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

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI KUL BHARAT, JUDICIAL MEMBER**

ITA No.581/DEL/2022 [A.Y 2016-17)

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| Krishak Bharti Co-operative Ltd<br>A-60, Kailash Colony<br>New Delhi | Vs. | The A.C.I.T<br>Circle -29(1)<br>Delhi |

PAN: AAAAK 0203 G

ITA No. 860/DEL/2022 [A.Y 2016-17)

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| The A.C.I.T<br>Circle -29(1)<br>Delhi | Vs. | Krishak Bharti Co-operative Ltd<br>A-60, Kailash Colony<br>New Delhi |

PAN: AAAAK 0203 G

(Applicant) (Respondent)

Assessee By : Shri K.V.S.R Krishna, CA

Department By : Shri Sanjay Kumar, CIT- DR

**Date of Hearing : 15.11.2022**
**Date of Pronouncement : 15.11.2022**

**ORDER**

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above two captioned cross appeals by the assessee and the Revenue are preferred against the order of the ld. CIT(A) - 30, New Delhi dated 10.02.2022 pertaining to Assessment Year 2016-17. Both these appeals were heard together and are disposed of by this common order for the sake of convenience and brevity.

2. We will first address to the appeal of the assessee in ITA No. 581/DEL/2022.

3. The solitary grievance of the assessee is that the ld. CIT(A) erred in confirming the disallowance of Rs. 45,45,010/- being amortization of lease payment.

4. At the very outset, the ld. counsel for the assessee stated that a similar issue was considered by this Tribunal in assessee's own case for Assessment Year 2012-13 in ITA No. 5711/DEL/2017 and decided the issue in favour of the assessee partly.

5. Per contra, the ld. DR fairly conceded to this.

6. We have carefully perused the orders of the authorities below. We find force in the contention of the ld. counsel for the assessee. An identical issue came up for hearing before this Tribunal in Assessment Year 2012-13 in ITA No. 5711/DEL/2017. This Tribunal has considered the issue at Para 6 of its order and, thereafter, held as under:

> ***"7. Insofar as the amortisable 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."*

7. Finding parity on facts, respectfully following the findings of the co-ordinate bench, amortization portion of the lease taken from Noida authority is decided against the assessee and the challenge in respect of land at Vishakapatnam and Tuticorn is restored to the file of the Assessing Officer to be decided as per directions given in Assessment Year 2012-13 [supra].

8. In the result, the appeal of the assessee is, accordingly, allowed in part for statistical purposes.

ITA No. 860/DEL/2002 [Revenue's Appeal]

9. Ground Nos. 1 and 2 relate to the disallowance u/s 14A of the Act.

10. Facts on record show that during the year, the assessee has not earned any tax free income which may trigger application of provisions of section 14A of the Act. Such issue has now been decided in favour of the assessee and against the Revenue by the decision of the Hon'ble Jurisdictional High Court of Delhi in the case of Era Infrastructure [India] Pvt Ltd 327 CTR 0489 wherein the Hon'ble High Court, following

the decision in the case of IL & FS Energy Development Company Ltd. 2017 SCC Online Del 9893 held that no disallowance u/s 14A of the Act can be made if the assessee had not earned any exempt income.

11. The Hon'ble Delhi High Court further considered the amendment made by the Finance Act, 2022 to Section 14A of the Act and held as under:

> ***"Consequently, this Court is of the view that the amendment of Section 14A, which is "for removal of doubts" cannot be presumed to be retrospective even where such language is used, if it alters or changes the law as it earlier stood.***
>
> ***9. Though the judgment of this Court has been challenged and is pending adjudication before the Supreme Court, yet there is no stay of the said judgment till date. Consequently, in view of the judgments passed by the Supreme Court in Kunhayammed and Others vs. State of Kerala and Another, (2000) 6 SCC 359 and Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras (1992) 3 SCC 1, the present appeal is dismissed being covered by the judgment passed by the learned predecessor Division Bench in PCIT vs. IL & FS Energy Development Company Ltd (supra) and Cheminvest Limited vs. Commissioner of Income Tax-VI, (2015) 378 ITR 33.***
>
> ***10. Accordingly, the appeal and application are dismissed. However, it is clarified that the order passed in the present appeal shall abide by the final decision of the Supreme Court in the SLP filed in the case of PCIT vs. IL & FS Energy Development Company Ltd (supra)"***

12. Respectfully following the findings of the Hon'ble High Court of Delhi, Ground Nos. 1 and 2 are dismissed.

13. Ground No. 3 relates to the deletion of disallowance of deemed tax credit of Rs. 18,06,24,855/- by the Assessing Officer.

