : 2005-06 & 06-07)

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| ACIT, Circle 23(1),<br>New Delhi. | Vs. | Indian Farmer Fertilisers Coop.Ltd.,<br>1, Distt. Centre, Saket,<br>New Delhi.<br>(PAN/GIR No.AAAAI0050M) |
| (Appellant) | | (Respondent) |

Assessee by : Shri Harbhajan Singh, Jt. GM(F&A)
Revenue by : Smt. Shyama S. Bansia, CIT(DR)

ORDER

PER K.D. RAJNAN, AM

These appeals by the Revenue for assessment years 2005-06 & 06-07 arise from separate order of CIT(A)-XXII, New Delhi. These appeals were heard together and for the sake of convenience are disposed of by this common order.

I.T.A. No.1194/Del./2011

2. The first issue for consideration relates to deleting the addition of Rs 13,03,74,047/- made u/s 43B of the Act. The facts of the case stated in brief are that the AO from tax audit report found that a sum of Rs.23,98,96,527/- has been shown payable as on 31.3.06. The tax audit report also stated that a sum of Rs.13,03,74,047/- on account

of payments of these liabilities had been added back and the balance amount of Rs10,95,22,480/-. The assessee was required to produce evidence for payment of liabilities. However, since assessee did not file any evidence, he disallowed the amount of Rs.13,03,74,047/- u/s 43B of the Act.

3. On appeal, it was submitted that the statutory dues payable on 31.3.2006 at Rs.13,03,74,047 were paid before furnishing/filing of income-tax return for assessment year 2006-07. The amount as well as subsequent dates of deposits of these payments have been verified and certified by the tax auditors. The CIT(A) deleted the addition on the ground that AO was required to allow the deduction u/s 43B on the basis of verification and certification of tax auditors as filed in form 3CD along with the return of income.

4. Before us, Ld. CIT(DR) supported the order of the AO. On the other hand, Ld. AR of the assessee relied on the order of the CIT(A).

5. We have heard both the parties. The assessee is a multi state cooperative Society having its sales office spread all over India and its accounts are decentralized. The tax audit report in form 3CD is compiled on the basis of tax audit reports received from various branch auditors in form 3CD. On identical issue, for assessment year 2004-05, the AO disallowed the payment u/s 43B, but the same was allowed by the CIT(A) on the ground that the dates of deposits have been verified and certified by the tax auditors of the assessee and the certificate of tax auditors was already available with the AO. The ITAT vide order dated 16.1.2009 upheld the order of CIT(A). We have gone through the order for assessment year 2004-05 in I.T.A. No.244/Del./08 dated 16.1.2009 in assessee's own case. ITAT, Delhi bench 'D' has allowed the issue in favour of the assessee by holding that the payments have been made before due date for filing of return of income. The CIT(A) was justified in deleting the addition. From the tax audit report, we also find that amount of Rs13,03,74,047/- has been shown as paid on or before due date for furnishing return of income for the previous year u/s 139(1) of the Act. Form 3CD has been prepared and signed by Rajnish & Associates, CA. The accounts of the assessee

have been audited by statutory auditors. The assessee had filed the details of payment of Rs.13,03,74,047/-. The assessee is entitled for deduction u/s 43B of the Act in respect of amount of Rs.13,03,74,047/-. Accordingly, we do not find any infirmity in the order passed by the CIT(A) deleting the addition made u/s 43B of the Act.

6. The next issue for consideration relates to deleting the addition of Rs 3,40,99,000/- made on account of contribution to Coop. Education Fund. The AO from the scrutiny of P&L A/c found that the assessee had claimed a sum of Rs 3,40,99,000/- on account of contribution to Coop. Education Fund being 1% of net profit of the society. In response to query raised by the AO, it was submitted that as per section 63 of Multi State Cooperative Society Act read with Rule 25 of Multi State Coop. Society Rules, 2002, every coop. Society shall credit a sum calculated at 1% of its net profit every year as contribution to Coop. Education Fund maintained by National Coop. Union of India, New Delhi. This fund is administered by a committee constituted by Central Govt. Accordingly, during the financial year 2005-06, the society made a provision of Rs. 3,40,99,000/- in the books of account towards contribution to Coop. Education Fund being 1% of the net profit of the society. As per the assessee the contribution to education fund being a statutory obligation is an overriding charges created under the said Act on the income of the IFFCO allowable expenditure u/s 37 of the Act. However, the assessing officer examined the provisions of section 63 of Multi State Coop. Society Act. As per the provision of this section a Multi State Coop. Society shall out of its net profit in any year:

(a) transfer an amount not less than 25% to reserve fund;

(b) credit 1% to Coop. Education Fund, maintained by the National Coop. Union of India Ltd., New Delhi, in the manner as may be prescribed; and

(c) transfer of amount not less than 10% to a reserve fund for meeting unforeseen losses.

