

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'C', NEW DELHI**

**Before Sh. N. K. Choudhary, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 6364/Del/2018 : Asstt. Year : 2013-14**

**ITA No. 6365/Del/2018 : Asstt. Year : 2014-15**

M/s Krishak Bharati Cooperative Ltd., A-60, Kailash Colony, New Delhi-110048	Vs	ACIT, Circle-30(1), New Delhi-110002
(APPELLANT)		(RESPONDENT)
<b>PAN No. AAAAK0203G</b>		

**ITA No. 7241/Del/2018 : Asstt. Year : 2013-14**

**ITA No. 7242/Del/2018 : Asstt. Year : 2014-15**

ACIT, Circle-29(1), New Delhi-110002	Vs	M/s Krishak Bharati Cooperative Ltd., A-60, Kailash Colony, New Delhi-110048
(APPELLANT)		(RESPONDENT)
<b>PAN No. AAAAK0203G</b>		

**Assessee by : Sh. K.V.S.R. Krishna, CA &  
Sh. Aman Goel, CA**

**Revenue by : Ms. Sapna Bhatia, CIT DR &  
Sh. Ravi Kant Choudhary, Sr. DR**

<b>Date of Hearing: 01.09.2022</b>	<b>Date of Pronouncement: 14.11.2022</b>
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**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

These appeals have been filed by the assessee as well as the Revenue against the orders of Id. CIT(A)-10, New Delhi dated 21.08.2018.

2. In ITA No. 6364/Del/2018, following grounds have been raised by the assessee:

*"1. The Id. CIT(A) erred in law and on facts in confirming the disallowance of Rs.45,28,162/- being amortization of lease payment. These are allowable business expenditure for determining the taxable income and should have been allowed.*

*2. The appellant contends that amortization of these expenses over the period of the lease is revenue expenditure and is in the nature of rent paid for the use of land. It is not in the nature of capital expenditure as the assessee does not get any legal title or any right over the land.*

*3. The Id. CIT(A) has erred in law and on facts in confirming the disallowance Rs. 13,47,192/- u/s 14A r.w.r. 8D of the Income Tax Rule 1962 without recording any satisfaction for rejecting assessee's claim. The disallowance wrong and bad in law and should be deleted.*

*4. The Id. CIT(A) has failed to appreciate that the AO has not brought on record any material to show nexus between expenditure and earning of exempt income. No disallowance u/s 14A r.w.r. 8D can be made.*

*5. The CIT(A) has failed to appreciate that Rule 8D can be invoked only when the A.O. from the books of accounts is able to demonstrate that some expenditure has been incurred for earning tax free income. Rule 8D has been mechanically invoked by A.O. without establishing such nexus. Consequently, the disallowance u/s 14A r.w.r. 8D of Rs.13,47,192/- should be deleted."*

3. In ITA No. 6365/Del/2018, following grounds have been raised by the assessee:

*"1. The Id. CIT (A) erred in law and on facts in confirming the disallowance of Rs. 45,45,070/- being amortization of lease payment. These are allowable business expenditure for determining the taxable income and should have been allowed.*

*2. The appellant contends that amortization of these expenses over the period of the lease is revenue expenditure and is in the nature of rent paid for the use of land. It is not in the nature of capital expenditure as the assessee does not get any legal title or any right over the land."*

4. In ITA No. 7241/Del/2018, following grounds have been raised by the Revenue:

*"1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs.262,58,60,000/- made by the AO vide order u/s 143(3) of the IT Act, 1961 dated 30.12.2017, by disallowing the deemed tax credit of Rs.262,58,60,000/- u/s 90 of the I.T. Act, 1961 on the dividend income received by the assessee from OMIFCO, Oman."*

*2. "On the facts and in the circumstances of the case, the Ld. CIT has erred in deleting the aforesaid addition made by the AO by simply following the decisions of his predecessor for A.Y. 2012-13 and Hon'ble High Court, Delhi in ITA No. 578/2016 and 579/2016 dated 21.04.2017 in assessee's own case without giving any reasons of his own other than the reference of Hon'ble Tribunal decision wherein the Hon'ble ITAT has erred in allowing the appeals of the assessee without appreciating the facts and findings given by the AO."*

*3. "On the facts and circumstances of the case, the Ld. CIT(A) has erred in relying upon the decision of the Hon'ble High Court, Delhi, in assessee's own case for the AYs 2010-11 and 2011-12 against which the department has filed an appeal before the Hon'ble Supreme Court of India."*

