2023INSC834

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 836 OF 2018

PRINCIPAL COMMISSION ER OF
INCOME TAX-10 .... APPELLANT

VERSUS

M/S KRISHAK BHARTI COOPERATIVE LTD. .... RESPONDENT

WITH

CIVIL APPEAL NO. 3369 of 2019, CIVIL APPEAL NO(s). 2256 OF 2018, CIVIL APPEAL NO(s). _____ OF 2023 @ SLP(C)NO(s). _____OF 2023 @ SLP (C) Diary No(s). 4647 of 2018, CIVIL APPEAL NO(s). _____ OF 2023 @ SLP(C) No(s). 11204 of 2023 & CIVIL APPEAL NO(s). _____ OF 2023 @ SLP (C) NO(s). _____ OF 2023 @ SLP (C) Diary No(s). 15333 of 2023.

J U D G M E N T

PRASHANT KUMAR MISHRA, J.

Delay condoned in SLP (C) Diary No. 4647 of 2018 and SLP (C) Diary No. 15333 of 2023.

2. Leave granted in SLP (C) No. _____ @ Diary No. 4647 of 2018, SLP(C) No. 11204 of 2023 and SLP (C) No. _____ @ Diary No. 15333 of 2023.

3. This judgment governs the disposal of Civil Appeal No. 836 of 2018, C.A. No. 3369 of 2019, Civil Appeal No. 2256 of 2018 and the appeals arising out of SLP (C) Diary No. 4647 of 2018, SLP(C) No. 11204 of 2023 and SLP (C) @ Diary No. 15333 of 2023.

BACKGROUND FACTS:

4. 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, Government of India. In the course of its business of manufacturing fertilizers, it entered into a joint venture with Oman Oil Company to form the Oman Fertilizer Company SAOC (for short 'OMIFCO' or 'the JV'), a registered company in Oman under the Omani laws. The assessee has 25% share in the JV. The JV manufactures fertilizers, which are purchased by the Central Government. The assessee has a branch office in Oman which is independently registered as company under the Omani laws having permanent establishment status in Oman in terms of Article 25 of the DTAA. The branch office maintains its own books of account and submits returns of income under the Omani income tax laws.

5. The assessment for the relevant year was completed under Section 143 (3) of the Income Tax Act, 1961 (for short, 'the Act'). The Assessing Officer

allowed tax credit in respect of the dividend income received by the assessee from the JV. The dividend income was simultaneously brought to the charge of tax in the assessment as per the Indian tax laws. However, under the Omani tax laws, exemption was granted to the dividend income by virtue of the amendments made in the Omani tax laws w.e.f the year 2000.

6. The Assessing Officer allowed credit for the said tax, which would have been payable in Oman, but exemption was granted. Thereafter, the Principal Commissioner of Income Tax (for short, 'PCIT') issued a show cause notice under Section 263 of the Act on the ground that the reliance placed on Article 25(4) of DTAA was erroneous in this case and no tax credit was due to the assessee under Section 90 of the Act. This notice was duly replied to by the assessee. However, the PCIT rejected all the contentions raised by the assessee *inter alia* holding that Article 25 of Omani tax laws is not applicable in the instant case because there is tax payable on dividend in Oman and, accordingly, no tax has been paid and that assessee is not covered under the exemption.

7. Questioning the order of PCIT, the assessee preferred an appeal before the Income Tax Appellate Tribunal (for short, 'ITAT'), which allowed the appeal holding that the order passed by the PCIT under Section 263 of the Act is without jurisdiction and is not sustainable in law.

8. The order passed by the ITAT was challenged before the Delhi High Court by preferring an Income Tax Appeal, which has been dismissed by the High Court by the impugned judgment holding that as per the relevant terms of the DTAA between India and Oman, the assessee is entitled to claim the tax credit, which has been rightly allowed by the Assessing Officer.

CONTENTIONS RAISED BY THE PARTIES:

9. Shri Arijit Prasad, learned senior counsel would submit that Article 11(4) would only apply in a case where the Permanent Establishment (for short, 'PE') of the assessee was carrying on business in Oman, whereas, in the case in hand, the PE is only doing preparatory and auxiliary work and is not having any tangible expenses. Therefore, the dividend income of the assessee is not related to its PE. It is also argued that the exemption letter dated 11.12.2000 issued by the Sultanate of Oman, Ministry of Finance under the signatures of Secretary General for Taxation, has no statutory force as per Omani Tax Laws, therefore, the same cannot be relied upon to claim exemption.

10. *Per contra,* Mr. Arvind P. Dattar, learned senior counsel appearing for the assessee would contend that the provisions of DTAA fully exempt the assessee from payment of tax on dividend in Oman which, in turn, would exempt the

assessee from taxation in India. It is further argued that the letter issued by the Sultanate of Oman, Ministry of Finance emanates from the highest authority of the Omani regime, therefore, the clarification set out in the said letter is valid for interpretation of the relevant clauses of DTAA, to exempt the assessee from payment of dividend tax in Oman and, in turn, in India.

ISSUE TO BE CONSIDERED BY THIS COURT:

11. All the matters involve a similar question of law as to whether the dividend income earned by the assessee is taxable, although exempted under Omani Tax Laws to entitle the assessee to the benefits of the Double Taxation Avoidance Agreement (for short, 'DTAA') between India and Oman.

ANALYSIS AND FINDINGS:

12. The decision in these appeals revolves around the relevant provisions of the DTAA and Omani Tax Laws, therefore, it is profitable to extract them for ready reference. Article 7 speaks about business profits which reads as follows:

> **"ARTICLE 7.**
>
> The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carried on business in the other Contracting State through a Permanent Establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other Contracting State but only so much of them as is

attributable directly or indirectly to that Permanent Establishment."

Article 11 deals with dividends, which reads as follows:

"ARTICLE 11 DIVIDENDS

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:

(a) 10 per cent of the gross amount of the dividends if the beneficial owner is a company which owns at least 10 per cent of the shares of the company paying the dividends;

(b) 12½ per cent of the gross amount of the dividends in all other cases. This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares or other rights, not being debt-claims, participating in profits as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the Contracting State of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein or performs in that other Contracting State independent personal services from a fixed base situated therein, and the holding in

respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 16, as the case may be, shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other Contracting State may not impose any tax on the dividends paid by the company except insofar as such dividends are paid to a resident of that other Contracting State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other Contracting State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other Contracting State."

The significant provision concerning avoidance of double taxation is contained in Article 25, which is re-produced hereinunder:

"**25. AVOIDANCE OF DOUBLE TAXATION.**

(1) The law in force in either of the Contracting States will continue to govern the taxation of the income in the respective Contracting States except where provisions to the contrary are made in this Agreement.

(2) 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. Such deduction shall not, however, exceed that part of the income tax(as computed before the deduction is given) which is attributable to the income which may be taxed in the Sultanate of Oman.

> (3) Where a resident of the Sultanate of Oman derives income which, in accordance with the provisio0ns of this Agreement, may be taxed in India, the Sultanate of Oman shall allow as a deduction from the tax on the Income of the resident an amount equal to the income tax paid in India, whether directly or by deduction. Such deduction shall not, however, exceed that part of the income tax (as computed before the deduction is given) which is attributable to the income which may be taxed in India.
>
> (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.
>
> (5) Income which, in accordance with the provisions of this Agreement, is not to be subjected to tax in a Contracting State, may be taken into account for calculating the rate of tax to be imposed in that Contracting State."

The provisions contained in **Omani Tax Laws**, relied upon by the assessee read as follows:

> "**Article 8 (bis)** – In exception to the provisions of Article 8 of this law, tax shall not apply on the following:
>
> 1. Dividends received by the company against equity shares, portions or stocks in the capital of any other company.
>
> 2. Profits or gains realized by the company from the sale of securities listed in Muscat Securities Market or from their disposal."

13. Article 25 (2) of the DTAA provides that where a resident of India derives income, which in accordance with 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) clarifies that the tax payable in a Contracting State mentioned in clause 2 and clause 3 of the said 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.

14. The revenue relied upon Article 11 which provides that dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other Contracting State. Thus, according to the revenue, dividend received by the assessee is taxable in India and is not exempt because the same is not designed as tax incentive in Oman to promote development in that country. In the same manner, it is argued that the letter issued by the Secretary General for Taxation, Ministry of Finance, Oman was not issued by the competent Omani authority and has no statutory force.

15. The term 'incentive' is neither defined in the Omani Tax Laws nor in the Income Tax Act, 1961. Faced with this situation, the JV addressed a letter in November, 2000 to Oman Oil Company seeking clarification regarding the purpose of Article 8 (bis) of the Omani Tax Laws. The clarification letter dated

11.12.2000 addressed by the Secretary General for Taxation, Sultanate of Oman, Ministry of Finance, Muscat to Oman Oil Company SAOC is significant, and reads as follows:

> "We refer to your letter dated 2nd December, 2000 and our previous letter dated 8 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 this 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 unchanged."

16. It is, thus, clear from the above letter of the Omani Finance Ministry that the dividend distributed by all companies, including the tax-exempt companies would be exempt from payment of income tax in the hands of the recipients. By extending the facility of exemption, the Government of Oman intend to achieve its object of promoting development within Oman by attracting investments. Since the assessee has invested in the project by setting up a permanent establishment in Oman, as the JV is registered as a separate company under the Omani laws, it is aiding to promote economic development within Oman and achieve the object of Article 8 (bis). The Omani Finance

Ministry concluded by saying 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).

17. A plain reading of Article 8 and Article 8 (bis) would manifest that under Article 8, dividend is taxable, whereas, Article 8(bis) exempts dividend received by a company from its ownership of shares, portions, or shareholding in the share capital in any other company. Thus, Article 8(bis) exempts dividend tax received by the assessee from its PE in Oman and by virtue of Article 25, the assessee is entitled to the same tax treatment in India as it received in Oman.

18. Insofar as the argument concerning the assessee not having PE in Oman, it is significant to note that from the year 2002 to 2006, a common order was made under Article 26 (2) of the Income Tax Law of Oman. The High Court has extracted the opening portion of the above order, which 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."

It is, thus, apparent that the assessee's establishment in Oman has been treated as PE from the very inception up to the year 2011. There is no reason as to why all of a sudden, the assessee's establishment in Oman would not be treated as PE when for about 10 years it was so treated, and tax exemption was granted basing upon the provisions contained in Article 25 read with Article 8 (bis) of the Omani Tax Laws.

19. Learned senior counsel for the appellant has also raised an issue to the effect that the letter dated 11.12.2000 issued by the Secretary General for Taxation, Ministry of Finance, Sultanate of Oman has no statutory force as per Omani Tax Laws, hence, the same cannot be relied upon to claim exemption. In our view, the above letter, as has been reproduced in the preceding paragraph of this judgment, is only a clarificatory communication interpreting the provisions contained in Article 8 and Article 8 (bis) of the Omani Tax Laws. The letter itself has not introduced any new provision in the Omani Tax Laws. In this view of the matter, the argument raised by the learned senior counsel would not convince us to deny exemption to the assessee.

20. In our considered view, the appellant has not been able to demonstrate as to why the provisions contained in Article 25 of DTAA and Article 8 (bis) of the Omani Tax Laws would not be applicable and, consequently, we hold that the appeals have no substance and deserve to be dismissed which are hereby dismissed.

……J.
(B.V. NAGARATHNA)

……J.
(PRASHANT KUMAR MISHRA)

SEPTEMBER 15, 2023
NEW DELHI.