7. The AO also examined Rule 25 of Multi State Coop. Society Rules, 2002, according to which 1% of its net profit shall be credited as contribution to Coop. Education Fund and maintained by National Coop. Union of India Ltd., New Delhi. The Coop. Education Fund shall be administered by a Committee constituted by the Central

Govt. for this purpose. The AO, therefore, observed that Rule 25, provides as to how the Coop. Education Fund is to be administered. But, these provisions do not make the claim of assessee allowable u/s 37 of the Act. The provisions of section 63 read with Rule 25 of the Multi State Coop. Societies Rules clearly state that 1% of net profit should be credited to a Coop. Education Fund. The AO relying on decision of Hon'ble Supreme Court in the case of Bombay Steam Navigation Co. vs. CIT, 56 I.T.R. 52 observed that there was no business expediency in the case of the assessee for making this payment. He was of the opinion that expenditure was not incurred for earning the income. The expenditure was application of income. Therefore, the same could not be allowed as business expenditure.

8. On appeal before CIT(A), it was submitted that in assessment years 2001-02 and 2002-03, the AO has himself allowed the deduction of contribution to Coop. Education Fund as the business expenditure on accrual basis. For assessment year 2004-05, for the first time, the AO had treated the expenditure as appropriate of profit only and was not incurred wholly and exclusively for the purpose of business. It was submitted that CIT(A) vide his order dated 29.10.2007 has deleted the addition. It has been held that statutory liability cast on the assessee itself justified the business expediency of the particular expenditure. Secondly, in the absence of any material change of facts, the view taken by the authorities below for earlier assessment years holds good for present assessment year also on the principle of consistency. The CIT(A) deleted the addition.

9. Before us, ld. CIT (DR) submitted that the contribution to Coop. Education Fund is application of income. The amount has not been incurred for earning the income. Therefore, it cannot be allowed as deduction u/s 37 of the Act. She also submitted that it is not a case of diversion of income. She placed reliance on the decision of Hon'ble Supreme Court in the case of CIT v Sunil J. Kinariwala 259 ITR 10 (S.C.); CIT v. Mehsana District Co-op. Milk Producer's Union 307 ITR 83 (Guj); and CIT v jodhpur Co-operative marketing society 140 Taxman 541(Raj) for the proposition that assessee's case is not a case diversion of profits. On the other hand, Ld. AR of the assessee submitted that the assessee has to contribute the expenditure towards Coop. Education

Fund which is mandatory. The contribution is to be calculated @ 1% of its net profit. The Coop. Education Fund is administered by a committee constituted by the Central Govt. No expenditure out of Coop. Education Fund is incurred without approval of Committee. Since, it is a statutory liability, the same has been claimed. Ld. AR of the assessee has further submitted that in earlier years, similar claims have been allowed. For the first time, the AO has treated the expenditure as appropriation of income. On the principle of consistency, the contribution to Coop. Education Fund has to be allowed.

10. We have heard both the parties. There is no dispute that in earlier years identical claim of the assessee has been allowed. For assessment years 1991-92 and 92-93, the issue of allowability of contribution to Coop. Education Fund, traveled up to Hon'ble Delhi High Court. Hon'ble Delhi High Court in their order dated 14.12.04 held as under:

> *"According to the assessee, this contribution is not a cess, tax, duty or fee and therefore, section 43B would not be applicable. However, before the Tribunal, the question has not been specifically raised by the revenue or by the assessee. It was submitted that in terms of section 37, the amount of contribution to the said fund is an allowable deduction. The issue is that if section 43B is applicable then it will be allowed on actual payment basis only. If not, then it may be allowed on accrual basis. The key question is whether the contribution to the said fund is a "tax, duty, cess or fee". This aspect has not been examined by the tribunal and, therefore, it would be appropriate to remit the matter to the tribunal to dispose of the same in accordance with law and to return a finding as to whether section 43B would be applicable or not."*

11. As per the direction of Hon'ble Delhi High Court, the matter was set aside to the file of the AO with the direction to examine the nature of contribution to Coop. Education Fund whether it was in nature of tax, duty cess or fee. If the payment to Coop. Education Fund was found to be in nature of tax, duty cess or fee, the provisions of section 43B of the Act will be applicable. If, on the other hand, it was found that the nature of payment was not a tax, duty, cess or fees, the same will be allowable as deduction u/s 37 of the

Act. The AO vide his order dated 24.12.09 for assessment year 2004-05 has allowed the claim of the assessee in view of direction contained in ITAT order dated 16.1.2009.

12. In the instant case for the first time, the Revenue has taken plea that contribution to Coop. Education Fund is appropriation of income and not expended wholly and exclusively for the purpose of business. The assessee had made provision of 1% of its net profits under Rule 25 of Multi State Coop. Society Rules, 2002, to be credited as contribution to Coop. Education Fund which is maintained by National Coop. Union of India Ltd., New Delhi. It is statutory requirement to contribute 1% of its net profits to Coop. Education fund. The amount of 1% of net profit is, therefore, not in control of the assessee. The funds have been vested in third party outside corpus of assessee itself. Therefore, the amount contributed to Coop. Education Fund is diversion of profits at source which is eligible for deduction u/s 37 of the Act. The decisions relied upon by the Revenues are distinguishable on facts as in those cases there was no diversion of income. The amount claimed as diversion of income remained with the assessee and formed part of the corpus of the assessee.

13. However, as mentioned above, the claim of assessee has been allowed by the AO for last several years. Hon'ble Supreme Court in the case Radhasoami Satsang, 193 I.T.R. 321 has held that principle of res judicata does not apply to income tax proceedings. Again, each assessment year being an independent unit, what is decided in one year may not apply in the following year, but where fundamental aspect permeating through the different assessment year has been found as a fact one way or other and parties have allowed, that position to be sustained by not challenging the order, it would not be appropriate to allow the position to be changed in a subsequent year. In the case before us, the AO had allowed the claim of the assessee for last several years. For assessment year 2006-07 is the fist year where Revenue has disallowed the amount on the ground that it is appropriation of income and not business expenditure incurred wholly and exclusively for the purpose of business. Since the AO has allowed deduction in respect of Coop. Education Fund in earlier years, respectfully following the decision of Hon'ble Supreme Court in the case Radhasoami Satsang(supra), it is held that Revenue is

not permitted to take a different stand in the year under consideration. Accordingly, we do not find any infirmity in the order of the CIT(A) deleting the addition.

14. In the result, the grounds raised in this appeal by the Revenue are dismissed.

I.T.A. No.3350/Del./2009

15. The first issue for consideration relates to disallowance u/s 14A of the Act. The relevant grounds of appeal are reproduced as under:

> *"1. On the facts and in the circumstances of the case the CIT(A) has erred in law and on facts in deleting the disallowance of Rs.18,54,42,665/- claimed as deduction by the assessee u/s 80P(2)(d) of the Act.*
>
> *2. On the facts and I the circumstances of the case the CIT(A) has erred in law and on facts in directing the AO to calculate the disallowance u/s 14A after applying Rule 8D of I.T. Rules.*
>
> *3. On the facts and I the circumstances of the case the CIT(A) has ignored the fact that Rule 8D was inserted w.e.f. 24/03/2008 and whereas the assessment in this case was completed on 28/12/2007.*

16. The facts of the case stated in brief are that the assessee earned dividend income of Rs.17,47,11,495/- and interest of Rs.1,07,31,170/- from various cooperative societies totaling to Rs.18,54,42,665/- on the ground that expenditure on interest worth Rs.34,01,71,626/- and Rs3,08,44,818/- was made by the assessee on account of salary and wages of employees working in Finance and Accounts Deptt. at head office. The assessee claimed the amount of Rs.18,54,42,665/- exempt u/s 80P(2)(d) of the Act. The AO was of the view that expenditure incurred for earning this exempt income should be disallowed. The assessee placed reliance on various decisions in support of its contention that expenditure incurred for earning exempt income will not be allowable as deduction. The AO estimated the disallowance equivalent to income claimed exempt u/s 80P(2)(d) and disallowed the same.