*4. "On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in restricting disallowance of Rs. 25,46,85,644/- made by the AO u/s 14A read with rule 8D vide order u/s 143(3) to Rs. 13,47,192/- by observing that the provisions of section 14A would not apply to the dividend income received by the assessee from OMIFCO, Oman, as the same is part of total income."*

5. *"On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and on facts in allowing relief to exclude such investments which did not yield any income for the purpose of computation of disallowance u/s 14A by overlooking the provisions of section 14A read with Rule 8D(2) of IT Rules. The relevant portion of Rule 8D(2) is reproduced below:*

*"The average of value of investment, income from which does not or shall not form part of the total income, as appearing in the balance sheet of the assessee on the first day and the last day of the previous year."*

*It is evident that the words used are "does not or shall not form part of the total income." This clearly specifies that all those investments which has yielded dividend in the year under consideration are to be considered and similarly, the investments which though, have not yielded any income during the year should also be considered for arriving at the average of investment."*

6. *"On the facts and in the circumstances of the case, the Ld. CIT(A) did not consider the ratio of judgment of Hon'ble Supreme Court in the case of Tarulata Shyam, 108 ITR 345 wherein it was that held that there is no scope importing into the statute words which are not there."*

7. *"The Appellant reserves the right to raise any further and additional grounds of appeal at the item of hearing oral arguments including reliance on additional case laws."*

### **Revenue Appeal**

**ITA No. 7241/Del/2018 : A.Y. 2013-14**

**ITA No. 7242/Del/2018 : A.Y. 2014-15**

### **Tax Credit u/s 90 – Dividend Income**

5. The facts of the case are that the assessee is a multi State co-operative society registered in India, under the

administrative control of the Department of Fertilizers, Ministry of Agriculture and Co-operation, Central Government. Its main business is manufacturing fertilizers such as urea and ammonia. It entered into a joint venture with Oman Oil Company to form the Oman Fertilizer Company SAOC ("OMIFCO" or "the JV"), a registered company in Oman under the Omani laws. The assessee is 25 per cent, shareholder in the JV, which manufactures fertilizers. The fertilizer manufactured by OMIFCO are purchased by the Central Government. The assessee established a branch office in Oman to oversee its investments in OMIFCO. The branch office is independently registered as a company under the Omani laws. It claims permanent establishment (PE) status Oman in terms of article 25 of the Double Taxation Avoidance Agreement ("DTAA") between India and Oman. That branch office maintains its books of account and files, returns of income under the local income law of Oman.

6. Till A.Y. 2010-11, the assessee included the dividend received from OMIFCO in its gross total income, and then claimed tax credit u/s 90 of the income Tax Act in conjunction with the India-Oman DTAA which allows for tax credit in India of taxes paid or payable in OMAN.

7. However, w.e.f. 01/01/2010 the Oman tax rates underwent a change whereby the tax rate was reduced from 30% to 12% in Oman. Consequently, w.e.f. 01.01.2010, the assessee stood to gain much lesser tax credit as per the India -Oman DTAA since credit would be given only at 12% and not 30% (a reduction of 18%). Therefore, from AY 2011-12, the assessee changed their accounting and started excluding the dividend income in their Gross Total income and claiming tax credit u/s

90. Instead, the assessee started claiming the entire dividend received from OMIFCO as exempt income from AY 2011-12.

8. It is pertinent to note here that the order u/s 263 of the Act passed in the case of the assessee for AY 2010-11 and AY 2011-12. In those years, the Assessing Officer had completed the assessments by allowing the Foreign Tax Credit (FTC) to the assessee and had included the dividend received as part of the total income of the assessee.

9. Principal Commissioner in his order u/s 263 has held that since there was no tax payable by the assessee in Oman by virtue of general exemption granted under article 115 and 116 of Omani Income Tax Law promulgated by Royal Decree No 28/2009, no deemed foreign tax credit (FTC) is allowable to the assessee as per article 25(4) of the Indo- Oman DTAA.

