

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI**

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER

AND

SHRI SUNIL KUMAR SINGH, HON'BLE JUDICIAL MEMBER

**ITA NOs. 1709 & 1812/MUM/2023
(A.Ys: 2012-13 & 2014-15)**

Mack Star Marketing Private Limited Tower B, 1102, Peninsula Business Park S.B. Road, Lower Parel Mumbai - 400013 PAN: AADCM7564K	v.	National Faceless Appeal Centre Delhi
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Himanshu S. Sinha Shri Yash Varmani & Shri Utkarsh Mittal
Department Represented by	:	Ms. Sanyogita Nagpal
Date of conclusion of Hearing	:	17.04.2024
Date of Pronouncement	:	19.04.2024

ORDER

PER NARENDRA KUMAR BILLAIYA (AM)

1. These two appeals are separate appeals by the assessee preferred against two separate orders dated 22.03.2023 and 23.03.2023 by National Faceless Appeal Centre, Delhi [hereinafter in short "Ld. CIT(A)"] pertaining to A.Ys. 2012-13 and 2014-15 respectively.

2. Both these appeals were heard together and are disposed off by the common order for the sake of convenience and brevity.

3. We will first take up the appeal in ITA No. 1709/MUM/2023 for the A.Y. 2012-13. The grievance of the assessee read as under: -

"1. The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances in upholding the assessment order dated 30.03.2015 in relation to the disputed items under challenge and agitated in this appeal.

Merits

2. The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances of the case in disallowing the costs and expenses incurred by the Appellant in relation to the commercial building Kaledonia constructed by it while computing the loss incurred by it upon sale of units during AY 2012-13.

3. The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances of the case in not appreciating that the costs and expenses incurred by the Appellant in relation to the commercial building Kaledonia was accepted by the AO in AYs 2010-11 and 2014-15.

4. The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances of the case in disallowing the business loss incurred during the year to the tune of INR 3,26,01,606 and holding that no supporting details pertaining to maintenance expenses have been filed by the Appellant without providing an opportunity to the Appellant to provide such supporting details.

5. The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances of the case in making an addition on account of deemed rent of INK 26,98,74,180 under Section 23 (5) of the Income Tax Act, 1961 (IT Act).

6. *The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances of the case in making addition on account of mismatch of form 26AS for INR 15,03,072 being amount pertaining to recovery of service tax which is not to be treated as income.*

Principles of Natural Justice

7. *The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and the facts and circumstances of the case in not considering the submissions made by the Appellant before passing the order dated 22 March 2023 (Impugned Order).*

8. *The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and the facts and circumstances of the case in passing the Impugned Order without providing an opportunity of personal hearing to the Appellant which goes against the principles of natural justice.*

9. *The Appellant craves leave to add to and / or amend and / or delete and / or modify and / or alter the aforesaid grounds of appeal as and when the occasion demands.*

10. *All the aforesaid grounds of appeal are independent, in the alternative and without prejudice to one another.*

4. Representatives of both the sides were heard at length. Case records carefully perused and with the assistance of the counsel we have considered the relevant documentary evidences brought on record in the light of Rule 18(6) of ITAT Rules.

5. The assessee also moved an application dated 09.11.2023 for admission of additional evidences.

6. Briefly stated the facts of the case are that the, assessee is a real estate company and a joint venture between the foreign investor, Ocean Deity Investment Holdings Limited PCC and certain companies owned by the promoters of HDIL Group. Return for the year was electronically filed on 29.09.2012 declaring loss of ₹.121,25,18,852/-. The return was selected for scrutiny assessment and accordingly, statutory notices were served upon the assessee.

