IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI N.VIJAYAKUMARAN, JM and SANJAY ARORA, AM

I.T.A. No. 506/Coch/2010 & S.P. No.67/Coch/2010
Assessment Year: 2007-08

Kerala State Co-operative Agricultural Rural Development Bank Ltd., Statue, Trivandrum-695001. [PAN: AAAAK 4391F]	**Vs.**	The Assistant Commissioner of Income-tax, Circle-1(2), Trivandrum
(Assessee -Appellant)		**(Revenue-Respondent)**

Assessee by	Shri K.M.V.Pandalai, Adv.-AR
Revenue by	Dr. Babu Joseph, Sr. DR

O R D E R

Per Sanjay Arora, AM:

This Appeal by the Assessee is arising out of the Order by the Commissioner of Income-tax (Appeals)-I, Trivandrum (`CIT(A)' for short) dated 30.7.2010, and the assessment year (A.Y.) under reference is 2007-08.

2. The appeal raises two issues, each of which we shall take up in seriatim. The first and principal ground is in relation to the denial of the assessee's claim for deduction u/s. 80P(2)(a)(i) of the Income-tax Act, 1961 ('the Act', hereinafter), made at ₹3639.87 lakhs per its return of income for the year filed on 27.10.2007. This was done by the Assessing Officer (AO), the assessee being allowed the said deduction for the earlier years, in view of the amendment to s. 80P of the Act by insertion of sub-section (4) there-to by Finance Act, 2006, w.e.f. 1.4.2007, which reads as under:-

`(4) The provisions of this section shall not apply in relation to any co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank.

Explanation – for the purposes of this sub-section, -

(a) "co-operative bank" and "primary agricultural credit society" shall have the meanings respectively assigned to them in Part V of the Banking Regulation Act, 1949 (10 of 1949);

(b) "primary co-operative agricultural and rural development bank" means a society having its area of operation confined to a taluk and the principal object of which is to provide for long-term credit for agricultural and rural development activities.'

3.1 The assessee is, admittedly, neither a `primary agricultural credit society' nor a `primary cooperative agricultural and rural development bank'. As such, it is not covered by the exceptions to s. 80P(4), as provided by the said sub-section itself, denying deduction u/s. 80P to all cooperative banks. The Legislature in its wisdom restricted the exemption, which extends to the whole of the specified incomes, i.e., of cooperatives societies undertaking specified activities, w.e.f. 1/4/2007 to the said two primary units, where the assessee is a cooperative bank. The assessee in the instant case being an apex cooperative society lending money to such primary units functioning within the State of Kerala, he denied the assessee its claim for deduction u/s. 80P (2)(a)(i).

3.2 In first appeal, the matter, including the assessee's claims, was examined at length by the ld. CIT(A), to the same effect. She examined the activities and the structure of the assessee-society, to find it to be a state-level apex body of 48 affiliated primary cooperative agricultural and rural development banks (or primary ARDBs) functioning under a federal structure, with each primary unit having an area of operation of one to three taluks. It is formed as a successor to the `Central Land Mortgage Bank' by the Kerala State Cooperative Agricultural and Rural Development Banks Act, 1984 (`KSARDB Act' hereinafter) (Act 20 of 1984) with a mission of `comprehensive rural development' in the State of Kerala. There has been a shift with time in the focus of lending by the banking industry in the rural sector, i.e., in terms of the segments and areas of financing (viz. rural housing, which, of late has been accorded a high priority status), so that the banks now function as development banks; the assessee working as a nodal bank for the State of Kerala under the auspices of KSARDB Act. The assessee's claim that it is not a bank, so that the word `bank' in its name is a misnomer, was not correct in

view of s. 7 (Part V) of the Banking Regulation Act, 1949 (`the BR Act', hereinafter). The same clearly provides that no cooperative society other than a `cooperative bank' could function as a bank and use the name `bank' (or `banker' or `banking') in its name, or in connection with its business and, further, that the same is a must for any cooperative society carrying on the business of banking in India. The non-qualification for exemption u/s. 80P stood, therefore, confirmed.

4. We have heard the parties, and perused the material on record as well as the case law cited.

4.1 Section 80P(1) of the Act provides for a deduction in computing the total income under the Act of a cooperative society in respect of sums specified in sub-section (2) thereof. Section 80P(2), to the extent it is relevant, reads as under:-

`(2) The sums referred to in sub-section (1) shall be the following, namely:-

(a) in case of a cooperative society engaged in -

(i) carrying on the business of banking or providing credit facilities to its members, or …

(vii) fishing or allied activities, …

the whole of amount of profits and gains of business attributable to any one or more of such activities:…..'.

4.2 The assessee's claim is that it is not a `cooperative bank', so that it would not be hit by the provision of section 80P (4). In fact, it is not a bank, inasmuch as it is not in the business of banking. It would be incorrect to be guided by the presence of the word `bank' in its name, which is not determinative of its character. It is in fact a land mortgage bank (now called Agricultural and Rural Development Bank), to which the provisions of Banking Regulation Act, by virtue of section 3 thereof, do not apply, even as being a cooperative society providing credit facilities to its members, its income continues to enjoy exemption u/s. 80P(2)(a)(i) of the Act .

4.3 The Revenue's case, on the other hand, is that the assessee is a federal cooperative society, engaged in providing credit facilities to its member societies. As such, it is only a `cooperative bank' financing primary units, to which only the exemption u/s. 80P stands since restricted to.

4.4 The controversy, as would be apparent from the foregoing, revolves around whether the assessee is a `cooperative bank' or not. The assessee is a co-operative society registered under the Kerala Co-operative Societies Act, 1969. It was initially formed as a Land Mortgage Bank known as Kerala Co-operative Central Land Mortgage Bank Ltd. However, with the enactment of KSARDB Act by the Kerala State Legislature, the assessee became an apex co-operative society of the State of which the primary agricultural and rural development banks, which includes co-operative societies registered or deemed to be registered under the said Act as primary co-operative land mortgage banks, are members. That it is not a `primary agricultural credit society' or a `primary cooperative agricultural and rural development bank', i.e., the two entities that stand excepted from the provision of section 80P(4), which is even otherwise patent, is admitted. The assessee, nevertheless, contends that it is not a `cooperative bank', so that it would not be hit by the rigour of section 80P(4) brought in by way of an amendment to s. 80P by the Finance Act, 2006 with effect from 1.4.2007, i.e., A.Y. 2007-08 onwards. The expression 'cooperative bank' has been defined in the BR Act, i.e., the Legislation to which the Act adverts to for the purpose of defining it, so that this matter should not pose any problem, besides providing a firm and legal basis for resolution as to the scope of the term. Section 5(cci) of the BR Act [forming part of Part V thereof by virtue of s. 56] reads as under:-

`5. Interpretation. - *In this Act, unless there is anything repugnant in the subject or context, -*

(a) ……

(cci) "Co-operative Bank" means a state co-operative bank, a central co-operative bank and a primary co-operative bank.

[underlining supplied]

The term has been defined in an exhaustive manner, so that no entity that does not fall within the ambit of the three specified entities could be considered as a cooperative bank. Though well settled, reference for this purpose may be made to the decision in the case of *West Bengal State Warehousing Corporation vs. Indrapuri Studio Pvt. Ltd.* (in C.A. No. 3865 of 2006 dated 19.10.2010) wherein the apex court held that the use of the word 'means' in a definition signifies a hard-and-fast definition.

Adverting back to the definition, the assessee is clearly not a primary, the defining feature of which is that its bye-laws do not permit the admission of a cooperative society as its member, but a federated institution. As such, it is not a primary co-operative bank. Section 5 (ccvii) of the BR Act assigns the same meaning to the expression 'central co-operative bank' and 'state co-operative bank' (besides, primary rural credit society) as thereto by the National Bank for Agricultural and Rural Development Act, 1981 (`the NBARD Act'). Section 2(u) of the NBARD Act reads as under:-

`(u) "State co-operative bank" means the principal co-operative society in a State, the primary object of which is the financing of other co-operative societies in the State:

Provided that in addition to such principal society in a State, or where there is no such principal society in a state, the State Government may declare any one or more co-operative societies carrying on business in that State to be also or to be a State co-operative bank or State co-operative banks within the meaning of this definition;'

As such, the `state co-operative bank' is a principal co-operative society in the State, the primary object of which is the financing of other co-operative societies in the State. A `central co-operative bank' stands similarly defined (per section 2(d) of NBARD Act) as a co-operative society in a district in a State with the primary objective of financing other cooperative societies in the district, with a like *proviso*. It is not difficult to see that the assessee is, by definition, a state co-operative bank. It receives its corpus from the State Government and is the principal society in the state of Kerala for financing of other cooperative societies engaged in extending credit to the rural sector, including for agriculture and allied activities, which it does through the vehicle of primary and central (district) cooperative banks. It is eligible for financial assistance from the National Bank for Agricultural and Rural Development against its lending to its member societies.

4.5 Here it may be pertinent to state that the NBARD Act was enacted by the Parliament in the year 1981 to establish a bank known as `National Bank for Agricultural and Rural Development' (`NBARD' hereinafter), for promoting and regulating credit and other facilities for the promotion and development of agriculture, including agricultural small scale industries and other allied economic activities in the rural areas with a view to promote integrated rural development. The terms `agriculture' and `rural development' stand defined per ss. 2(a) and 2(q) thereof respectively in very broad and comprehensive terms. It provides loans and advances, by way of re-finance, to *inter alia*, state co-operative banks for financing agricultural operations and growing of crops; marketing and distribution of inputs necessary for agricultural or rural development; in fact, any activity for the promotion of or in the field of agricultural and rural development, besides also, commercial and trade activities in the rural sector. The same are repayable on demand or on the expiry of fixed periods not exceeding 18 months. It also provides long-term financial assistance to, among others, state co-operative banks, by way of refinancing, for promotion of agricultural and rural development. Section 2(v) of the NBARD Act defines the `state land development bank' as the principal co-operative society in a State which has, as its primary object, the providing of long-term finance for agricultural development. The Notes on Clauses to Finance Bill, 2006, vide clause 19 thereof, clarifies that the deduction u/s. 80P, which is *qua* the income of co-operative societies engaged in, *inter alia*, carrying on the business of banking or providing credit facilities to its members (s. 80P(2)(a)(i)), is withdrawn for all co-operative banks except primary agricultural credit society and primary co-operative agricultural and rural development bank. As such, but for these two primary units, all the co-operative societies, as covered u/s. 80P(2)(a)(i), shall no longer (effective A.Y. 2007-08) be eligible for deduction u/s. 80P.

4.6 Continuing further, as would be self-evident, the definition of a `cooperative bank' does not enlist the condition of the conduct of the `business of banking' as the criterion for a cooperative society to be a cooperative bank. In fact, it is not even stated as one of the qualifying activities; the sole and defining activity that qualifies a cooperative society to be a cooperative bank, be it at the primary, district or state level, *is the financing of its*

members, rendering the conduct of the `business of banking', even if so, irrelevant. Clause (viia) stands inserted [by Finance Act, 2006 (w.e.f. 1/4/2007)] in section 2(24) of the Act, defining `income' inclusively, to include *the profits and gains of any business of banking (including providing credit facilities) carried on by a cooperative society with its members*. Two things, thus, bear mention; firstly, the amendment only impacts cooperative societies and, secondly, only those in the business of banking, which is construed broadly so as to include provision of credit facilities to the constituents. Now, without doubt, the said profits and gains would even otherwise, i.e., independent of the amendment, qualify to be `income' assessable as business income u/c IV-D u/s. 28(i) r/w s. 2(24)(i). The only purpose that the amendment therefore serves, is to delineate such income of the specified entities (i.e., cooperative societies) separately and, further, clarify that for the purposes of the Act the `financing of its constituents' is to be considered as integral to banking, i.e., as a part of the business of banking. That is, *qua* the underlying economic activity generating the income, financing forms part of banking, or at least as far as the specified entities, being cooperative societies, are concerned.

4.7 At this stage we may advert to the decision in the case of *Kerala State Co-operative Agricultural Federation Ltd vs. CIT* (1998) 231 ITR 814 (SC) cited by the assessee, stating it to impliedly overrule the decision in the case of *U.P. Co-operative Cane Union Federation Ltd. vs. CIT* (1999) 237 ITR 574 (SC), relied upon by the Revenue. Per the latter decision, which is dated prior to the former decision (though reported later), the hon'ble apex court had held that the special deduction u/s. 80P(2)(a)(i) would not be available to the co-operative societies *qua* their income from providing credit facilities to member co-operative societies. This was on the premise that the word 'members' in s. 80P(2)(a)(i) must be construed in the context of the law enacted by the State Legislature under which a co-operative society claiming exemption has been formed. Accordingly, the word 'member' was understood in the light of the definition of that expression as contained in s. 2(n) of the State Co-operative Societies Act. This was coupled by the hon'ble court with the consideration that the expression 'member' was used in section 80P(2)(a)(i) in the normal sense (of a member of a co-operative society), and that the intention was to extend exemption to co-operative societies directly

extending credit facilities to their members. In *Kerala State Co-operative Agricultural Federation Ltd vs. CIT* (supra), the apex court was concerned with section 80P(2)(a)(iii), which specifies the activity of marketing of agricultural produce of its members by a co-operative society. It opined that 'marketing' is an expression of wide import involving a number of activities, which could be carried on by an apex society rather than a primary society. As such, as long as the agricultural produce being marketed by a co-operative society was of its members, i.e., belonged to them, whether it came by them as a product of their own agricultural activities or acquired through purchase from other cultivators was of no consequence. We are unable to see as to how the assessee can derive any assistance from the said decision in the instant case.

In fact, the reliance by the Revenue on the decision in *U.P. Co-operative Cane Union Federation Ltd. vs. CIT* (supra) is misplaced in-as-much as the assessee, a federal cooperative society, is entitled to deduction u/s. 80P(2)(a)(i), i.e., *de hors* s. 80P(4). If that be not so, i.e., going by the decision in the case of *U.P. Co-operative Cane Union Federation Ltd. vs. CIT* (supra), since said to be impliedly overruled, there is no question of application of section 80P(4), which forms the edifice of the Revenue's case. Sec. 80P(4) would have application only where the income is otherwise exempt u/s. 80P. However, that would not in any manner detract from or throw any light on the manner in which the proscriptive clause of s. 80P(4) is to be read or interpreted. The provision clearly draws a distinction between those co-operative societies which continue to enjoy the benefit of section 80P and those which shall not. The Notes on Clauses (of the Finance Bill, 2006), referred to earlier, are also on the point. The decision in the case of *Kerala State Co-operative Agricultural Federation Ltd vs. CIT* (supra) does not overrule the decision in the case of *U.P. Co-operative Cane Union Federation Ltd. vs. CIT* (supra), which we have even otherwise found to be not supportive of the Revenue's case. The only issue clarified by the apex court per its latter decision which is relevant to the present case is that the members of a co-operative society which is a member of another society do not *ipso facto* become the members of the parent society, affirming the decision in the case of *CIT* vs. *U.P. Co-operative Cane Union Federation Ltd*., 122 ITR 913 (All.) and 217 ITR 231 (All.). The same is trite law, and to which the decision in the case of *Kerala State Co-operative Agricultural Federation Ltd vs. CIT* (supra) makes no

exception or derogates from. The question involved in the said decision, as afore-metioned, was the interpretation of section 80P(2)(a) (iii), which at the relevant time, read as under:-

"(iii) the marketing of the agricultural produce of its members; or ....."

The hon'ble court was, thus, concerned with the scope of the activity entitled for exemption. It, giving a contextual and lexicographical meaning to the expression 'of' occurring in the provision, stated it to mean as 'belonging to' or `pertaining to'. It drew support from the fact that the provision of section 80P was introduced with a view to encourage and promote the growth of the co-operative sector in the economic life of the country in pursuance of the declared policy of the Government, as well as like interpretation by several high courts. Why would the Legislature, it observed, if it so intended, not restrict the exemption to the primary societies by making it evident, as in the case of clause (f) (as it then stood, being akin to the present clause (b), which provides for exemption to primary co-operative societies supplying milk, oilseeds, etc., raised by its members to among others, the federal society) (pg. 820). Adverting again to the said provision (s. 80P(f)) it observed as: "*That clause also shows that if the Legislature wanted an exemption to be given only to a primary society, it specifically said so*." [at pg. 823 of the report]. In other words, there was no scope for placing an indirect restriction, not warranted by the plain and natural meaning of the words employed, as was done by the apex court in the case of *Assam Co-operative Apex Marketing Society Ltd. vs. CIT (Addl.)* (1993) 201 ITR 338 (SC), which stood overruled by it. We may add that, interestingly, the relevant clause stands since modified, substituting the word `of' with the words `grown by', and now reads as under:-

"(iii) the marketing of agricultural produce grown by its members, or.....".

As such, the decision in the case of *Kerala State Co-operative Agricultural Federation Ltd vs. CIT* (supra), rather, supports the Revenue's case in-as-much as the Statute is explicit when it saves the two primary units from the blanket exclusion (of the co-operative banks) from the exemption of s. 80P with effect from A.Y. 2007-08 per s. 80P(4). The expressions 'primary agricultural credit society' (to which the BR Act is not

applicable), 'primary co-operative bank' (which is the third entity comprised in the term 'co-operative bank') and 'primary credit society' are defined in the BR Act (refer ss. 5(cciv), 5 (ccv) and 5(ccvi) thereof respectively). Similarly, the term 'primary rural credit society' is defined in NBARD Act (per s. 2(n)). It is not necessary to reproduce the said definitions here in view of the admitted position of the assessee being not a primary co-operative society, the distinguishing feature of which (subject to some exceptions) is that its bye-laws do not permit admission of another co-operative society as its member.

4.8 We may now advert to the several decisions cited by the assessee per its paper-book, even as in view of the clear language of the statutes, and its expounding by the apex court, as afore-noted, the same would be of no moment. The decisions in the case of *R. C. Cooper vs. UOI* (AIR 1970 SC 564, para 33); *Mahalaxmi Bank Ltd. v. Registrar of Companies* (AIR 1961 Cal. 666); and *CIT vs. Sirohi S.B.V. Bank Ltd.,* (2010) 321 ITR 533 (Raj.), relate to section 5(b) of BRA, i.e., which defines the term 'banking'. As afore-stated, the same has no bearing on the issue being decided, i.e., whether the assessee is a co-operative bank as defined under the BR Act or not (refer: s. 80P(4) r/w *Explanation* thereto). In this regard, it would be relevant to note that the definition of 'primary co-operative bank' as defined under the BR Act, i.e., the third entity which qualifies it to be a 'co-operative bank' (s. 5(cci of BRA) bears the condition of carrying on of banking business (as a primary object). The other two entities which are comprised in the definition of a co-operative bank, i.e., 'state co-operative bank' and 'central co-operative bank' are defined as co-operative societies whose primary object is financing of other co-operative societies in the State or District as the case may be. In other words, the reference to 'bank' or 'banking business' is absent, and not a condition to qualify as a 'co-operative bank', i.e., for a central or state cooperative bank. Consequently, the BR Act, being applicable thereto, albeit to a limited extent and manner (as provided in Part V), the same (banking business) is not a condition for its applicability, even as we find it to be an extraneous consideration. In fact, as clarified by several decisions, including *CIT vs. Sirohi S.B.V. Bank Ltd.* (supra), which further bears reference to a number of decisions, the 'business of banking' is to be given a wider meaning by adopting a liberal

approach, and is not required to be construed very strictly. Almost uniformly, giving of loans and advances as a business is considered as a 'banking activity'. Reference may also be drawn to s. 2(24)(viia) of the Act, discussed at para 4.6 above. Section 7 of BRA, which stipulates the condition for the use of the word 'bank' (or 'banker' or 'banking') in the name, or in connection with the business, stands since amended vide clause (f) of s. 56 (which prescribes for the application of BRA to co-operative banks), so that the same prohibits the co-operative societies, other than co-operative banks, from the use of these words.

The decision in the case of *West Bengal State Warehousing Corporation vs. Indrapuri Studio Pvt. Ltd* (supra) relates to the interpretation of the statute with reference to the scope of the word 'mean' in the provision, and stands already considered.

4.9 We may, though not required to, i.e., in view of the express language of the statute and, further, considered in the light of the precedents on the subject, for the sake of completeness of the order, address the various arguments raised by the assessee, which though we have examined for their validity in arriving at our decision. It states that it is not a `bank' and, therefore, the BR Act is not applicable thereto. Section 3 of the BR Act clarifies that the said Act shall not apply to a `primary agricultural credit society' and a `co-operative land mortgage bank'. For other co-operative societies, it would have application only to the extent and in the manner specified in Part V of the said Act. We are unable to discern any relevance in the argument, i.e., in view of the specific (defined) entities to which section 80P(4) shall not apply and, by implication, apply, i.e., all co-operative banks other than the excluded categories. A `primary agricultural credit society' and `primary cooperative bank' (which is the third entity comprised in the term 'co-operative bank') are defined exclusively under the BR Act. So is the case with `cooperative bank' and `cooperative credit society' (which includes a cooperative land mortgage bank) (refer s. 5(ccii)). Further on, the reference to the BR Act and, consequently, the NBARD Act, is only for the limited purpose of reference to the definitions provided therein. The applicability of the BR Act, or its extent and manner, is not an issue with which we are directly concerned with, though we may add that Part V of the BR Act has application for co-operative banks, whether operating at the primary,

district or state level (as the assessee). Again, for the same reason, the argument that the assessee is not in the business of 'banking', which stands defined u/s. 5(b) of the BR Act, is of no consequence. The assessee admittedly falls to be covered under the exemption clause of section 80P(2)(a)(i) only by virtue of the second limb of the said provision (providing credit facilities to its members) and not the first limb (i.e., the business of banking). As such, of what value or significance is the argument that it is not in the business of banking; the exclusion of section 80P(4) would apply only to, or in relation to the exemption category under which the assessee falls and or seeks exemption? Also, as afore-noted, the two activities are *pari materia* as far as the cooperative societies are concerned (also refer para 4.6 above).

4.10 Before concluding, however, we wish to highlight one important aspect of the matter, even as we are handicapped for want of the bye-laws of the assessee-bank as well as the KSARDB Act, to adjudicate the same conclusively. The assessee contends of it being a `land mortgage bank'. Just as in the case of co-operative banks, land mortgage banks would also be constituted as and operate at the primary level or as federal units. As far as we have been able to see, the term 'land mortgage bank' or 'co-operative land mortgage bank' is not defined in the BR Act. The only reference thereto is in the definition of 'co-operative credit society' which is defined to mean a co-operative society with the primary object of providing financial accommodation to its members, and includes a 'co-operative land mortgage bank' (s. 5 (ccii) of BR Act). Clearly, therefore, a land mortgage bank is also engaged in financial accommodation of its members. There is nothing to limit the expanse of the word 'member' to only 'individual members', so that it would include co-operative societies which are members as well. A co-operative credit society is not a co-operative bank and, therefore, if and to the extent the assessee is a co-operative land mortgage bank, it is not a co-operative bank and, consequently, not covered by s. 80P(4). Further, the NBARD Act does not bear any reference to land mortgage bank. On the other hand, it speaks of 'state land development bank' *as the principal co-operative society in the State with the object of providing long-term finance for agricultural development* (s. 2(v)). As noted earlier, the NBARD is engaged in providing financial accommodation on both short-term as well as long-term basis; its

relevant Chapter (Chapter VI) containing separate provisions for the same under the subject heads, *inter alia*, 'production and agricultural credit' (ss. 21 to 23), 'investment credit – medium term' (s.24) and `other investment credits' (s. 25), i.e., NBARD extends financial assistance to both state co-operative banks and state land development banks. As such, to the extent the assessee is working as a state land development bank, i.e., engaged in providing long-term finance for agricultural development, it is a state land development bank, as opposed to a state cooperative bank and, thus, not a cooperative bank. We may clarify that the distinction between the two is not in the length or the term of the finance, as NBARD provides long-term finance to state cooperative banks as well (s.25 of the NBARD Act), but, as we understand, the purpose for which the financing is provided, the purview of the state land development bank being limited only to `agricultural development'. The distinction between the two, i.e., `agricultural development' and `rural development' does not appear to be sharply defined, particularly considering that the assessee is a development bank, even as observed by the ld. CIT(A), the purview of which includes both spheres, so that there could be scope for some overlapping. Also, the primary unit, i.e., *the primary cooperative agricultural and rural development bank, is defined as one, the primary object of which is to provide long term credit facilities for agricultural <u>and</u> rural development activities* (*Explanation* to s. 80P(4)), so that it does appear incongruent and inconsistent (with the scheme of things) that a distinction is drawn or envisaged on that basis at the state level, i.e., for the federal units. However, once the two entities stand defined separately, and there is nothing to indicate that the `state land development bank' is a sub-set of the `state cooperative bank'; on the contrary, a separate/distinct entity, the distinction (between the two) is to be maintained and respected, i.e., given full effect. The difference, in actual terms, would be required to be determined on the basis of the definition of the words `agriculture' and `rural development' under the NBARD Act (refer ss. 2(a) & 2(q)), so that activities in relation to the former only would qualify to be `agricultural development' activities, and where involving long-term finance, would be eligible to be categorized as for or to `state land development bank', and to which the prescription of s. 80P(4) would not apply. In other words, though at the primary level the same bank assumes the functions of both agricultural and rural development, at the federal level, the distinction has been made by

classifying the two separately, i.e., as state cooperative banks and state land development banks. It is the former that attract s. 80P(4), and not the latter. Where the same bank assumes the role of both, it is functioning as both, so that the distinction would have to be maintained on the basis of the income attributable to the distinct pattern of financing, i.e., `long-term for agricultural development' and `others'.

5. In view of the obtaining legal position, as discerned from the reading of the applicable laws, i.e., the BR Act and the NBARD Act, in conjunction with which the relevant provisions of the Act are to be read, and the judicial precedents brought to our notice, we are of the clear view that the assessee is a `cooperative bank' and, consequently, hit by the provision of s. 80P(4), so that the deduction provided by the said section would not be available to it from A.Y. 2007-08 onwards and, accordingly, stood rightly denied the impugned claim in its assessment for the year. So, however, we also clarify that to the extent the assessee is (also) or is acting (also) as a `state land development bank', which too falls within the purview of the NBARD Act, exigible for financial assistance from NBARD, the assessee's claim merits acceptance, and it would be entitled to deduction u/s. 80P(2)(a)(i) on the income relatable to its lending activities as such a bank. The matter is, therefore, remitted to the file of the AO for a consideration of this aspect of the matter and adjudication as per law on factual verification and determination, per a speaking order, after allowing reasonable opportunity to the assessee to establish its claims, the onus for which is only on it. We decide accordingly.

6. The assessee's second ground is in relation to the contribution made by it to the staff retirement benefit fund during the relevant year in the sum of ₹221.26 lakhs. The assessee disclaimed the amount, debited to its profit and loss account for the year, by adding back the same in the computation of its taxable income. However, the claim was pressed before the ld. CIT(A) in view of the decision by the tribunal in the case of *CIT (Asst.) vs. State Bank of Travancore*, 306 ITR (AT) 128 (Cochin), who, though, rejected the same in the absence of any legitimate claim by the appellant. The assessee in second appeal relies on the decision in the case of *Union Coal Co. Ltd. vs. CIT* (1968) 70 ITR 45

(Cal.), besides by the apex court in *Jute Corporation of India Ltd. vs. CIT* (1991) 187 ITR 688 (SC) and *National Thermal Co. Ltd. vs. CIT* (1998) 229 ITR 383 (SC).

7. We have heard the parties, and perused the material on record as well as the case law cited.

7.1 The case of the assessee is that even though it may not have made a claim per its return of income or during the assessment stage, it is not precluded from doing so before a higher appellate authority or at least the first appellate authority, whose powers are co-terminus with that of the assessing authority, citing the afore-mentioned decisions in support. The Revenue's case, on the other hand, is that the assessee having not made any legitimate claim, i.e., per its original or even revised return of income, the same is not admissible, and for which legal proposition we may refer to the decision in the case of *Goetze (India) Ltd. vs. CIT* (2006) 284 ITR 323 (SC).

7.2 We have given our careful consideration to the matter. The first thing, therefore, that needs to be addressed is whether there is a dichotomy between the decision in the case of *Goetze (India) Ltd.* (supra) and other earlier decisions by the apex court. We find none, and neither is the point in issue, virgin; the apex court in the case of *Jute Corporation of India Ltd*. (supra) having considered the same in light of its decision in the case of *CIT (Addl.) vs. Gurjargravures Pvt. Ltd*. (1978) 111 ITR 1 (SC), wherein, similarly, the action of the assessing authority in rejecting the assessee's claim on the ground that it stood not made before the assessing authority was upheld. It, examining the issue comprehensively, held as under:-

`*(i) Power to tax on discovery of a new source of income is quite different from granting deduction on the admitted facts fully supported by the decision of the Supreme Court. If the tax liability of the assessee is admitted and if the Income-tax Officer is afforded an opportunity of hearing by the appellate authority in allowing the assessee's claim for deduction on the settled view of the law, there is no good reason to curtail the powers of the appellate authority u/s. 251(1)(a) of the Income-tax Act, 1961.*

(ii) An appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed

by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer.

(iii) The observations in the case of Gurjargravures P. Ltd (1978) 111 ITR 1 (SC) *do not rule out a case for raising an additional ground before the Appellate Assistant Commissioner if the ground so raised could not have been raised at the stage when the return was filed or when the assessment order was made or if the ground became available on account of change of circumstances or law. There may be several factors justifying the raising of such a new plea in an appeal, and each case has to be considered on its own facts. If the Appellate Assistant Commissioner is satisfied he would be acting within his jurisdiction in considering the question so raised in all its aspects. He must be satisfied that the ground raised was* bona fide *and that the same could not have been raised earlier for good reasons. While permitting the assessee to raise an additional ground, the Appellate Assistant Commissioner should exercise his discretion in accordance with law and reason.'*

The apex court in the case of *Gurjargravures P. Ltd.* (supra) had earlier held as:-

`Held*, reversing the decision of the High Court, that, as neither was any claim made before the Income-tax Officer regarding the relief u/s. 84 nor was there any material on record in support thereof, and from the mere fact that such a claim had been allowed in subsequent years it could not be assumed that the prescribed conditions justifying a claim for exemption u/s. 84 were also fulfilled, the Tribunal was not competent to hold that the Appellate Assistant Commissioner should have entertained the question of relief u/s. 84 or to direct the Income-tax Officer to allow the relief. Merely because the Income-tax Officer brings an item to tax he cannot be deemed to have considered its non-taxability though no such claim was made before him by the assessee.'*

7.3 The apex court in the case of *Goetze (India) Ltd*. (supra) has subsequently endorsed its view in the case of *Gurjargravures P. Ltd.* (supra), further clarifying that even the claim before the AO has to be made in the mode and manner prescribed under law, i.e., per the original return or the revised return of income. That is, the same is permissible and, thus, admissible in law, only where so made, having in the facts of that case been made before the AO by way of a letter, which stood rejected by him on the ground that there was no provision in the Act for allowing any amendment to the return as furnished except per a revised return, and which action of the AO stood confirmed by the apex court, affirming the decisions by the tribunal and the Hon'ble Delhi High Court

to that effect preceding it. The same, it may be noted, also conforms to the trite law that where the law prescribes a mode and manner (including a time limit) for doing a particular thing, the same has to be followed, at least in substance, so as to derive the advantage of the benefit provided. The decision in the case of *NTPC Ltd.* (supra) was also considered and distinguished by the apex court therein.

7.4 The position in law is, thus, amply clear. The only manner in which the assessee can make a claim under the Act is per its return of income or per its revision, i.e., where the assessee discovers any omission or any wrong statement in the return furnished u/s. 139(1) or in pursuance to notice u/s. 142(1). It is only then that the assessee could be said to have made a claim validly, and the assessing authority obliged to consider it, else not. Clearly, what the AO can not entertain or is precluded from doing under law, could not be achieved indirectly through the directions by a higher authority, and neither is that the intent or purport of the decisions by the apex court on the question of the powers of an appellate authority, and which, if so construed, would be rather defeative of the statutory mandate as explained by the apex court. So, however, there may arise situations which necessitate a claim before an appellate authority for the first time, as where it could not have been raised when the return was filed or during assessment or where the ground became available only subsequently on account of change in law or circumstances. The power of the first appellate authority being co-terminus with that of the assessing authority, he could in such circumstances admit the claim not raised earlier, and adjudicate the same after hearing the AO, and which may also include calling for remand report from him where considered necessary. Each case shall have to be considered on its own merits. The two decisions (or set of decisions), thus, operate in different fields; the decision *qua* the admissibility of a claim by an appellate authority (or for that matter even the assessing authority) carving out exceptions to the generally obtaining statutory position that any claim by the assessee could only be per a return of income, as confirmed by the apex court in the case of *Goetze India Ltd.* (supra), and it cannot be said that either the position in law is not clear or there is an inconsistency between the two sets of decisions; in fact, the latter ones having been rendered after considering and distinguishing the earlier ones.

7.5 We may now advert to the facts of the case to see if these can be said to fall within the exceptions as laid down. The return in the instant case was filed on 27.10.2007 and the assessment order passed on 22.12.2009, so that it could be revised (u/s. 139(5)) up to 31.3.2009. The Order by the tribunal in the case of *State Bank of Travancore* (supra), on the basis of which the assessee presses its claim is dated 8.8.2007, i.e., even prior to the date of the furnishing the return of income. As such, it obviously cannot be said that the claim could not have been made per the return of income or during the time available for its revision.

7.6 The second exception laid down by the apex court is a change in the circumstance(s) or change in law, i.e., after the passing of the assessment order. No such change has been reported to us, the only basis stated being the decision by the tribunal in the case of *State Bank of Travancore* (supra), which as afore-noted stands rendered much earlier. Also, in our considered view, the same would not even otherwise qualify to be either a change of circumstance or in law as envisaged in the decision in the case of *Jute Corporation of India Ltd. vs. CIT* (supra). The assessee had disclaimed the impugned contribution in view of sub-section (9) of 40A, which is the *non obstante* clause prevailing over the other provisions of the Act relating to the computation of income under the head 'profits and gains of business and profession', i.e., including s. 37(1). As such, the disallowance by the assessee appears to be, at least *prima facie*, in conformity with law, which rather explains its action. That the assessee's claim falls u/s. 40A(9), i..e., on facts, is admitted and not disputed, or else there would be no question of it effecting a *suo motu* disallowance there-under. In any case, the decision by the tribunal, to which we accord due respect, cannot by any means form a valid ground for the admission of a claim in deviation of the statutory procedure mandated for the same. It could no doubt constitute a valid basis or ground for revising the return or for pressing a claim per the return (even though apparently inconsistent with the statutory provision), but cannot be considered as a change in law meriting admission of a new claim. It is only the decision by the apex court or by the jurisdictional high court that would, by virtue of Art. 141 and Arts. 226 & 227 of the Constitution of India, qualify to be regarded as a change in law, i.e., apart from a retrospective amendment in law. Further, no change in

circumstance, leave alone one that is vital and arose subsequently, has been informed to us or is borne by any material on record. Under the circumstances, it is difficult to see as to how the claim is admissible or became so subsequently in the present case.

7.7 The decision in the case of *NTPC Ltd.* (supra), i.e., the second decision by the apex court relied upon by the assessee, relates to the power of the appellate tribunal u/s. 254 of the Act. The same, it was clarified, is not limited to the ground/s arising from the order of the first appellate authority but extends to any question of law arising from the assessment on the basis of undisputed facts on record. In fact, the decision in the case of *Jute Corporation of India Ltd*. (supra) is *qua* the power of the appellate authority, so that it applies to the jurisdiction of the tribunal, the second appellate authority, as well, even as noted by the apex court itself in the said later decision. We are unable to see, and neither has it been shown to us, as to how the said decision is applicable in the facts of the case. Firstly, there is no claim for the first time before the tribunal, and it is only the rejection of such claim by the first appellate authority that stands agitated before us. Secondly, there is no material on record in support of the assessee's claim, i.e., on facts, and neither any determination thereof by the authorities below for it to be considered as a question of law arising from the assessment. The said decision, thus, has no application in the facts of the instant case.

To state in other words, the decision in the case of *Jute Corporation of India Ltd*. (supra) is applicable to the tribunal, and stands further explained by the apex court in the case of *NTPC Ltd. vs. CIT* (supra), allowing the raising of a legal plea/ground on established or proven facts at the appellate stage. Coming to the applicability of the same to the facts of the present case, the question under reference is a mixed question of law and fact. The fund, the contribution to which is being claimed, is said to be for the retired employees. Apart from the legal question of applicability or otherwise of section 40A(9), the factual issues that arise and, thus, need to be addressed would be along the following lines: Whether there is any contractual relationship between the assessee and its retired employees? That is, is the impugned contribution in pursuance to any pre-existing obligation, i.e., on being given effect to, or a result of a fresh contract? If it is the latter case, what is its commercial expediency considering that no contractual obligation is cast

on the assessee in respect of the past services of its retired employees?; How would the funds be managed?; Are the conditions stipulated for recognition of funds specified u/s. 36(1)(iv)/(v) met?, etc. There being no claim by the assessee, there was no examination on these counts, even as these represent essential factual considerations for satisfying the condition/s of section 37(1).

7.8 Finally, we may clarify that the Cochin Bench of the tribunal (by the same constitution) accepted the assessee's claim *qua* u/s. 37(1) in the case of *Kar Mobiles Ltd. vs. Dy. CIT* (in I.T.A. No. 920/Coch/2007 dated 29.1.2010) even as the same stood rejected by the first appellate authority following the decision in the case of *Goetze (India) Ltd.* (supra) The claim in that case stood made on the basis of a decision by the apex court, with there being no dispute as regards the primary facts; the sole question of law arising being *qua* the nature of the expenditure incurred, i.e., `capital' or `revenue', having been since settled by the apex court, with it holding it as revenue. As would be appreciated, the said case, thus, qualifies to fall within the exceptions laid down by the apex court itself in the case of *Jute Corporation of India* (supra). The said decision of the tribunal is, thus, distinguishable on facts. We decide accordingly.

8. In the result, the assessee's appeal is partly allowed for statistical purposes. As we have decided the assessee's appeal, we dismiss its stay petition as unfructuous.

sd/-	sd/-
(N.VIJAYAKUMARAN)	(SANJAY ARORA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Ernakulam
Dated: 23rd February, 2011
GJ
Copy to:
1. Kerala State Co-operative Agricultural Rural Development Bank Ltd., Statue, Trivandrum - 695001.
2. The Assistant Commissioner of Income Tax, Circle-1(2), Trivandrum
3. The Commissioner of Income-tax (Appeals)-I, Trivandrum
4. The Commissioner of Income-tax, Trivandrum.
5. D.R., I.T.A.T., Cochin Bench, Cochin.

6. Guard File.

By Order

(ASSISTANT REGISTRAR)