14. This issue was also decided by the Hon'ble High Court of Delhi in assessee's own case in 395 ITR 572. The relevant findings of the Hon'ble High Court read as under:

> ***"The second question: Did the ITAT err in deciding that dividend income was taxable but exempt under Omani law to entitle the assessee to the benefits of the Indo Oman DTAA.***
>
> ***24. The rival contentions on this aspect are whether dividend income is at all taxable or if it taxable, but exempt. This is relevant in the context of the assessee's contention that under Article 25 (2) of the treaty, it is entitled to benefit of whatever was the tax treatment it received in Oman. The relevant part of the said provision states "..Where a resident of India derives income which, in accordance with the provisions of this Agreement, may be taxed in the Sultanate of Oman, India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in the Sultanate of Oman, whether directly or by deduction." Article 25 (4) further clarifies one eventuality, i.e. if dividend is not tax as a result of incentive for economic development of Oman:***

> *"(4) The tax payable in a Contracting State mentioned in paragraph 2 and paragraph 3 of this Article shall be deemed to include the tax which would have been payable but for the tax incentive granted under the laws of the Contracting State and which are designed to promote development."*

*The relevant portions of Article 11, which deals with dividend income in the DTAA, reads as follows:*

> *"1. Dividends paid by a company which is resident of a Contracting State to a resident of the other Contracting State may be taxed in that other Contracting State.*
>
> *2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of the State, but if the recipient is the beneficial owner of the dividends, the tax so charged shall not exceed:..."*

*Naturally, the revenue's argument is that Article 11 (1) applies, to say so, it urges that the dividend income is not taxed, at least as far as co-operative societies are concerned and that in any event, the certificate relied upon by the assessee to claim the benefit of Article 25 (2) was not issued by a competent Omani authority.*

*25. The Tribunal noticed- in this court's opinion, correctly- that the expression "incentive" is neither defined in the Omani Tax Laws nor in the Income Tax Act, 1961. Due to this, OMIFCO wrote in November 2000 to Oman Oil Company SAOC seeking authentic clarification, regarding purpose of Article 8 (bis) of the Omani tax law. The Omani Ministry of Finance, Secretariat General for Taxation, Muscat, by letter dated 11th December, 2000 addressed to Oman Oil Company SAOC stated as follows:*

*"We refer to your letter dated 2 December, 2000 and our previous letter dated 6 August, 2000 on the above subject.*

*Under Article 8 of the Company Income Tax Law of Oman, dividend forms part of the gross income chargeable to tax. The tax law of Oman provides income tax exemption to companies undertaking certain identified economic activities considered essential for the country's economic development with a view to encouraging investments in such sectors.*

*Before the recent amendments to the Profit Tax Law on Commercial and Industrial Establishments, Article 5 of this law provided for exemption of dividend income in the hands of the recipients if such dividends were received out of the profits on which Omani income tax was paid by distributing companies. It meant that Omani income tax was payable by the recipients on any dividend income received out of the exempt profits from tax exempt companies. As a result, investors in tax exempt companies that undertake those activities considered essential for the country's economic development suffered a tax cost on their return on investments. the tax treatment under the above mentioned Article 5 had the negative impact on investments in tax exempt project.*

*The Company Income Tax Law of 1981 was, therefore, recently amended by Royal Decree No. 68/2000 by the insertion of a new Article 8 (bis) which is effective as from the tax year 2000.*

*As per the newly introduced Article 8 (bis) of the Company Income Tax Law, dividend distributed by all companies, including the tax exempt companies would be exempt from payment of income tax in the hands of the recipients. In his manner, the Government of Oman would achieve its aim objective of promoting economic development within Oman by attracting investments.*

*We presume from our recent discussions with you that the Indian investors in the above Project would be setting up Permanent Establishment in Oman and that their equity investments in the Project would be effectively connected with such Permanent establishments.*

*On the above presumption, we confirm that tax would be payable on dividend income earned by the Permanent Establishments of the Indian Investors, as it would form part of their gross income under Article 8, if not for the tax exemption provided under Article 8 (bis) .*

*As the introduction of Article 8 (bis) is to promote economic development in Oman, the Indian Investors should be able to obtain relief in India ITA NOS. 6785&6786/DEL/2015 (AYRS. 2010-11 & 2011-12) KRISHAK BHARATI CO-OPERATIVE LIMITED VS. ACIT under Article 25 (4) of the Agreement for Avoidance of Double Taxation in India.*

*All other matters covered in our letter No. FT/13/92/, dated 6th August, 2000 remained un-changed. "*

*26. The Tribunal concluded that the above clarification showed that the amendment of the law was to promote Omani economic development and to encourage investment in Omani companies. The Sultanate of Oman itself therefore clarified the issue regarding interpretation of Article 8 (bis). The tribunal held, in the light of this letter as follows:*

> *"It is an accepted position of interpretation that if there is some doubt about the interpretation of a particular provision of Law, the Competent Authority to clarify that provision is only the Government of that particular country. The Income Tax Department of India has no locus standi in this matter. The issue has been clarified by the*

> *highest Authority of the Sultanate of Oman through the Secretariat General of Taxation."*

*The ITAT also noticed Article 6 of Omani Income Tax Law of Companies No.47 /1981, which spells out functions of the Secretariat General Article 3 (3) states that:*

> *"3 - Any form or notification of document issued or published or delivered by the Secretary General in accordance with this Law shall be considered an official document if it carries the name or description of the Secretary General or the responsible officer who is designated by virtue of Paragraph (2) of Article (3) and this shall be whether the name or description is printed, stamped or written."*

*In view of the above, it is held that the clarification has to be regarded as conclusive; if the tax authorities had any doubts, they could not have proceeded to elevate them into findings, but rather addressed them to Omani authorities- if not directly, then through Indian diplomatic channels. In not doing so, but proceeding to interpret the laws and certificate of Omani authorities, the revenue, especially the Commissioner fell into error.*

*27. As far as the submission of the revenue, that the assessee did not have a Permanent Establishment in Oman is concerned, this court is of opinion that admittedly, for about 5 years, i.e 2002 to 2006, a common order was made under Article 26 (2) (b) of the Income Tax Law of Oman. The opening para of this order reads as under:*

> *"We refer to the returns of income and determine the taxable income as under:*

> *Kribhco Muscat is a permanent establishment supported by M/s. Krishak Bharati Cooperative Limited, a multi- state cooperative society registered in India. As per the accounts, Kribhco-Muscat is in receipt of dividend income from Omifco, a joint stock company registered in Oman, and that dividend income is connected with the investment of Kribhco-Muscat. The dividend income is, however, exempt from tax in accordance with Article 8 (bis) (1) of the Company Income Tax Law.*

*The tax exemption on dividend is granted with the objective of promoting economic development within Oman by attracting investments."*

*That order first included dividend income (in the total income determined) and thereafter granted deduction. For later years as well, assessments were made similarly. The ITAT also noticed as follows:*

> *"Up to the tax year 2011 dividend has been first included in the total income and thereafter deduction has been granted. The facts mentioned above clearly establish that the Assessee Society is entitled to getting credit for the deemed dividend tax by virtue of the provisions of DTAA read with Section 90 of the Income Tax Act, 1961 together with the clarifications issued by the Sultanate of Oman and the assessment made under the Omani Laws. In view of the above it is respectfully submitted that on merits also Assessee Society is entitled for the tax credit which has been rightly allowed by the Assessing Officer and, therefore, the Ld. PCIT has completely erred in giving directions to the Assessing Officer under Section 263 to withdraw the said tax credit."*

***These findings are, in this court's opinion, in consonance with logic and reason and do not call for interference. Both questions of law are answered in favour of the assessee; the appeals fail and are, therefore, dismissed."***

15. Respectfully following the binding decision of the Hon'ble High Court [supra], Ground No. 3 is also dismissed.

16. In the result the appeal of the Revenue is dismissed.

17. To sum up, in the result, the appeal of the assessee in ITA No. 581/DEL/2022 is allowed in part for statistical purposes and that of the Revenue in ITA No. 860/DEL/2022 is dismissed.

The order is pronounced in the open court on 15.11.2022.

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| **Sd/-** | **Sd/-** |
| **[KUL BHARAT]**<br>**JUDICIAL MEMBER** | **[N.K. BILLAIYA]**<br>**ACCOUNTANT MEMBER** |

Dated: 15th November, 2022

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

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