7. The assessee company is stated to be engaged in the business of building construction activity since last several years. For the year under consideration total receipts credited to the profit and loss account include lease rental of ₹.8,98,83,457/- and sale receipt of tenancy rights of ₹.33 lakhs. While scrutinizing the return of income the Assessing Officer noticed that the assessee has shown short term capital loss of ₹.118,40,32,101/-which is claimed to be carried forward to subsequent assessment year. The assessee was asked to furnish copies of purchase agreements and sale agreements of office premises sold. Assessee filed the requisite details and on perusal of the same the Assessing Officer noticed that the assessee had started construction of project "Kaledonia" situated at Sahar road, Andheri (East) during the F.Y. 2007-08 and the same was completed during the previous year under consideration. The

Assessing Officer observed that the instead of declaring this activity as business the assessee has shown it under the head "investments". From the financial statements, the Assessing Officer found the total cost of the commercial project Kaledonia at ₹.1107,10,38,584/- as on 31.03.2012. Considering the nature of business of the assessee, the Assessing Officer out rightly rejected the claim of investments and treated the activities of the assessee as business activity and disallowed the short term capital loss on sale of office premises in the project Kaledonia and further, went on to disallow the same as business loss. Since, according to the Assessing Officer the assessee has not discharged its primary onus of substantiating the loss claimed with supporting evidences.

8. Proceeding further, the Assessing Officer was of the opinion that for the cost of construction of ₹.1107,10,38,584/- claimed by the assessee, no details whatsoever has been furnished by the assessee. Assessing Officer further observed that the major portion of the cost of construction of ₹.963,85,96,369/- was incurred during the Financial year 2007-08 but since the assessee has wrongly classified the activity as investment the veracity of this huge claim of construction expenses and the source of this so-called investment has not been examined at any stage since there was not scrutiny assessment done in the case of the

assessee. The Assessing Officer commented that the scrutiny assessment for the A.Y. 2008-09 to 2011-12 are being reopened under section 147 of the Act in order to examine the claim of cost of construction of ₹.1107,10,38,584/-.

9. Before us, counsel has explained the underlying facts in the issue, pointing out that HDIL Promoter Entities has misappropriated and siphoned off funds belonging to the assessee. It was further pointed out that even the activity of the assessee in the construction of Kaledonia Project has been wrongly stated as investment and after coming to the knowledge of the fraudulent activities, the assessee took steps to modify the object clause of the memorandum of association as under: -

"To carry on in India or abroad the business as builders, real estate developers, contractors, designers, architects, decorators, interior decorators, constructors, consultants, engineers of all types of buildings and structures including houses, flats, apartments, offices, godowns, warehouses, shops, factories, sheds, hospitals, clubs, hotels, holiday resorts, shopping and/or residential complexes, malls, schools, colleges and to develop, erect, install, alter, improve, add, establish, renovate, recondition, protect, enlarge, repair, demolish, replace, maintain, manage, lease, let on hire, fabricate all such buildings and structures and to purchase, sell or deal in all types of movable or immovable properties for development including Transferable Development Rights and also to invest or otherwise deal in all types of real estate properties and also to carry on in India or abroad the business to undertake development of infrastructure work on build, operate and transfer basis or otherwise and to develop, construct, run, repair, maintain, decorate, improve, remodel, build, operate and manage roads,

bridges, highways, railways, waterways, gas lines, airports, townships, IT Parks, Industrial Parks, SEZs, docks, ports, jetties, gardens, public places, buildings and other structures, developments, utilities and to operate and transfer the same as per the agreements with the respective authorities, companies or concerns."

10. The counsel fairly considered that the short term capital loss disallowed by the Assessing Officer is correct in as much as the Kaledonia Project is the business activity of the assessee and not investment. However, at the same time it has been strongly claimed that once the activities of the assessee has been accepted as business activities then the income / loss should have been computed as per the relevant provisions of the Act allowing all the expenditure incurred in furtherance of the business.

11. We find that for the A.Y. 2009-10 the assessment is framed under section 143(3) r.w.s. 147 of the Act in which at Para No. 6.11 the Assessing Officer has observed as under: -

"6.11 In the year under, consideration, there are no sales affected. As per the above, discussion, the project "Kaledonia" being considered as Business activity of the assessee and the investments shown in the Balance sheet, is held and treated as WIP, However the WIP shown as Rs.10,42,37,61,960/- which includes the WIP of Rs. 96,38,55,96,369/- incurred in the F.Y.2007-08 relevant to A.Y. 2008-09 which is pending for verification. The assessee has not provided any bills or vouchers and other supporting documents in respect of the expenses Incurred during the year when it was aware that the case has been reopened for the purpose of verification of WIP expenses. It has only submitted ledgers of various heads of expenses

which in the absence of any bills or vouchers cannot be accepted on face value. Accordingly the said WIP of Rs.10,42,37,6.1,960/- will be allowed to be carried forward subject to the outcome of the findings of the A.Y.2008-09. It will be allowed accordingly. In the circumstances, it is satisfied that the assessee has concealed particulars of its income in respect of its business activity within the meaning of S 271(1)(c) read with explanation I thereto, of the I T Act, 1961. Penalty proceedings under section 271(1)(c) are being initiated separately for furnishing inaccurate particulars of income and concealment of income."

12. In A.Y. 2008-09 again assessment order is framed under section 143(3) r.w.s. 147 of the Act wherein the Assessing Officer at Para No. 6.5 has observed as under: -

"6.5 During the course of assessment proceedings the assessee was asked to provide the details of the expenses incurred during the year on the project "Kaledonia", The AR has submitted the ledger account of expenses of Rs.9,63,85,96,3697- added to Investments/work in progress. As per the above discussion, the project "Kaledonia" being considered as Stock in trade, the expenses incurred on the same have to be considered as work-in-progress and thus capitalized. Thus the amount of Rs. 9,63,85,96,369/- is considered as work-in-progress and thus capitalized."

13. Thus the observations of the Assessing Officer that the assessee has not filed any details to substantiate its cost of construction is not acceptable, since the Assessing Officer himself has assessed the Work-in-Progress as mentioned hereinabove. Since the business activities in Kaledonia Project is common from A.Y. 2008-09, therefore, it becomes imperative to determine the cost of construction shown by the

assessee in its books of accounts. Therefore, in the interest of justice, we deem it fit to send the matter back to the file of the Assessing Officer.

14. Since there is no dispute that the assessee is engaged in the business, therefore, the Assessing Officer is directed to decide the impugned quarrel afresh in the light of the fact that the assessee is engaged in business activities. The assessee is directed to justify its claim of cost of construction / Work-in-Progress by submitting necessary documentary evidences and the Assessing Officer is directed to examine / verify the same and decide the issue afresh after affording reasonable and adequate opportunity of being heard to the assessee.

15. The contention that some of the sales are illegal and since no sale consideration has been received the same should be excluded from the business receipts of the assessee need to be verified in the light of the decision of this Tribunal in the case of M/s. Sagar Developers v. ACIT in ITA No. 843 and 3726/MUM/2014 dated 20.08.2014. The assessee has filed copies of FIR filed with Enforcement Department, CBI etc., as additional evidences, which are admitted and the Assessing Officer is expected to consider the same while deciding the issue afresh.

16. The Assessing Officer has also disallowed business loss amounting to ₹.3,26,01,606/-, we find that this essentially comprises of certain expenses debited to the profit and loss account and the major expenses was on account of building maintenance charges of ₹.2,04,22,884/-. The claim of the assessee is also that it has incurred expenditure of ₹.2,37,07,356/- for the slum buildings in the compound and it collected maintenance charges of ₹.32,84,473/- from tenants of Kaledonia Project. But the assessee could not collect the maintenance charges from the slum buildings as per the rules prescribed by the Slum Rehabilitation Authority. There was net expenses of ₹.2,04,22,884/- however, the Assessing Officer disallowed the entire business loss on the basis that the assessee had classified Kaledonia as its investment. Since as discussed hereinabove we have held that Kaledonia Project is a business activity of the assessee and have directed the Assessing Officer to decide the issue afresh, we set-aside this issue also to be decided afresh. The assessee is directed to furnish all the details of the expenses claimed by it under the head and the Assessing Officer is directed to examine the same and decide the claim as per the provisions of law.

17. While scrutinizing the return of income and the details of the immovable property as on 31.03.2012 the Assessing Officer noticed that

out of total 45 units of the project, 8 units were sold as on 31.03.2012 26 units are vacant and 11 units are given on leave and licence. The Assessing Officer found that the assessee has not offered any rental income in respect of 26 vacant units. Since the commercial project Kaledonia has been completed during the year under consideration and the assessee has in fact earned lease rental of ₹.8,98,83,457/- invoking provisions of section 23(4) of the Act. The Assessing Officer went on to determine the deemed rent in respect of vacant units in Kaledonia Project and made addition of ₹.26,98,74,180/-.

18. After giving thoughtful consideration to the findings of the Assessing Officer we find that the Assessing Officer has drawn support from the decision of the Hon'ble Delhi High Court in the case of CIT v. Ansal Housing finance & leasing Co. Ltd., [(2013) 29 taxmann.com 303] whereas while confirming the assessment the Ld. CIT(A) drew support from specific provision inserted by the Finance Act, 2017 in section 23(5) of the Act.

19. We are of the considered view that both the Assessing Officer and Ld. CIT(A) erred. The Ld. CIT(A) has erred in as much as it relied upon the provisions brought into statute by Finance Act, 2017 and we are in

A.Y.2012-13 and section 23(5) has not been held to have a retrospective effect. Assessing Officer has erred in drawing the support from the decision of the Hon'ble Delhi High Court (supra) in as much as the decision of the Hon'ble Delhi High Court is for the provisions prior to the year 2001 and after introduction of section 23(1)(c) of the Act the assessee is eligible for vacancy allowance. Therefore, if the rental income has been taxed then the assessee is equally eligible for the vacancy allowance as per section 23(1)(c) of the Act for the vacant commercial units in Kaledonia Project. Considering the facts in the light of the relevant provisions of Act, we direct the Assessing Officer to delete the addition of ₹.2,69,87,480/-. This ground is allowed.

20. The last grievance of the assessee is on account of addition based upon mismatch of Form 26AS, we find that the bone of contention is the income inclusive of service tax and the income shown in the TDS Form 26AS is exclusive of service tax. Assessee is directed to file a reconciliation statement and the Assessing Officer is directed to examine and verify the same and give credit to taxes paid as per the provisions of the law.

21. In the result, appeal is allowed in part for statistical purposes.

ITA No. 1812/MUM/2023 (A.Y. 2014-15)

22. Coming to A.Y. 2014-15 in ITA No. 1812/MUM/2023, the grievance of the assessee read as under: -

"Grounds of Appeal General

1. *The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances in upholding the assessment order dated 13 December 2016 in relation to the disputed items under challenge and agitated in this appeal.*

Merits

2. *The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances of the case in upholding the disallowance in relation to the loss incurred during the AY under consideration on sale of units in Kaledonia.*

3. *The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances of the case in not appreciating that the costs and expenses incurred by the Appellant in relation to the commercial building Kaledonia was accepted by the AO in AYs 2010-11 and during the AY under consideration as well, i.e., AY 2014-15.*

4. *The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances of the case in upholding the action of the AO wherein the sale consideration of units sold during AY 2014-15 was revised upwards without any evidence of suppression of income.*

5. *The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances of the case in not appreciating that if the units in Kaledonia were sold at a value exceeding the stamp duty ready reckoner rate, such sale consideration cannot be revised sans any evidence that the actual consideration was suppressed.*

6. *The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances of the case in disallowing the interest under Section 36 (1) (iii) of the Income Tax Act, 1961 (IT Act) to the tune of INK 3,84,38,821 on the loan taken from Yes Bank Limited.*

7. *The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances of the case in making addition on account of deemed rent of INR 26,46,57,172 under Section 23 (5) of the IT Act.*

8. *The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances of the case in not appreciating that Section 23 (5) applies only prospectively from AY 2018-19.*

9. *The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and on the facts and circumstances of the case in disallowing the prior period expenses to the tune of INR 52,35,842.*

Principles of Natural Justice

10. *The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and the facts and circumstances of the case in not considering the submissions made by the Appellant before passing the order dated 23 March 2023 (Impugned Order).*

11. *The Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre erred in law and the facts and circumstances of the case in passing the Impugned Order without providing an opportunity of personal hearing to the Appellant which goes_ against the principles of natural justice.*

12. *The Appellant craves leave to add to and / or amend and / or delete and / or modify and / or alter the aforesaid grounds of appeal as and when the occasion demands.*

13. *All the aforesaid grounds of appeal are independent, in the alternative and without prejudice to one another."*

23. In ITA No. 1709/MUM/2023 (supra) we have discussed the issue of business activities vis-à-vis investment in Kaledonia Project, for our

detailed discussion therein Ground No. 2 to 5 are allowed for statistical purpose with similar directions as given in ITA No. 1709/MUM/2023.

24. The Ground No. 6 relates to the disallowance of interest under section 36(1)(iii) of the Act to the tune of ₹.3,84,38,821/-. The underlying facts in the issue are that, the assessee had borrowed term loan from Yes Bank on which it paid interest @13% and accordingly, paid interest of ₹.6,24,56,032/-. The Assessing Officer found that the assessee has lended money to M/s. Sapphire Land Development Pvt Ltd., without any interest. The assessee was asked to justify its claim. On receiving no plausible reply, the Assessing Officer again asked the assessee to furnish the details. The Assessing Officer found that the reserves and surplus of the assessee company are negative and was of the opinion that the assessee has forwarded the borrowed loan bearing interest to M/s. Sapphire Land Development Pvt Ltd., interest free without justifying the commercial expediency and disallowed the same. Since the assessee itself has disallowed the sum of ₹.2,40,17,212/- the Assessing Officer disallowed balance of ₹.3,84,38,821/-.

25. We have carefully considered the order of the authorities below. It is true that the assessee has provided interest free loans and

advances to its sister concern M/s. Sapphire Land Development Pvt Ltd., amounting to ₹.40,44,27,517/- as on 01.04.2013. During the year under consideration the assessee provided further loan amounting to ₹.51,14,95,856/- and received back ₹.20,88,03,927/-, thus leaving a closing balance of ₹.70,71,19,446/-, we find that the details of this transaction was furnished to the Assessing Officer vide submission dated 19.08.2016.

26. It is equally true that during the year under consideration the assessee has availed term loan of ₹.43,39,90,306/- from Yes Bank on which it paid interest of ₹.6,24,56,032/-. We find that out of this interest expenditure the assessee has suomoto disallowed ₹.2,40,17,217/- as not attributable to business purpose. The undisputed fact is that the sister concern M/s. Sapphire Land Development Pvt Ltd., is also engaged in the business of real-estate development and has utilized this amount towards development of the real estate business. Therefore, it cannot be said that the assessee has failed to justify the business necessity of these advances. Considering the fact that the assessee has suomoto disallowed the interest of ₹.2,40,17,212/- we are of the opinion that this should suffice any necessity for the disallowance. Therefore, the

Assessing Officer is directed to delete the addition of the balance amount of ₹.3,84,38,821/-. This ground is allowed.

27. The next grievance relates to the addition on account of deemed rent, this quarrel has been elaborately discussed by us in ITA No. 1709/MUM/2023 (supra) for our detailed discussion therein, this ground is allowed.

28. The last grievance relates to the disallowance of prior period expenses. The underlying facts in this issue are that during the year under consideration the assessee has debited an amount of ₹.52,35,842/- to the profit and loss account as prior period expenses.

The details of such expenses are as below: -

Sl.No.	particulars	Amount (₹.)
1.	Security charges	7,52,784
2.	Professional Fee	3,62,312
3.	Brokerage	41,20,746

29. It is true that these expenses pertain to period prior to the year under consideration. But it is equally true that these expenses were capitalised in value of capital Work-in-Progress of Kaledonia Project and

were never debited to the profit and loss account of earlier assessment years. It appears that the Assessing Officer has never called any documentary evidences to corroborate this claim. Therefore, in the interest of justice and fair play, we set-aside this issue to the file of the Assessing Officer. The assessee is directed to justify its claim that the impugned expenses crystalized during the year under consideration and the Assessing Officer is directed to examine the same and decide the issue afresh after affording reasonable and adequate opportunity of being heard to the assessee.

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

31. To sum-up, both the appeals of the assessee are allowed in part for statistical purposes.

Order pronounced in the open court on 19th April, 2024.

Sd/-
(SUNIL KUMAR SINGH)
JUDICIAL MEMBER

Mumbai / Dated 19.04.2024
Giridhar, Sr.PS

Sd/-
(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum