* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 955/2008

KRISHAK BHARATI COOPERATIVE LTD. ..... Appellant
Through Mr. S.Ganesh Sr. Advocate with
Ms. Surekha Raman and
Mr. Anuj Sarma, Advocates.

versus

COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. Sanjeev Sabharwal, sr.
standing counsel.

\+ ITA 1280/2007

KRISHAK BHARATI COOPERATIVE LTD. ..... Appellant
Through Mr. S.Ganesh Sr. Advocate with
Ms. Surekha Raman and
Mr. Anuj Sarma, Advocates.

versus

JOINT COMMISSIONER OF INCOMETAX SPECIAL RANGE 12
..... Respondent
Through Ms. Rashmi Chopra, sr. standing
counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

O R D E R

% 23.04.2012

Having heard learned counsel for the parties in these two appeals, which pertain to the assessment years 1993-94 and 1994-95, we are inclined to frame the following substantial question of law:-

> "Whether the Income Tax Appellate Tribunal was right in holding that the Commissioner of Income Tax had rightly invoked and exercised jurisdiction under Section 263 of the Income Tax Act, 1961?"

2. We have heard learned counsel for the parties and proceed to dictate our decision on the aforesaid question of law.

3. The appellant-assessee is a multi state co-operative society engaged in the business of manufacture and sale of Urea and Ammonia at its plant at Hazira, Gujarat. For the two assessment years in question, it had claimed deduction under Section 80 I of the Income Tax Act, 1961 (Act, for short) in respect of its manufacturing activity, which was allowed by the Assessing Officer. While claiming and calculating the said deduction, the assessee had included interest income on short term bank deposits and tank hire charges received from third parties. The Assessing Officer in the assessment order did not disturb the computation and accepted the claim that short term bank deposits and tank hire charges should be included for calculating the deduction under Section 80-I of the Act.

4. The Commissioner of Income Tax, Delhi-IX (Commissioner) issued notices under Section 263 of the Act, dated 27th March, 1998 and 12th March, 1999 in respect of the assessment years 1993-94 and 1994-95 to the assessee, why the two amounts should not be excluded from the deduction claimed under Section 80 I of the Act. After

considering the reply and hearing the assessee, the Commissioner h passed two orders dated 31st March, 1998 and 30th March, 1999 modifying the assessment orders in the two years and holding that the two amounts were not entitled to deduction under Section 80 I as they were not "derived from" manufacturing activity undertaken by the industrial unit.

5. By the impugned orders dated 26th October, 2007 and 20th April, 2007, relating to the assessment years 1993-94 and 1994-95 respectively, the Income Tax Appellate Tribunal (Tribunal, for short) has rejected/dismissed the appeal of the appellant-assessee.

6. Before us two primary contentions have been raised. Firstly, the Assessing Officer in the original assessment proceedings had examined the issue and taken a plausible view and, therefore, the order passed by the Assessing Officer was not erroneous and prejudicial to the interest of the Revenue. It is submitted that the Commissioner in the order dated 31st March, 1998 relating to the assessment year 1993-94 had wrongly and incorrectly observed that the Assessing Officer had not conducted inquiries and, therefore, the assessment order was erroneous and prejudicial to the interest of Revenue. Secondly, it is submitted that even in law, and as a legal principle, interest earned on short term deposits made pursuant to the directions given by the Government of India were inter-connected and closely linked with the industrial

activity. The interest earned was income derived from manufacturing activity undertaken by the industrial unit. Similarly, tank hire charges also qualify and are connected with the manufacturing activities.

7. We have considered the above contentions, but do not find any merit in the same.

8. The Commissioner in the order dated 31st March, 1998 has specifically examined and gone into the question whether the order passed by the Assessing Officer including the aforesaid amounts was erroneous and prejudicial to the interest of the Revenue and held that these two amounts cannot be taken into account for computation of the said deduction. Accordingly, he has held that computation of deduction made by the Assessing Officer was wrong and excessive/enhanced deduction contrary to law has been allowed. The exact reasoning given by the Commissioner in the order dated 31st March, 1998, reads as under:-

> "5. I am not inclined to agree with the arguments of the learned counsel. In this case, the industrial activity in which the company was involved was the manufacturing of Urea & Ammonia and not the business of letting out the Ammonia tanks on hire and investing funds to earn interest. None of these activities form an essential part of industrial undertaking nor were they in any manner directly related to the industrial activities of the company. The interest income and tank hire charges had no direct and proximate nexus with the activity or the earning of the business profit or gains of the industrial

undertaking.

6. With the introduction of Sec. 80I w.e.f. 1.4.81, the legislature has substituted the word 'attributable to' with the words 'derived from' which have been construed to have a definite, narrow and restrictive meaning as compared to the word 'attributable to'. For this purpose, industrial undertaking must itself be the source of profits and gains and it would not be sufficient if commercial connection is established between the profit and gains earned and industrial undertaking. The aforesaid view was held by the Hon'ble Supreme Court in the case of M/s Cambay Electric Supply Indl. Co. Ltd. Vs. CIT, Gujrat-II 113-ITR-84.

7. The assessee has placed reliance on the decision of Supreme Court in the case of M/s Vellore Electric Corp. Ltd. Vs. CIT (1997) 227-ITR-557. This decision interprets Sec. 80I when the term 'attributable to' was existing. This term has since been omitted and the words 'derived from' substituted. Accordingly, the ratio of this decision would not be applicable. On the other hand, the term 'derived from' has been interpreted by the Madhya Pradesh High Court in the case of CIT Vs. Paras Oil Extraction Ltd. (1997) 230-ITR-280. In this case the Hon'ble High Court has held that where the assessee was engaged in the business of oil extraction, the income earned by it from letting out weighing machine and granting loan on interest would not be entitled for deduction u/s 80I, as such activities would not be incidental to the activity of the industrial undertaking of the assessee.

8. The ITAT, Jabalpur Bench in the case of Dy. CIT Vs. Vindhya Telelinks Ltd. reported in 63-ITD-127 (1997) has also categorically defined the phrase 'attributable to' and 'derived from'. It was held that an income can be said to be derived from an industrial undertaking only if it is directly related to the running of the industrial undertaking

itself. The scope of expression 'derived from' is much narrower thant the word 'attributable to'.

9. In view of the above, it is clear that the earning of interest and tank hire charges have no direct and proximate nexus with the industrial activities or the carrying of business profit as envisaged in Section 80I. Therefore, the income from these two items earned by the assessee company cannot be said to be 'derived from' the industrial undertaking."

9. Similarly, for the assessment year 1994-95, the Commissioner in the order dated 30th March, 1999 after considering the case law on the subject and examining the expression "derived from", has held as under:-

15. The facts of the assessee's case are that the assessee has included interest income earned by it on deposits with different banks and financial institutions and has included the same as eligible profit for calculation of deduction under section 80 I. The facts of the case cited above are identical to the facts of the assessee's case since earning of interest income by the assessee has no direct nexus with the activity of the industrial undertaking of the assessee and hence interest income earned cannot be said to be derived from industrial undertaking. The words 'derived from an industrial undertaking' mean that the income has been derived from industrial activity of the undertaking and it does not mean any commercial activity undertaken by the assessee. The words 'industrial undertaking' have to be construed narrowly and cannot be given a wide meaning. In the instant case, the industrial undertaking of the assessee was involved in the manufacture of urea and ammonia and not in the business of making deposits for interest. Hence, interest earned on deposits cannot be considered to be an income

derived from industrial activity as envisaged u/s 80I w.e.f. 1.4.1981.

16. The Ld. counsel has argued that the provisions of the Act should be liberally construed so as to promote economic growth. It has been held by the Delhi High Court in the case of Escorts Ltd. Vs. Union of India 189 ITR 81 that "merely because of provision of Act is harsh …. this is no ground for discarding one of the cardinal rules of interpretation of statue(sic) that if the language of the statute is clear and unambiguous, then resort cannot be bad to the aims and objects or to the minister's speech with a view to interpret the provisions of the statue(sick)."

17. In the case of K.P.Verghees Vs. ITO 131 ITR 597, the hon'ble Supreme court has held that "Statue (sick) may be interpreted by reference to the exposition it has received from contemporary authority though such exposition must give way where the language of the statue (sic) is plain and unambiguous. Similar view was also taken by the hon'ble Supreme Court in the case of CWT vs. Hasmatunnisa Begum 176 ITR 98 that if the words of the statue(sick) on a proper construction can be read in a particular way than they cannot be read in another way by a Court of construction anxious to avoid its unconstitutionality.

18. Once the provisions of the Act are clear, they have to be strictly construed and not be disputed that the expression "attributable to" is certainly wider in import than the expression "derived from". Whenever the legislature has intended to a restrictive meaning it has used the expression "derived from" as in Section 80 J (Combay Electric Supply co. Ltd. Vs. CIT 113 ITR 84). In the present case, word used is "derived from" which has to be strictly interpreted to mean anyone having direct nexus to the industrial activity of the undertaking.

> 19. By admitting the claim of the assessee society for asstt. year 1995-95, the assessee has been allowed deduction under section 80 I in excess of what is legally permissible. I am of the opinion that the aforesaid assessment order dated 27.2.1997 passed by DCIT, Special Range-12 is erroneous and prejudicial to the interest of revenue. I, therefore, set aside the assessment order for asstt. year 1994-95 with the direction to recalculate the deduction u/s 80 I after excluding the interest income of Rs.375882341/- received by the assessee society."

10. A reading of the aforesaid paragraphs clearly elucidates that the Commissioner has not gone into the question whether or not the Assessing Officer had conducted inquiries in the original assessment proceedings and whether it a case of failure of the Assessing Officer to conduct enquiries, which itself makes an assessment order erroneous and prejudicial to the interest of the Revenue. The Commissioner has examined the merits of the claim and then opined that the deduction allowed and the order passed was erroneous and prejudicial.

11. In the order relating to the assessment year 1994-95, the Commissioner may have made a reference that the Assessing Officer should have conducted further inquiries, but the primary and core reasoning and the ground for invoking jurisdiction under Section 263 was that the Assessing Officer had wrongly interpreted the expression "derived from" and the narrow meaning and interpretation given by the Supreme Court was applicable. The reasoning and the grounds given

by the Commissioner are correct and as per law.

12. We may reproduce our observations in Income Tax Officer versus D. G. Housing Project Ltd. ITA No. 179/2011 dated 1st March 2012:-

> "10. Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. Section 263 has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression 'prejudicial to the interest of the Revenue' is of wide import and is not confined to merely loss of tax. The term 'erroneous' means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law.
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> 11. The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word 'erroneous' includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.
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17. This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged 'inadequate investigation', it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see ***CIT vs. Shree Manjunathesware Packing Products,*** 231 ITR 53 (SC)]. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

18. It is in this context that the Supreme Court in ***Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax,*** (2000) 243 ITR 83 (SC), had observed that the phrase 'prejudicial to the interest of Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer.

> Every loss of Revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of Revenue. Thus, when the Assessing Officer had adopted one of the courses permissible and available to him, and this has resulted in loss to Revenue; or two views were possible and the Assessing Officer has taken one view with which the CIT may not agree; the said orders cannot be treated as an erroneous order prejudicial to the interest of Revenue unless the view taken by the Assessing Officer is unsustainable in law. In such matters, the CIT must give a finding that the view taken by the Assessing Officer is unsustainable in law and, therefore, the order is erroneous. He must also show that prejudice is caused to the interest of the Revenue. "

[Also see order passed by this Bench in ***CIT Vs. DLF Power Ltd.***, ITA No.973/2011 decided on 29th November, 2011]

13. The contention raised by the appellant assessee that the interest on short term deposit is income derived from manufacturing activity undertaken by the industrial unit has to be rejected. Interest is paid by the bank on account of the deposit made. Immediate and first source of receipt of interest income is the deposit of money and not the industrial activity. Manufacturing activity, or profit earned therefrom, is not the proximate source of the interest earned. The said interest income, therefore, cannot be treated as income earned or derived from manufacturing activity undertaken by the industrial unit.

14. Tank hire charges were received by the appellant-assessee from the consumers to whom Ammonia was supplied. It represents

payment for transportation. On query, it is accepted/stated by the appella that these tank hire charges were separately billed and these tanks were the carriage wagons owned by the Railways. Transportation charges when separately billed and charged cannot be included in the profit and gain from manufacturing activity undertaken by an industrial unit. There is no evidence or material that the transport charges paid and received were intrinsically connected and linked with the manufacturing activity and have to be treated as sale proceeds for the goods sold. Normally, transportation is after or post manufacture. The onus was on the appellant assessee to show and establish that in the present case, because of the peculiarity of facts, transportation charges should be treated as sales proceeds or part of sale proceeds of the goods manufactured and were intrinsically connected and had live link with the manufacturing activity. In the absence of aforesaid evidence and material placed by the appellant assessee, the transportation charges cannot be treated as profit and gain derived from the manufacturing activity, which qualifies for deduction under Section 80-I.

15. In view of the aforesaid reasoning, the substantial question of law is answered in affirmative i.e. in favour of the Revenue and against the assessee. In the facts and circumstances of case, there will be no order as to costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

APRIL 23, 2012/NA