17. On appeal before CIT(A), it was submitted that the assessee had received dividend of Rs.17,47,11,495/- and interest of Rs 1,07,31,170/- from other cooperative societies. The assessee placed reliance on various decisions in support of its contention that the expenditure equivalent to entire income could not be disallowed. However, the assessee worked out the amount disallowable under Rule 8D in line with the decision of Special Bench in the case of Daga Capital Management Pvt. Ltd. vs. ITO, 26 SOT 603. The assessee worked out disallowance under Rule 8D of the I.T. Rules, 1962 to the extent of Rs.1,82,00,000/-. The CIT(A) following the decision of ITAT in the case Daga Capital management Pvt. Ltd.(supra) agreed with the contention of the assessee that disallowance to the extent of Rs.1,82,00,000/- could be made subject to verification by the AO while giving the appeal effect.

18. Before us, Ld. CIT(DR) supported the order of AO. However Ld. AR of the assessee submitted that the assessee has no objection to the extent of disallowance made under Rule 8D of the Act.

19. We have heard both the parties and have gone through the material available on record. We find that Hon'ble Bombay High Court in the case of Godrej Boyace Mfg. Co. ltd. vs. DCIT 234 CTR 01, has held that provisions of Rule 8D of the I.T. Rules are prospective in nature and will be applicable from assessment year 2008-09. It has also been held that disallowance to the extent incurred for earning the exempt income can be disallowed. In the instant case, the assessee itself has given the disallowance as per Rule 8D at Rs.1,82,00,000/-. Since the assessee has not filed appeal against the order passed by the CIT(A), the order passed by the CIT(A), qua the assessee becomes final. Since the disallowance has been restricted by the CIT(A) as per Rule 8D, we do not find any infirmity in the order passed by the CIT(A). restricting the disallowance to the extent of Rs.1,82,00,000/- as against the amount disallowed equivalent to the exempt income u/s 80P(2)(d) of the Act.

20. The next issue for consideration relates to deleting the disallowance of Rs.50,000/- claimed by the assessee as per provisions of section 80P(2)(c) of the Act. The relevant ground is reproduced as under:

> *"On the facts and I the circumstances of the case the CIT(A) has erred in law and on facts in deleting the disallowance of `50,000 claimed as deduction by the assessee u/s 80P(2)(c) of the Act."*

21. The facts of the case stated in brief are that the assessee while computing the taxable income deducted at Rs.50,000/- u/s 80P(2)(c) of the Act. The AO disallowed the amount of Rs.50,000/- for the reasons for which disallowance of Rs.18,54,42,665/- was disallowed.

22. On appeal, the CIT(A) directed the AO to allow the deduction of Rs.50,000/- u/s 80P(2)(c) on the ground that after applying Rule 8D, the gross total income was profit and, therefore, the assessee will be eligible for deduction u/s 80P(2)(c) of the Act at Rs.50,000/-.

23. We have heard both the parties and gone through the material on record. U/s 80P(2)(c) of the Act, in case of a cooperative society engaged in activities other than those specified in clause (a) or clause (b) (either independently of, or in addition to, all or any of the activities so specified), so much of its profits and gains attributable to such activities as does not exceed –

(i) where such cooperative society is a consumers' cooperative society, one hundred thousand rupees; and

(ii) in any other case, fifty thousand rupees.

shall be allowed as deduction. The case of the assessee admittedly does not fall in clause (a) or clause (b) of section 80P. The assessee is also not a cooperative society for benefit of the consumers. Therefore, assessee's case falls under section 80P(2)(c)(ii) of the Act. Therefore, assessee will be eligible for deduction of Rs.50,000/-, if the gross total income includes any income referred to in sub-section (2) of section 80P. In the instant case, the

assessee has still income u/s 80P(2)(d) of the Act, after restricting disallowance of Rs.1,82,00,000/- determined under Rule 8D and, therefore, the assessee will be eligible for deduction of Rs.50,000/- u/s 80P(2)(c) of the Act.. Accordingly, we do not find any infirmity in the order passed by the CIT(A) deleting the addition.

24. The last issue for consideration relates to deletion the addition of Rs.2,98,28,000/- being contribution to Cooperative Education Fund. Since identical issue has been decided in I.T.A. No.1194/Del./2011 (supra), for the same reasons, it is held that the assessee is eligible for deduction on account of contribution to Cooperative Education Fund.

25. Accordingly, the grounds of appeal raised by the Revenue are rejected.

26. In the result, the appeals of the Revenue for both the years are dismissed.

Order pronounced in open court on : **31.05.2011**.

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| Sd/- | Sd/- |
| (I.P. BANSAL) | (K.D. RANJAN) |
| JUDCIAL MEMBER | ACCOUNTANT MEMBER |

Dated: 31 .5.2011

SKB

copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)-XXIII, New Delhi.
5. DR

Deputy Registrar