

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
MS. MADHUMITA ROY, JUDICIAL MEMBER**

ITA No.1829/Bang/2013
Assessment Year: 2007-08

M/s. Southern Hills Developers Pvt. Ltd. (formerly known as M/s. Nitesh Estates Projects Pvt. Ltd.) 7 th Floor, Nitesh Timesquare 8, M.G. Road Bangalore 560 001 PAN NO : AACCN3865H	Vs.	Deputy Commissioner of Income-tax Circle-12(2) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Smt. Sheetal Borkar, A.R.
Respondent by	:	Shri Parithivel, D.R.

Date of Hearing	:	04.09.2023
Date of Pronouncement	:	05.09.2023

ORDER

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

This appeal by assessee is directed against order of CIT(A) dated 11.9.2013. Originally assessee came in appeal before this Tribunal vide following grounds:

- 1. “The learned Commissioner of Income-tax (Appeals) erred in passing the order in the manner he did.*
- 2. The learned Commissioner of Income-tax (Appeals) erred in upholding the addition made by A.O. without appreciating the explanation of the appellant.*
- 3. The learned Commissioner of Income-tax (Appeals) further erred in not restricting from enhancing the percentage of the apportionment.*

4. *The learned Commissioner of Income-tax (Appeals) ought to have accepted the explanation of the appellant and refrained from disallowing Rs.80, 73,115/-.*
 5. *On the facts and circumstances of the case the learned Commissioner (A) further erred in observing that no amount on account of share of profit payable to M/s. Nakoda Constructions can be treated as deductible expenditure from the income of the appellant without appreciating that sharing of profit is project specific and is to be treated as cost for the project and not as appropriation of profit and the same is taxable in the hands of Nakoda Construction Pvt. Ltd.,*
 6. *Without prejudice the disallowance as confirmed by the learned Commissioner (A) is arbitrary, unreasonable and liable to be reduced substantially.*
 7. *The learned Commissioner (A) erred in confirming the interest levied u/s.234B of the Act.*
 8. *For these and other grounds that may be urged at the time of hearing of the appeal the appellant prays that the appeal may be all owed.*
2. These grounds are disposed of by this Tribunal vide order dated 26.8.2016 by observing as under:

6. *"We have considered the rival submissions as well as the relevant material on record. It is not the case of the assessee that the assessment of the income from NBG Project be made in the hand of AOP being joint venture. The assessee has offered the income from NBG Project as assessee's own project as well as income without offering in the hand of joint venture. The claim of 50% share in the profit to the other partner is not permissible business expenditure. The CIT (Appeals) has discussed this issue in paras 7 to 9 as under:*

"7.0 In the course of submissions before me, appellant has pointed out that there are mistakes in the computation of the Assessing Officer as Assessing Officer has only excluded the project expenses of Rs.2,06,51,067 as against the incorrect figure of project expenses pertaining to NMF and NWP of Rs.2,45,70,752. It is further been stated that the share of profits to M/s. Nakoda Construction is also required to be excluded by treating it as an expense. After considering the issue, I am of the view that expenses on NMF and NWP the

figure of Rs.2,45,70,752 is to be reduced while arriving at the share of expenses to be allocated, as this amount is admittedly not claimed by assessee in computing income, the proportionate payment of 50% of profits of NBG to M/s. Nakoda Construction is not in the nature of expenditure to be included in the project cost as expended towards earning profits. This is therefore not to be reckoned with in arriving at allocable project cost. In my considered opinion, the profit attributable to a profit-sharing arrangement entered by the appellant is not a deductible expenditure as it is only an appropriation of profits. Thus, the action of the Assessing Officer in reworking the cost allocable to the profit NBG by excluding the proportionate inadmissible costs cannot be faulted. The action of the A.O. is therefore upheld.

8.0 *It may not be out of context to consider the actual nature of payment claimed to be made to M/s. Nakoda Constructions and to consider whether this is a deductible amount in arriving at the taxable income of the appellant. It is pointed out by the Assessing Officer in the assessment order that M/s. Nakoda Constructions has invested money in the NBG project. An obligation that arises to discharge a sum to an investor on realizing profits would only be an appropriation of income. The Hon'ble Supreme Court in the case of CIT Vs Sitaldas Tirathdas 041 ITR 0367 has laid down the litmus test to determine whether an amount is deductible being in the nature of income is as follows:*

"In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow". Thus, on the facts of the case the income receipt falls squarely in the ambit of scope of income which is chargeable as per provisions of section 5.

9.0. *The Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd Vs CIT 227 ITR 0172 has held as follows:*

"Whether a particular receipt is of the nature of income and falls within the charge of section 4 of the income-tax Act is a question of law which has to be decided by the court on the basis of the provisions of the Act and the interpretation of the term "income" given in a large number of decisions of the High Court, the Privy Council and also this court. It is well-settled that income attracts tax as soon as it accrues. The application or destination of the income has nothing to do with its accrual or taxability." The appellant's claim for payment of a share of profits as a deductible expenditure is therefore not admissible as it is income in the hands of the appellant.

9.1. *Considering the facts of the case and the judicial pronouncements cited above, it is evident that no amount on account of share of profits payable to M/s. Nakoda Constructions can be treated as a deductible expenditure from the income of the appellant. In the instant case, the AO has pointed out that when the project expenses are allocated proportionately there is only a loss from the project. However, even in the event of the project resulting in profits, the payment cannot be treated as an admissible expenditure as it is only an appropriation of profits."*

It is clear from the finding and facts discussed by the CIT (Appeals) that the share in the profit is always to be considered profit after tax. Therefore, we do not find any error or illegality in the impugned order of the CIT (Appeals).

7. *In the result, the appeal of the assessee is dismissed."*

2.1 Against this, assessee went in appeal before the jurisdictional High Court in ITA No.40 of 2017, the Hon'ble Karnataka High Court vide judgement dated 23.8.2022 disposed of this appeal by observing as under:

5. *We have carefully considered rival contentions and perused the records.*

6. *The ITAT has recorded the submissions of the learned representatives for the assessee and the Revenue till para 5. In para 6, it has extracted paras 7 to 9 of CIT(A)'s order and without recording any reasons dismissed the appeal. Therefore, we are persuaded to accept the argument*

advanced on behalf of the assessee that the order passed by the CIT(A) is bereft of any independent reasons.

7. *In view of the above, the following:*

ORDER

- (a) *Appeal is allowed.*
- (b) *The order dated 26.8.2016 in ITA No.1829/Bang/2013 passed by the ITAT, is set-aside.*
- (c) *The matter is remitted to the ITAT for fresh consideration in accordance with law.*
- (d) *As the matter has been remitted to the ITAT, the questions of law are not answered.”*

2.2 Hence, this appeal is listed for hearing once again and came before this Bench today.

3. The facts of the issue are that the assessee has filed a return of loss of Rs. 13,58,935/-. In the course of assessment proceedings u/s 143(3) of the Income-tax Act, 1961 [‘the Act’ for short] the AO has verified the expenses incurred on various projects and held that the assessee has not apportioned expenses proportionately and inadmissible project expenses relating to Nitesh Mayfair and Nitesh Wimbledon park, which are projects undertaken on behalf of Nitesh Estate Pvt Ltd have also been included, while working out profitability from the Nitesh Buckingham Gate (NBG). The AO has therefore stated that the percentage of expenses allocable to NBG out of the total project expenses works out at 79.9%. Considering this, the ld. AO has allocated 79.9% of the total administrative cost of Rs. 4,70,34,701/- to the NBG project. Thus, reworking the profitability from the NBG project, the ld. AO has held that a loss had resulted from the NBG project. The AO has therefore held that the claim of an amount of Rs. 80,73,115/- to M/s Nakoda constructions with whom the assessee had a profit-sharing arrangement of 50%

in the NBG project is not allowable as there is no resultant profit available to be shared. Income has thus been assessed at Rs. 67,14,181/-. However, the ld. AO finally while determining the income of the assessee has considered the loss declared by the assessee at (-) Rs.13,58,934/- and added the share of profit from NBG payable to M/s. Nakoda Constructions Pvt. Ltd. since it is the appropriation of profits and cannot be considered as allowable expenditure as this was not incurred wholly and exclusively for the purpose of business.

4. The ld. CIT(A) observed that it is based on the Memorandum of Understanding (MOU) dated 11-02-2006 that the amount of 50% of the profits of NBG project is claimed to be paid to M/s Nakoda constructions and that cannot be claimed as an allowable deduction. It is necessary to note that the profits have been arrived at after deducting the cost and other administrative expenses relatable to the project. According to assessee, the project cost allocable to the NBG project is only 65.14%. However, the AO has observed that since the assessee has arrived at the percentage of 65.14 after including project expenses of Rs. 2,45,70,752/- that pertain to Nitesh Mayfair and Nitesh Wimbledon park which are projects undertaken on behalf of Nitesh Estate Pvt Ltd., this figure is to be reworked. It is significant that while the assessee has excluded the expenses on the Wimbledon Park and Mayfair project; in its computation of income, this has been included for the purpose of allocation of proportionate share of project expenses and administrative expenses while arriving at the profits on NBG. Thus, ld. CIT(A) observed that the action of the AO in rejecting this contradictory method adopted by assessee, is well founded and logical.

4.1 The ld. CIT(A) further observed that assessee has pointed that there are mistakes in the computation made by the ld. AO as the AO has only excluded the project expenses of Rs. 2,06,51,067/- as against the correct figure of project expenses pertaining to NMF and NWP of Rs. 2,45,70,752/-. It is further been stated that the share of profits to M/s Nakoda Constructions is Rs.80,73,115/- and added the share of profit from NBG payable to Nakoda Constructions Pvt. Ltd., since it is the appropriation of profit and required to be excluded as it cannot be treated as an expense. The ld. CIT(A) also observed that the expenses on NMF and NWP the figure of Rs. 2,45,70,752/- is to be reduced while arriving at the share of expenses to be allocated, as this amount is admittedly not claimed by assessee in computing income, the proportionate payment of 50% of profits of NBG to M/s Nakoda Constructions is not in the nature of expenditure to be included in the project cost as expended towards earning profits. This is therefore not to be reckoned with in arriving at allocable project cost. He observed that the profit attributable to a profit-sharing arrangement entered by the assessee is not a deductible expenditure as it is only an appropriation of profits. Thus, the action of the AO in reworking the cost allocable to the profit NBG by excluding the proportionate inadmissible costs cannot be faulted. Therefore, the action of the AO was upheld by the ld. CIT(A).

4.2 He further observed that it is to be considered as the actual nature of payment claimed to be made to M/s Nakoda Constructions and to consider whether this is a deductible amount in arriving at the taxable income of the assessee. It is pointed out by the ld AO in the assessment order that

M/s Nakoda Constructions has invested money in the NBG project.

4.3 Considering the facts of the case and various judicial decisions, the Id. CIT(A) observed that it is evident that no amount on account of share of profits payable to M/s Nakoda Constructions can be treated as a deductible expenditure from the income of the assessee. He observed that in the instant case, the Id. AO has pointed out that when the project expenses are allocated proportionately there is only a loss from the project. However, even in the event of the project resulting in profits, the payment cannot be treated as an admissible expenditure as it is only an appropriation of profits.

Against this assessee is in appeal before us.

5. We have heard the rival submissions and perused the materials available on record. Ground Nos.1, 2 & 6 are general in nature, which do not require any adjudication.

5.1 Ground Nos.3, 4 & 5 are with regard to sustaining addition made by Id. CIT(A) at Rs.80,73,115/-. The assessee has declared a loss of Rs.13,58,934/- in the assessment year under consideration. The assessee carried out one project by name "Nitesh Buckingham Gate" (in short "NBG") for which M/s. Nakoda Constructions Pvt. Ltd. is a co-partner.

(A) The total sales of this project - Rs.8,66,22,523/-.

(B) The total cost relating to this project is as follows:

Cost	-	Rs.1,94,53,686/-
Administrative expenses	-	Rs.1,18,63,440/-
Common expenses (5%)	-	Rs. 27,65,270/-
Land cost	-	<u>Rs.3,63,93,989/-</u>

(C) Total cost - Rs.7,04,76,385/-

(C) = (A – B) i.e. Net Profit - **Rs.1,61,46,229/-**

5.1 Out of the above net profit, the assessee has to pay Nakoda Constructions Pvt. Ltd. of Rs.80,73,115/- being co-partner of this project and however, it has been shown an amount of Rs.80,13,115/- as an expenditure under the head "Cost of sales" which is included in Schedule 13 annexed to P&L account for the year ended on 31.3.2007 and claimed it as an allowable expenditure. The ld. AO observed that the assessee cannot claim this as an expenditure as this being the proportion of the profits payable to M/s. Nakoda Constructions Pvt. Ltd. out of income from NBG project. Accordingly, he added this amount to the loss shown by the assessee in the return of income as follows:

Loss returned	-	(-) Rs.13,58,934/-
Disallowance of expenses Wrongly claimed as business expenditure	-	(+) <u>Rs.80,73,115/-</u>
Net assessed income	-	Rs.67,14,180/-
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5.2 Now the contention of the ld. A.R. is that the ld. AO himself accepted the loss at Rs.68,05,788/- by re-casting the assessee's Profit & Loss account by considering the total cost incurred by assessee at 79.9% of the total project value and arrived at the loss figure of as above. Even after that he has not considered that loss for determining the income of the assessee itself and considered the loss declared by the assessee at Rs.13,58,934/- and thereafter, disallowed an expenditure towards payment of share of profit to M/s. Nakoda Constructions Pvt. Ltd. at Rs.80,73,115/-, which is incorrect. According to ld. A.R., the assessee is not entitled for entire profit from NBG project and assessee's interest in this project is only to the extent of 50% and 50% of profit of this project has to be given to M/s. Nakoda Construction Pvt. Ltd. Hence, she submitted that there is a total misunderstanding of the facts of the case by the ld. AO.

5.3 The ld. D.R. relied on the orders of the lower authorities and submitted that amount of Rs.80,73,115/- claimed by the assessee as an expenditure towards project of NBG over and above the actual expenditure incurred by the assessee towards their project. The assessee claimed the share of 50% profit payable to M/s. Nakoda Construction Pvt. Ltd., which cannot be allowed as a deduction in computing income of the assessee as this was the appropriation of profit. Hence, it has been disallowed. In our opinion, the assessee has taken the gross sales value of NBG project at Rs.8,66,22,523/- and thereafter assessee has charged all the expenditure incurred towards this project at Rs.7,04,76,385/-. Thus, there was an income from this project at Rs.1,61,46,229/-. The contention of ld. A.R. is that out of this assessee's share is only Rs.80,73,115/- and the balance amount is to be payable to M/s. Nakoda Construction Pvt. Ltd. and this is the allowable expenditure. We find no merit in this argument of the ld. A.R. Admittedly, there is no dispute that the profit earned from NBG project was Rs.1,61,46,229/- and the income is charged on the income earned from this project which should be before the appropriation of the same between assessee and M/s. Nakoda Construction Pvt. Ltd. Thereafter, allowing the deduction at Rs.80,73,115/- on this income means to give deduction out of the income earned from this project, which is not the intention of section 4 read with section 28 to 38 of the Act. The assessee is entitled to claim deduction towards expenditure which is incurred wholly and exclusively for the purpose of business. This is the expenditure which is not incurred wholly and exclusively for the purpose of business. This is the share of profit which is payable to M/s. Nakoda Constructions Pvt. Ltd. who is the co-partner of the NBG project and it is the appropriation of profit from business, which cannot be allowed as a deduction while computing the income of assessee. As such, the net income earned from this project from NBG was at Rs.1,61,46,229/-. This amount is liable for taxation. The assessee

by charging the amount of Rs.80,73,115/- to P&L account has artificially reduced the income of the assessee to that extent. Accordingly, the ld. AO after accepting the book result at Rs.13,58,934/- and disallowed the expenditure of Rs.80,73,115/- being the share of profit of M/s. Nakoda Construction Pvt. Ltd. and assessed income at Rs.67,14,181/-, which is the correct computation of income made by ld. AO. However, the assessee has taken plea that the AO ought to have considered the loss as he computed in page 4 of the assessment order at Rs.68,05,788/-. However, in our opinion, this has no bearing on the final computation of income of the assessee in the assessment year under consideration as this working has been made by ld. AO to show that assessee even determining the income from NBG project, it has allocated the cost relating to administrative selling expenses at 65% instead of 79.9%. Now the contention of ld. A.R. is that the loss determined by the AO from NBG project at Rs.68,05,788/- to be considered, thus, assessee's share on this NBG project was 50%, which worked out at (-) Rs.34,02,894/- and to that extent, assessee shall get relief. In our opinion, this argument of the assessee's counsel is totally devoid of merits. The ld. AO while computing the income for the assessment year under consideration started the computation at negative figure of Rs.13,58,934/- as returned by assessee. Thereafter, the wrong expenditure claimed by assessee towards share of profit of NBG project attributed to the co-owner i.e. M/s. Nakoda Constructions Pvt. Ltd., which has been charged to P&L account vide Schedule No.13 added back to the income of the assessee as this is not the allowable expenditure as it is not wholly and exclusively incurred for the purpose of business. Being so, we do not find any infirmity in the order of the lower authorities and the same is confirmed. The grounds raised by assessee in ground Nos.3, 4 & 5 in this appeal are dismissed.

6. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 5th Sept, 2023

Sd/-
(Madhumita Roy)
Judicial Member

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 5th Sept, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(Judicial)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.