10. The assessee submitted before the revenue authorities the communication by Secretariat General for Taxation Muscat addressed to Oman Oil Company SAOC dated 11.12.2000. Ld. Principal Commissioner objected to validity of the communication as the same was not a general Circular/Notification but was addressed to one tax payer and also on the authority of the Secretary General to issue such a letter. The Pr Commissioner has noted that Article 8 of Oman Law clearly stated that tax shall not apply on dividends. If tax does not apply to an income it is not correct to hold that "tax was payable" which has been "forgone" for promoting economic development. Thus, it was held that the assumption in the letter dated 11.12.2000 that tax will be payable on the dividend income is fundamentally erroneous and is just an opinion. About the contention of the assessee that the dividend was connected to its Branch at Muscat (which the assessee regards as

permanent establishment in Oman), Ld. PCIT held that income which is exempt from taxation cannot be said to have become taxable by claiming that the same is connected to permanent establishment in Oman.

11. The assessee went in appeal before ITAT against the order passed under section 263 of the Act. Hon'ble ITAT held in a common order for AY 2010-11 & 2011-12 the revision order passed by the Principal Commissioner invalid on technical grounds. ITAT held that the assessee is eligible for deemed FTC on the dividend received as per article 25(4) of the DTAA even though no tax was actually paid by assessee in Oman. ITAT relied upon provisions of Article 25(4) of DTAA, Article 8(bis) of Omani Tax Law and the letter from Secretariat General for Taxation Muscat dated 11.12.2000.

12. Revenue went to appeal before Hon'ble High Court against the order of ITAT. Hon'ble High Court has upheld the decision of ITAT. It was stated that the revenue is in SLP before the Hon'ble Supreme Court against the order of Hon'ble High Court. Thus, we find that the decision of the Hon'ble High Court which confirmed the order of the ITAT is binding as of now.

13. The Hon'ble High Court vide order dated 21.04.2017 in the case of PCIT Vs. KBCL (395 ITR 572), after examining the facts and the DTAA between India and Oman held that the assessee is entitled for the tax credit. The Id. CIT(A) has prudently deleted the addition in deference to the order of the Hon'ble High Court. Hence, we decline to interfere with the order of the Id. CIT(A) on this issue.

**Disallowance u/s 14A:**

14. In the A.Y. 2013-14, the assessee received dividend of Rs.1,10,00,000/- from one company namely Nagarjuna Fertilizers & Chemicals Pvt. Ltd. (NFCL) over the unaltered investments of Rs.5,23,80,950/-. The Assessing Officer disallowed an amount of Rs.25,46,85,644/- in accordance with Rule 8D(2)(ii) and Rule 8D(2)(iii). The Id. CIT(A) restricted the addition to Rs.13,47,192/- considering the investments of NFCL only as per the Rule 8D(2)(ii) and Rule 8D(2)(iii). After hearing the arguments and going to the records, we find that no satisfaction has been recorded as per the provisions of Section 14A(2) and also that the assessee had sufficient share capital & reserves to meet the cost of investments and hence we deem it proper that the disallowance of Rs.1,00,000/- would suffice to recompense the expenditure involved in earning the exempt income as the work involves only encasing of the dividend vouchers which are directly credited to the bank account of the assessee.

15. In the A.Y. 2014-15, it is an undisputed fact on record that the assessee claimed no exempt income and hence, placing reliance on the judgments in the case of PCIT Vs. IL&FS Energy Development Pvt. Ltd. 399 ITR 483 (Del.), Chem Investment Ltd. Vs. CIT 378 ITR 33 (Del.), PCIT Vs Kohinoor Projects Pvt. Ltd. 121 Taxmann.com 177, CIT Vs. ESSAR Teleholdings Ltd. (2018) 3 SCC 253 and CIT Vs. Oil Industry Development Board (SLP) (Civil) No. 2755/2019 dated 08.02.2019, we hold that no disallowance is called for.

**Assessee's Appeal****ITA No. 6364/Del/2018 : A.Y. 2012-13****ITA No. 6365/Del/2018 : A.Y. 2013-14****Amortization of Lease Payment:**

Ground No. 1 &amp; 2

16. The facts are as under:

17. During the year under consideration, the Society has made a claim for amortization of lump sum amount paid in respect of lease premium of the following leasehold lands taken for business purposes:

S. No.	Particulars	Amount of amortization claimed (Rs.)
1	Land at Noida wherein office building (A 8- 10, Sector 1- Noida) of the Society at Noida is situated	6,17,364/-
2	Land at Visakhapatnam for construction of Rural Godown leased from Port Trust	39,10,798/-
3.	Land at Tuticorin for construction of Godown leased from Port Trust	
Total		45,28,182/-

Item No. 1: Rs.6,17,364/-

18. The assessee Society obtained land on lease from Noida authorities for a period of 90 years and had paid a lump sum amount and is amortizing the lease payment over the lease period. The office building has been constructed on the said lease hold land and is used as its Corporate Office and Central Marketing Office. Therefore, this is akin to payment of rent, which otherwise is an allowable deduction.

19. The Society submits that on a perusal of the document given by NOIDA authorities, it is clear that 1/90th of the value for the land is consumed because the land has been given by NOIDA authorities for a period of 90 years. Therefore, the assessee has been deducting annually Rs.6,17,364/- being the expired period out of 90 years. This has been allowed as a deduction in all the years from AY 1989-90 onwards up to Assessment Year 2003-04. What is claimed is only the expired period out of the amount paid attributable expired period of the lease i.e. the assessee has claimed write off only of the year which has been exhausted, which is Rs.6,17,364/-. The lease of land is for the purpose of constructing its office by the assessee and the agreement says it is a premium paid.

20. It was pleaded that the allowability can also be considered from the point of view of rent which the assessee will have to pay for using the lease hold land. The assessee does not get any ownership rights. The Noida authority is the owner of the land and has made available the land for use of construction of office. The clauses of the agreement with Noida authority would reflect that the assessee cannot utilize for any purpose other than for construction of office, cannot make any sale of the land without permission of the Noida authority. It was pleaded that the payment to Noida authority is in the nature of one time rent and the assessee is spreading the same over a period of use so that each completed year proportionate claim is only made in the computation.

Item No. 2 and 3: Rs. 39,10,798/-

21. The assessee Society has obtained land on lease from Port of Visakhapatnam and Tuticorin for a period of 30 years vide agreement dated 28.06.2007 between the Port of Authorities

and the assessee Society. The amount paid towards the lease premium and other expenses amounting to Rs.3,47,01,502/- were booked in the accounts in the year under assessment. The said land has been taken for the purpose of and use as Rural Godown. Therefore, this is akin to payment of rent, which otherwise is an allowable deduction. The assessee pleads that on perusal of the agreement entered into with the Port of Visakhapatnam, it is clear that 1/30th of the value for the land is consumed because the land has been given by Port authority for a period of 30 years.

22. Similar is the case with item of lease hold land obtained from Tuticorin Port Trust for construction of godowns for storage of fertilizer.

23. The agreement with Noida Authorities provides for payment of yearly rent at the rate of 2.5% of the lease premium in addition to the lease premium paid. Similarly, the agreement with Port of Visakhapatnam provides for payment of yearly nominal rent of Re.1/- per sq. mtr amounting to Rs.24,282/- in addition to the lease premium paid. Secondly, both the agreements provide through various clauses that the vacant possession of the land is to be given back to the respective authorities on completion of lease period.

24. The Id. CIT(A) confirmed the action of the Assessing Officer based on the orders of the revenue for the A.Y. 2011-12 and A.Y. 2012-13 which was further on adjudicated by the Co-ordinate Bench of the Tribunal and the Hon'ble Delhi High Court in ITA No.205/2010 dated 12.07.2012.

25. We have gone through the orders of the Tribunal on this issue for the A.Y. 2012-13 and for A.Y. 2015-16 in ITA No.

5711/Del/2017 dated 04.01.2022 wherein one of the Member of this bench is the co-author and ITA No. 1195/Del/2020 dated 26.07.2022 wherein the another Member of this bench was the co-author. For the sake of ready reference, the relevant part of the order is reproduced as under:

ITA No. 5711/Del/2017

*"6. Coming to ground Nos.1 and 2 of assessee's appeal in respect of the disallowance of Rs.45,75,672/-being the amortizable portion of lease premium payment, it could be seen from the record that out of such payment an amount of Rs.6,17,364/- was in respect of the land at Noida wherein the office building of the assessee is situated, and the balance of Rs.39,58,308/- was in respect of the land at Visakhapatnam for construction of Rural Godown leased from Port Trust, Visakhapatnam and also the land Tuticorin for construction of Godown leased from the Port Trust, Tuticorin.*

*7. Insofar as the amortizable portion of the lease taken from the Noida Authority is concerned, Ld. AR fairly admitted that this issue is covered against the assessee by the order of the Hon'ble Delhi High Court in ITA No.205/2010 dated 12.07.2012 pertaining to the assessment year 2004-05, and though the assessee is in appeal before the Hon'ble Supreme Court on that issue, as the things stand today the assessee is bound by the order of the Hon'ble Delhi High Court.*

*8. Assessee is, therefore, confining the challenge in respect of the land at Visakhapatnam into Tuticorin, which issue is quite different from the issue relating to the Noida land. On this aspect it is the submission of the Ld. AR that in assessee's own case for the assessment year 2008-09 in ITA numbers.2304 and 2321/Del./2012, a Coordinate Bench of this Tribunal considered the same and after careful consideration thereof it was observed that the nature of lease, the location of the land, the terms and conditions of lease etc,*

*for example, it is located in the Porto premises, the entry and exit of which is with Port Security, land used only for storage during transit etc., that the assessee has in its long time lease with Visakhapatnam Port trust is different from the terms and conditions of lease from Noida Authority; that the principle on the issue whether the rent in question is to be allowed as Revenue expenditure or not, is laid down by the Hon'ble High Court in assessee's own case for earlier assessment years and this depends on the facts of each case; that the issue was to be examined in the interest of Justice; that no prejudice would be caused to the Revenue in examining the matter once again; and therefore, the issue was set aside to the file of the learned Assessing Officer for considering the arguments of the assessee de novo in accordance with law.*

*9. Ld. AR, in all fairness, submits that the same course as adopted for the assessment year 2008-09 may also be followed for this assessment year in restoring the issue to the file of the learned Assessing Officer for considering the facts and circumstances relevant for this particular assessment year and to take a call de novo. Ld. DR reports no objection for sending it back to the learned Assessing Officer. Recording the same, we allow this ground for statistical purpose, by restoring the issue to the file of the learned Assessing Officer to take a view de novo for this particular assessment year after hearing the assessee de novo in accordance with law."*

*ITA No. 1195/Del/2020*

*"4. Heard the parties and perused the material available on record. Ground No. 1 & 2 relates to the disallowance qua amortisation of lease payments. At the outset, our attention was drawn by the assessee to the order 04.01.2022 passed by the Hon'ble coordinate Bench in Assessee's own case in ITA Nos. 5711/Del/2017 & 5754/Del/2017 for the AY 2012-13 decided on 04- 01-2022, wherein the Hon'ble coordinate Bench in para No. 8 and 9 of its order considered the similar issue qua disallowance on account of*

*amortisable portion of lease premium payment and restored the issue concerning to the land at 'Vishakhapatnam' for construction of Rural Godown leased from Port Trust, Visakhapatnam and also the land at 'Tuticorin' for construction of Godown leased from the Port Trust, Tuticorin, to the file of Assessing Officer for decision de novo in accordance with law. 4.1 Considering the peculiar facts and circumstances and the order referred above passed by the Hon'ble Coordinate Bench, we deem it appropriate to remit the issue related to the amortisation of lump sum amount paid as lease premium quo the lands at Visakhapatnam leased from Port Trust and at Tuticorin for construction of godown leased from Port trust Tuticorin, to the file of Assessing Officer for decision afresh in accordance with law. Hence ordered accordingly. 4.2.1 With regard to the amortisable portion of the lease taken from Noida Authority, before the Hon'ble co-ordinate Bench in the case pertains to previous AY referred above and before us as well, the Assesseeconceded that the issue has already been decided against the Assessee by the Hon'ble High Court in ITA no. 205/2010 decided on 12-07-2012, though the Assessee has preferred an appeal before the Hon'ble Apex Court, however, not pressing the [6] same. As the decisions as stands today are against the Assessee, therefore the disallowance qua amortisable portion of the lease taken from Noida Authority, stands affirmed. Consequently, ground Nos. 1 & 2 are partly allowed."*

26. Since, the matter stands covered by the order of the Co-ordinate Bench of Tribunal, in the absence of any change in the facts of the case and legal proposition, we hereby allow the appeal of the assessee on this ground.

**ITA No. 6364/Del/2018 : A.Y. 2013-14****Ground Nos. 3 to 5**

**27. Disallowance u/s 14A:** Stands adjudicated along with appeal of the revenue in ITA No. 7241/Del/2018 for A.Y. 2013-14.

28. In the result, the appeals of the assessee are allowed and that of the Revenue are dismissed.

Order Pronounced in the Open Court on 14/11/2022.

Sd/-

**(N. K. Choudhary)**  
**Judicial Member**

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**Dated: 14/11/2022**

\*Subodh Kumar, Sr. PS\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR**