IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1721/Mum./2023 (Assessment Year : 2012–13)	**ITA no.1722/Mum./2023** (Assessment Year : 2013–14)
ITA no.1723/Mum./2023 (Assessment Year : 2014–15)	**ITA no.1724/Mum./2023** (Assessment Year : 2015–16)

Shri Renukamata Multi–State Co–operative Society Ltd., 335/2AB, Behind Pushpak Hotel Pipe Line Road, Savedi, Ahmednagar 414 003
PAN – AADAS7782D ……. Appellant

v/s

Asstt. Commissioner of Income Tax Central Circle–4(4), Mumbai ……. Respondent

ITA no.2072/Mum./2023 (Assessment Year : 2012–13)	**ITA no.2073/Mum./2023** (Assessment Year : 2013–14)
ITA no.2074/Mum./2023 (Assessment Year : 2014–15)	**ITA no.2075/Mum./2023** (Assessment Year : 2015–16)

Jt. Commissioner of Income Tax Central Circle–4(4), Mumbai ……. Appellant

v/s

Shri Renukamata Multi–State Co–operative Society Ltd., 335/2AB, Behind Pushpak Hotel Pipe Line Road, Savedi, Ahmednagar 414 003
PAN – AADAS7782D ……. Respondent

Assessee by : Shri Dharmesh M. Kansara
Revenue by : Smt. Sanyogita Nagpal

Date of Hearing – 11/12/2023	Date of Order – 31/01/2024

O R D E R

PER BENCH

The present batch of cross-appeals have been filed by the assessee and the Revenue challenging the separate impugned orders of even date 30/03/2023, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals)–52, Mumbai, [*"learned CIT(A)"*], for the assessment year 2012–13 to 2015-16.

2. Since these cross-appeals pertain to the same assessee and involve similar issues that arise out of a similar factual matrix, therefore, these appeals were heard together and are being decided by way of this consolidated order.

3. In its appeal, the assessee has raised a common jurisdictional issue and submitted that since the assessment in these assessment years was already concluded before the date of search and therefore the same was not abated as per the second proviso to section 153A of the Act, no additions can be made in absence of any incriminating material found during the course of search. Thus, before dealing with the issues raised by both sides on merits, we will examine this jurisdictional issue in the assessment years 2012-13 to 2015-16. With the consent of the parties, the assessment year 2012-13 is considered as the lead year.

4. The brief facts of the case pertaining to the aforesaid jurisdictional issue, as emanating from the record, are: The assessee is a co-operative credit society and is a registered Multi-State Co-operative Urban Credit Society

established under the Multi-State Co-operative Societies Act, 2002 and is involved in the facility of providing credits and other banking facilities to its members. The assessee is also providing ATM card facility and RTGS facility to its members. The assessee has operations in Maharashtra, Gujarat, Madhya Pradesh, Andhra Pradesh, Karnataka, and Delhi and has around 100 branches across the country and is covered under the provisions of the Multi-State Co-operative Societies Act, 2002 and the byelaws framed by it. The assessee has two types of members, namely, ordinary and nominal members. The ordinary members have the right to vote and are subscriber to the shares of the assessee. On the other hand, nominal members are admitted on payment of fees of Rs. 100 and don't have voting rights. The assessee operates different types of accounts, such as savings account, current account, recurring deposit account, loan account, daily collection account, and FDR account. As per the assessee, in order to open and operate any of the above accounts, a person has to first become a member of the society, either ordinary or nominal. Further, the main source of income is interest on loans advanced to its members.

5. For the assessment year 2012-13, the assessee filed its original return of income on 29/09/2012 declaring a total income of Rs. Nil after claiming deduction under section 80P of the Act. The return filed by the assessee was selected for scrutiny and assessment under section 143(3) of the Act was completed assessing the total income of the assessee at Rs. 4,64,400. Subsequently, survey action under section 133A of the Act was conducted on the assessee on 08/02/2016, during which huge unexplained cash was found at the branch office at Raipur, therefore the survey was converted into search

under section 132 of the Act on 09/02/2016 by executing the warrant on the assessee on 09/02/2016. Subsequent to the search assessment conducted on the assessee on 09/02/2016, a second search action under section 132 of the Act was also carried out on the assessee on 26/05/2017 at the head office of the assessee at Ahmednagar along with branch offices at Mumbai, Ulhasnagar, and residences of key persons of the assessee, who handled the business affairs of the assessee. Simultaneously, survey actions under section 133A of the Act were also carried out at the branch offices of the assessee at Ahmedabad, Chennai, and Hyderabad. In response to the notice issued under section 153A of the Act, the assessee filed its return of income on 02/10/2018 declaring a loss of Rs. 26,82,099. Thereafter, notice under section 143(2) as well as notice under section 142(1) of the Act along with a detailed questionnaire were issued and served on the assessee. On the perusal of the documents found during the course of the search, the Assessing Officer ("*AO*") vide show cause notice dated 03/12/2019 noted that there is non-compliance in maintaining proper KYC documents, non-compliance in collecting KYC details from the depositors, irregularities found in account opening forms of society, and non-compliance of Rule 114B in respect of cash deposits. Accordingly, the assessee was asked to show cause as to why the total case deposited in its books should not be considered and taxed as unexplained cash credit under section 68 of the Act. In response thereto, the assessee filed its detailed submission before the AO on 18/12/2019. During the assessment proceedings, the AO also directed a special audit under section 142(2A) of the Act in the case of the assessee.

6. The AO on the basis of the details provided by the assessee and various evidences gathered during the search and seizure action as well as the report of the Special Auditor, vide order dated 07/05/2021 passed under section 143(3) read with section 153A of the Act, came to the conclusion that the assessee is not a bank within the provisions of the Banking Regulation Act and therefore is not empowered to carry on the business of banking. It was further held that the assessee is a credit co-operative society, which is empowered to mobilise deposits and grant loans to its members only. The AO held that the assessee has indulged in the gross violations of not only the Co-operative Society Act, 2002 but also its own byelaws by deviating from the core principles and as asked in its Memorandum. The AO held that on perusal of documents found during the search and furnished during the assessment proceedings, it was found that the majority of the members of the assessee have not submitted their PAN cards and in numerous cases, photo identities are also not present in these documents. Further, the addresses that have been provided are incomplete in most of the cases, while there was no information regarding the source of income, contact details, status of income tax return, etc. in the account opening form. The AO further held that there are several instances where the amount of cash deposits exceeded Rs. 50,000 by the depositor in a single day. However, the assessee has collected neither the PAN nor Form 60 from such depositor, which is a clear violation of Rule 114B of the Income Tax Rules, 1962. It was further held that the assessee has neither furnished any details regarding the identity, creditworthiness, and genuineness of its regular or nominal members nor produced any of them. Therefore, it was held that the assessee has failed to explain the source of

credit entries contained in its books of account. Accordingly, the AO made an addition of the amount credited in the books of the assessee under section 68 of the Act. As regards, the at-par cheques/demand draft issued by the assessee, the AO held that the same have not been routed through the member's account, therefore it is not possible to identify the source of these cash receipts credited in the bank account. Accordingly, the AO held that the assessee has failed to explain the source of aforesaid credit entries contained in its books of account along with the identity, genuineness, and creditworthiness of the persons who claim to have given cash to the assessee society for the issue of at-par cheques/demand draft. Accordingly, the amount was added to the total income of the assessee under section 68 of the Act. Apart from the above, the AO also made the addition on account of provision for standard assets, provision for gratuity, prior period expenses, and disallowances under section 40A(3) and section 40(a)(ia) of the Act as well as the disallowance of deduction claimed under section 80P of the Act.

7. The learned CIT(A), vide impugned order, dismissed the ground challenging the additions made vide order passed under section 153A of the Act in the absence of incriminating material found during the course of the search on the basis that large no. of incriminating material in the form of KYC discrepancies, pay-in slips, and other evidences were found during the course of the search. The learned CIT(A) further held that once it is accepted that the assessee is in the business of mobilisation of savings and provision of credit facilities, the entire transactions cannot be added as income of the assessee. However, the onus remains with the assessee to show that it has reasonably discharged its onus to explain the nature and source of any amount credited in

its books of account. The learned CIT(A) further held that as regards the deposit slips it is quite inconceivable that the assessee, which claims to be a co-operative society, is unable to pinpoint the person making such deposits. After taking into consideration the discrepancies in KYC documentation as noted by the AO on the basis of the Special Auditor's report, the learned CIT(A) held that the assessee has not shifted the onus placed on it under section 68 of the Act. The learned CIT(A), drawing the analogy with Rule 114E, held that the assessee has failed to collect the PAN or report such transactions and therefore there is a failure on the part of the assessee to discharge its onus or shift its onus to the depositor, as regards the requirement of section 68 of the Act. It was further held that it would be unwise to hold that all such deposits are income of the assessee by considering the nature of business of the assessee. After considering various factors as noted in paragraph 7.43 of its order, the learned CIT(A) held that there is culpability on the part of the assessee but nothing to warrant addition under section 68 of the entire transactions. By taking into consideration the commission charged by the assessee for collecting the cash deposit in its home branch and the commission charged for demand draft/at-par cheques, the learned CIT(A) came to the conclusion that it would be reasonable to estimate the income of the assessee @ 0.15% of such deposits for which no such commission has been charged. As regards the demand draft/at-par cheques, since the assessee has already recognised income @ 0.05%, the learned CIT(A) computed the income @0.10%. As far as the failure to comply with the membership requirements, violation of byelaws, etc., the learned CIT(A) came to the conclusion that they do not impinge on the taxation aspect per se. As a result, the learned CIT(A)

granted partial relief to the assessee. On the issue of disallowance of provision for standard assets and provision for gratuity, the learned CIT(A) dismissed the appeal filed by the assessee. As regards the disallowance of prior period expenses, the learned CIT(A) granted partial relief to the assessee and directed the AO to allow the claim of the assessee that expenses for the specific years should be allowed in the preceding year to which such expenditure relates to, as such appeals are pending. As regards other issues, the learned CIT(A) granted partial relief to the assessee. However, on the issue of deduction claimed under section 80P of the Act, the learned CIT(A) dismissed the appeal filed by the assessee. Being aggrieved, the assessee is in appeal before us.

8. We have considered the submissions of both sides and perused the material available on record. In the present case, it is undisputed that on the date of search action under section 132 of the Act, i.e. on 26/05/2017, resulting in the present appeals, no assessment for the assessment years 2012-13 to 2015-16 was pending, and therefore the same was not abated as per the second proviso to section 153A of the Act. We find that the Hon'ble jurisdictional High Court in CIT v/s Continental Warehousing Corporation (Nhava Sheva) Ltd., (2015) 374 ITR 645 (Bom.), held that no addition can be made in respect of assessments which have become final if no incriminating material is found during the search. We further find that the Hon'ble Supreme Court affirmed this position in PCIT v/s Abhisar Buildwell (P.) Ltd., [2023] 454 ITR 212 (SC), by observing as under:-

> *"14. In view of the above and for the reasons stated above, it is concluded as under:*

i) to iii) ……..

iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under Sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved."

9. Therefore, it is now settled that in respect of completed/unabated assessments, no addition can be made in the absence of any incriminating material found during the course of search and seizure action. In the present case, from para 8.4 of the assessment order, it is evident that the evidence gathered at the time of search primarily were the KYC documents of the account holders, who had deposited large scale of cash in the accounts maintained with the assessee society. On the basis of these materials/documents, the AO noticed that the KYC documents were not completely filled in and the documents obtained supporting KYC were not verifiable. Further, several instances of improper filing and maintenance of account opening forms were also noticed from the seized and impounded material and the evidences gathered during the course of search and survey proceedings at the premises of the assessee. The AO treated these documents as incriminating evidence and held that the assessee could not substantiate the veracity of the cash depositors and the identity, genuineness, and creditworthiness of the depositors were also not established. The learned CIT(A) treated the gaps found in KYC requirements as incriminating. Therefore, in the present case, in order to decide the jurisdictional issue raised

by the assessee, it is firstly relevant to examine whether the material/evidence found during the course of the search action under section 132 of the Act is incriminating in nature.

10. We find that the coordinate bench of the Tribunal in assessee's own case in Renukamata Multi-State Co-operative Urban Credit Society Ltd v/s ACIT, in ITA No. 401/Mum./2019, etc., vide order dated 06/02/2023 decided the similar issue arising out of the first search action conducted on 09/02/2016 at the premises of the assessee. It is pertinent to note that the coordinate bench specifically directed that the order has been passed on peculiar facts and circumstances of the case and therefore should not be taken as precedent while deciding such cases. However, from the perusal of the aforesaid order, we find that the coordinate bench very succinctly analysed the meaning of the expression "*incriminating material*" on the basis of judicial interpretation made by different judicial forums in para-25 of its order. Therefore, without going into the adjudication of a similar issue, in view of the observation of the coordinate bench, as noted above, we are of the considered view that the meaning assigned to the expression "*incriminating material*" by the coordinate bench in the aforesaid decision can be considered to determine whether the materials/documents found during the course of search and survey action at the premises of the assessee in the present case constitute incriminating material. In para-25 of the aforesaid decision dated 06/02/2023, the coordinate bench of the Tribunal analysed the meaning of the expression "*incriminating material*" as under:-

> *"25. Before we look into the relevant 'incriminating material' referred to by the Ld. CIT(A), it is first necessary to understand the meaning of the expression*

"incriminating material" or evidence. It is noted that there is no definition set out in the Act and therefore meaning of this term has to be discerned from its judicial interpretation made by different judicial forums. We understand that there can be several forms of incriminating material or evidence. In order to constitute an incriminating material or evidence, it is necessary for the AO to establish that the information, document or material, whether tangible or intangible, is of such nature which incriminates or militates against the person in relation to whom it is found. Some common forms of incriminating material are for instance, where the search action u/s 132 of the Act reveals information (oral or documented) that the assets found from the possession of the assessee in the form of land, building, jewellery, deposits or other valuable assets etc. do not corroborate with his returned income and/or there is a material difference in the actual valuation of such assets and the value declared in the books of accounts. Further, incriminating evidence may also constitute of information, tangible or intangible which suggests or leads to an inference that the assessee is carrying out certain activities outside books of accounts which is not disclosed to the Department. Incriminating material also comprises of document or evidence found in search which demonstrates or proves that what is apparent is not real or what is real is not apparent. In other words, if an assessee has recorded transactions in his books or other documents maintained in the ordinary course, then in order to hold the material or evidence found in the course of search to be incriminating in nature, the seized documents / evidences should lead to the conclusion that the entries made in the books of the assessee do not represent the true and correci state of affairs of the assessee. Rather the evidence unearthed or found in the course of search should establish that the real transaction of the assessee was something different than what was recorded in the regular books and therefore the entries in the books did not represent true and correct state of affairs i.e. the assessee has undisclosed income/expense outside the books or that the assessee is conducting income earning activity outside the books of accounts or all the revenue earning activities are not disclosed to the tax authorities in the books regularly maintained or the returns filed with the authorities from time to time, etc. The nature of the evidence or information gathered during the search should be of such nature that it should not merely raise doubt or suspicion but should be of such nature which would prima facie prove that real and true nature of transaction between the parties is something different from the one recorded in the books or documents maintained in the ordinary course of business. In some instances, the information, document or evidence gathered in the course of search, may raise serious doubts or suspicion in relation to transaction reflected in regular books or documents maintained in the ordinary course of business, but in such case the AO is not permitted to straightaway treat such material to be 'incriminating' in nature unless the AO thereafter brings on record further corroborative material or evidence to substantiate his suspicion and conclude that the transaction reflected in regular books or documents did not represent the true state of affairs. Until these conditions are satisfied, it cannot be held that every seized material or document or information is incriminating in nature, capable of justifying the additions in unabated assessments."

11. Therefore, it has been held that in order to constitute an incriminating material or evidence, it is necessary for the AO to establish that the

information, documents, or material, whether tangible or intangible, is of such nature which incriminates or militates against the person in relation to whom it is found. The coordinate bench further observed that the nature of the evidence or information gathered during the course of the search should be of such nature that it should not merely raise doubt and suspicion but should be of such nature which would prima facie prove that the real and true nature of the transaction between the parties is something different from the one recorded in the books documents maintained in the ordinary course of business. Therefore, incriminating material can be understood to be material that has prima facie the potential of identifying undisclosed income of the assessee under the Act.

12. It is evident from the record that upon perusal of the documents found during the course of the search, the AO noted that the assessee is not following the rules and regulations of KYC and other guidelines as stipulated by the Reserve Bank of India. Further, on page 96 of the assessment order, the AO also noted that the assessee has blatantly violated and disregarded the byelaws, Multi-State Co-operative Society Act as well as due diligence expected in a similar business. The AO further noted that the assessee is hardly following any objective as envisaged in its Memorandum. Further, on perusal of the KYC documents, and the documents pertaining to account opening, the AO noted that the assessee has not collected the PAN of the depositor or Form 60 in certain cases. It is further evident from the record that during the assessment proceedings on perusal of the materials found during the course of the search, the AO issued show cause notice to the assessee after noting that there is non-compliance in maintaining proper KYC

documents, non-compliance in collecting KYC details from the depositors, irregularities found in account opening forms of society, and non-compliance of Rule 114B in respect of cash deposits. We are of the considered view that none of the aforesaid observations of the AO with regard to various deficiencies would tantamount to "*incriminating material*". However, even then, the AO made the addition under section 68 of the Act on the basis that the assessee has failed to prove the identity of the creditors, genuineness of the transaction, and creditworthiness of the depositors. It is pertinent to note that the learned CIT(A), after agreeing with various factors in favour of the assessee as noted in para 7.43 of its order, came to the conclusion that addition under section 68 of the Act of the entire transaction is not warranted.

13. In the present case, it is worth noting that the assessee received the money in the normal course of its business as a co-operative credit society, i.e. through repayment of loans by its members or deposits by its members, etc. Further, it is not disputed that the assessee has duly recorded in its books of account the transactions of collections of money as well as deposits made into its bank account. The violation of provisions of Rule 114B by the depositors in certain cases and Rule 114E by the assessee also cannot lead to the conclusion that the money deposited in the members' account belongs to the assessee. Further, in the post-search enquiry also no material or evidence was found which could lead to the conclusion that the money deposited belongs to the assessee. It is further pertinent to note that during the assessment proceedings, the case of the assessee was subjected to Special Audit under section 142(2A) of the Act. However, the Special Auditor only highlighted the discrepancies in maintaining KYC documentation, account

opening form and violation of society byelaws by the assessee, without reference to any material which could lead to the conclusion that the amount deposited in member's account or amount received for the issuance of at-par cheques/ demand drafts belongs to the assessee. In the present case, it is not the plea of the Revenue that the credit in books of account or bank accounts of the assessee came to its knowledge pursuant to the material/documents found during the course of the search. For discrepancies in maintaining KYC documentation, account opening form, and violation of society byelaws, action can be taken against the assessee under the relevant statute or by the concerned authority, such as RBI, however, the same cannot lead to an addition in the hands of the assessee under the Act. Therefore, in view of the aforesaid findings, we are of the considered view that the material/documents found during the course of the search are not of such a nature which incriminates or militates against the assessee. Further, we are of the view that the material/documents found during the course of search also do not raise any doubt or suspicion against the assessee, and if at all the material/documents may only incriminate against the members in whose account the money was deposited. We find that in certain cases proceedings under the Act were initiated against the members on the basis of material/documents found during the course of the search and survey at assessee's premises. Thus, from the above, it is established that the material/documents found during the course of search are not incriminating in nature. Therefore, the AO could not have made any addition under section 153A of the Act in respect of concluded/unabated assessments for the assessment years 2012-13 to 2015-16. Accordingly, the additions made by the

AO for the assessment years 2012-13 to 2015-16 are deleted. Since the relief has been granted to the assessee on this short issue, the other grounds raised in the assessee's appeals are rendered academic and therefore are left open.

14. In the result, the appeal by the assessee for the assessment years 2012-13 to 2015-16 are allowed, while the appeals by the Revenue are dismissed as infructuous.

Order pronounced in the open Court on 31/01/2024

Sd/-	**Sd/-**
B.R. BASKARAN	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 31/01/2024

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai