आयकर अपीलीय अधिकरण "ए" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI

श्री डी.टी. गरासिया,न्यायिक सदस्य **एवं**
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।

BEFORE SHRI D.T. GARASIA, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

ITA Nos. 1133,558 &724/Hyd/2010
&
ITA Nos.1010/Hyd/2009
&
ITA No.308/Hyd/2012

(Assessment Years: 2004-05, 2005-06, 2006-07 & 2008-09)

Luvish Infotech Projects Pvt.Ltd Silicon Towers, Kondapur Village, Madhapur Hyderabad– 500 032	बनाम/ Vs.	**(i)Commissioner of Income Tax (A)-V** **(ii)Commissioner of Income Tax (A)-IV** Hyderabad
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

ITA No.897/Hyd/2010
(Assessment Year: 2006-07)

Asstt. Commissioner of Income Tax **Circle 16(2)** Hyderabad	बनाम/ Vs.	**Luvish Infotech Projects Pvt.Ltd** Silicon Towers, Kondapur Village, Madhapur Hyderabad– 500 032
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&
ITA No.2745/Mum/2013

&
ITA No.2748/Mum/2013
(Assessment Years: 2007-08 & 2009-10)

Deputy Commissioner of Income Tax 8(2) Room No.216-A Aaykar Bhavan M.K.Road Mumbai– 400 020	**बनाम**/ Vs.	**Luvish Infotech Projects Pvt.Ltd** Sani Arma Opp. ISKCON Temple Raut Lane, Juhu Mumbai- 400 049
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

आयकर अपील सं./I.T.A. No.1992/Mum/2013

(**निर्धारण वर्ष** / Assessment Year: 2009-10)

Luvish Infotech Projects Pvt.Ltd Sani Arma Opp. ISKCON Temple Raut Lane, Juhu Mumbai- 400 049	**बनाम**/ Vs.	**Deputy Commissioner of Income Tax 8(2)** Room No.216-A Aaykar Bhavan M.K.Road Mumbai– 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. **AADCM-4966-H**		
(□ पीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Naresh Jain, Ld. AR
Revenue by	:	R.P.Meena & Saurabh Deshpande, Ld. DR's

सुनवाई की तारीख / **Date of Hearing**	:	24/08/2017
घोषणा की तारीख / **Date of Pronouncement**	:	04 /10/2017

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. These are nine appeals by assessee as well as revenue for different Assessment Years. Since common issues are involved in the appeals, we dispose-off the same by way of this common order for the sake of convenience and brevity. For ease of reference, the appeals are *tabulated* in the following manner:-

Sl.No.	Appeal No.	Assessment Year	Filed By
1	ITA.No.1010/Hyd/2009	A.Y.2004-05	Assessee
2	ITA.No.1133/Hyd/2010	A.Y.2004-05	Assessee
3	ITA.No.558/Hyd/2010	A.Y.2005-06	Assessee
4	ITA.No.724/Hyd/2010	A.Y.2006-07	Assessee
5	ITA.No.897/Hyd/2010	A.Y.2006-07	Revenue
6	ITA.No.2745/Mum/2013	A.Y.2007-08	Revenue
7	ITA.No.308/Hyd/2012	A.Y.2008-09	Assessee
8	ITA.No.1992/Mum/2013	A.Y.2009-10	Assessee
9	ITA.No.2748/Mum/2013	A.Y.2009-10	Revenue

2.1 First, we take up assessee's appeal ITA Nos. 558/Hyd/2010 for AY 2005-06 as the lead year which contest the order of Ld. Commissioner of Income Tax (Appeals)-V, Hyderabad [CIT(A)] Appeal No. 071/DC-16(2)/CIT(A)-V/2008-09 dated 02/03/2010. The assessment was framed by Ld. Deputy Commissioner of Income Tax, Circle 16(2), Hyderabad [AO] on 30/09/2008. The following grounds have been raised:-

1. *"On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (A) erred in confirming all the additions made by Ld. Assessing Officer and accordingly dismissing the appeal of your appellant.*
2. *On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in treating the Lease Rentals income on house property & equipment as Income from house property as against Business Income as done by your appellant.*
3. *On the facts and circumstances of the case, the learned Commissioner of Income tax (Appeals) grossly erred in not considering the claim of depreciation on equipment and amenities provided by your appellant to the tune of Rs. 8.70 crores.*
4. *On the facts and circumstances of the case, the Learned Commissioner of Income Tax (Appeals) grossly erred in confirming Assessing Officer's order with respect to denial of claim of depreciation on building & denial of deduction of other expenditure which are permissible under business head.*
5. *On the facts and circumstances of the case, Ld. Commissioner of Income Tax (Appeal) erred in disallowing prepayment charges of Rs. 19,72,233/- by stating that foreclosure penalty is not covered in the definition of interest and cannot be allowed under the head income from house property.*
6. *On the facts and circumstances of the case, the Ld. Commissioner of Income Tax erred in disallowing interest on additional loan of Rs.5 Cr. Obtained from HDFC Bank amounting to Rs.10,81,707/- by stating that loan given to sister concern does not qualify for business expediency.*
7. *The appellant craves leave to add to, alter, to delete from or substantiate the above ground of appeal".*

2.2 Facts leading to the same that the assesse being *resident corporate assessee* was subjected to an assessment u/s 143(3) *read* *with section 147* of the Income Tax Act,1961 for impugned Assessment Year [AY] on 30/09/2008 at Rs.99,63,333/- as against loss return of Rs.73,86,040/- filed by the assessee on 01/11/2005. The original return was processed u/s 143(1) of the Income Tax Act. The case was subsequently reopened by issuance of notice u/s 148 dated 02/04/2008 which was followed by statutory notice u/s 143(3).

2.3 During reassessment proceedings, the Ld. AO opined that the rental income reflected by the assessee in the Profit & Loss account were assessable under the head *Income from House Property* as against *Business Income* as shown by the assessee and accordingly, the assessee was eligible to claim only statutory deduction of 30% against the same. The assessee contended that the leased premise was built as per exact space requirements of the tenant and the assessee provided many other facilities / amenities along with the premises and complied with possible requirements of claiming deduction u/s 80-IA. However, Ld. AO noted that the lease period was ten years and the assessee company was not carrying out any other activity and further, could not fulfill certain conditions to avail deduction u/s 80-IA. Moreover, the tenant was deducting TDS as applicable to rental payments and the assessee was not exploiting the business premises as commercial asset and simply leased out the same to tenant and therefore, the income was assessable under the head *House Property*. Finally, placing reliance on several judicial pronouncements, the income was *re-computed* by assessing rental income under the head *Income from House Property.*

2.4 Further, Ld. AO noted that the assessee purchased the said premise for Rs.24.42 crores during AY 2004-05 and the same was financed from *Indusind Bank Ltd.* to the extent of Rs.15 Crores. During the impugned AY, it obtained fresh loan of Rs.20.50 crores from *HDFC Bank Limited* at lower rate of interest and repaid the loan taken from *Indusind Bank Limited*. Out of fresh loan obtained during the impugned AY, an amount of Rs.5 crores was advanced to sister concern as *interest free advances* and accordingly, Ld. AO disallowed proportionate interest against the same which came to Rs.10,81,707/-.

2.5 It was further noted that the assessee paid *foreclosure* amount of Rs.19,72,233/- to *Indusind Bank Limited,* the deduction of which could not be granted to the assessee under *Income from House Property* in view of the statutory provisions.

2.6 Finally, by making above adjustments, the income of the assessee was *re-computed* as Rs.99,63,333/-.

3. Aggrieved, the assessee contested the same without any success before Ld.CIT(A) vide impugned order dated 02/03/2010. During appellate proceedings, the assessee submitted written submissions against which a *remand report* was called for. The assessee reiterating the contentions submitted the transaction was composite letting out of Building and Plant & Machinery along with various other amenities / facilities like centralized AC, DG Set, Car Parking, Elevators etc. and therefore, the same was assessable as *Business Income.* The attention was drawn to the fact that borrowed funds were used to finance the project. However, not convinced, Ld.CIT(A) after placing reliance on various judgments of higher authorities including judgment of Madras High Court rendered in *CIT Vs, Chennai Properties & Investments Limited [2004 266 ITR 685]* concluded that impugned income was

chargeable as *Income from House Property* only since the tenant took full charge of the building and was also liable to pay all routine expenditure and the assessee was not carrying out any activity with respect to the building. The addition against interest expenditure was confirmed since the same could not be granted to the assessee under the head *Income from House Property* in view of express statutory provisions. Aggrieved, the assessee is in further appeal before us.

4.1 The Ld. Counsel for Assessee [AR], at the outset, drew our attention to the fact that the lower authorities concluded that the rental income earned by assessee was assessable as *Income from House Property* by placing reliance on the decision of Madras High Court in *CIT Vs. Chennai Properties & Investments Limited [2004 266 ITR 685]* which has subsequently been reversed by the Hon'ble Supreme Court *[2015 373 ITR 673]* where the assessee's appeal has been allowed and therefore, the issue squarely stood covered in assessee's favor by the cited judgment of Hon'ble Court. Our attention is also drawn to the fact the ratio of this decision has subsequently been followed by the same court in the case of *Rayala Corporation Vs. ACIT [2016) 72 taxmann.com 149].*

4.2 The Ld. AR further contended that the Ld. CIT, in subsequent order for AYs 2007-08 & 2009-10 directed the Ld.AO to treat the impugned income as *Business Income* only and the revenue has accepted the stand of Ld.CIT(A) and did not contest the issue any further. Further, the Ld. AO in quantum assessment for Ay 2014-15 u/s 143(3), himself, accepted the same under the head *Business Income* only an therefore, following rule of consistency, the revenue was debarred from changing stands under similar factual matrix. Our attention is further drawn to the order of this Tribunal rendered in the case of assessee's sister concern namely *M.S.Luvish Projects (P) Ltd. Vs. DCIT [ITA No. 919/H/2012 & others order dated 23/09/2015]* where the issue has been decided in appellant's favor under identical circumstances.

4.3 Lastly, Ld. AR placed reliance on *CBDT Circular No.16/2017 dated 25/04/2017* where it has been clarified that the rental income earned by undertakings operating industrial Park / SEZ as per approved scheme would be chargeable to tax as *Business Income.*

4.4 Per *Contra,* Ld. DR while placing reliance on the stand of lower authorities, fairly conceded the settled legal position.

5. We have carefully heard the rival contentions and perused relevant material on record including cited case laws. At the outset, we are inclined to reproduce the main objects of the assessee company as evident from copy of *Memorandum of Association* placed on record:-

> *A. THE MAIN OBJECTS TO BE PURSUED BY THE COMPANY ON ITS INCORPORATION ARE:*
> *To purchase, acquire, take on lease or in exchange or in any other lawful manner any area, land, buildings, structure and turn the same into account, develop the same and dispose of or maintain the same and to build Hi-tech parks, Software development zones, Software Technology Parks, Ports, Bio-tech Parks, Industrial estates, Industrial parks, townships, markets or other buildings, residential and commercial or conveniences, drainage facility electric, telephonic, television installations and to deal with the same in an manner whatsoever and by advancing money to and entering into contracts and arrangements of all kinds with builders, tenants and others. To construct, erect, build, let out, repair, re-model, demolish, develop, improve, grades, curve, pave, macadamize, cement and maintain buildings, structure, hi-tech parks, houses, apartments & hospitals".*

Further, the rental income earned by the assessee is the only source of its income as evident from the financial statements of the impugned AY placed on record. The Hon'ble Supreme Court in the cited case of *Chennai Properties & Investments Limited (supra)* have held that if the main objective of the assessee was to make earning by leasing of property and the leasing was the main source of income, then lease income earned by the assessee shall be taxed under the head *'business and profession'*. The concluding portion from the cited judgment is extracted below:-

> *We are conscious of the aforesaid dicta laid down in the Constitution Bench judgment. It is for this reason, we have, at the beginning of this judgment, stated the circumstances of the present case from which we arrive at irresistible conclusion that in this case, letting of the properties is in fact is the business of the assessee. The assessee therefore, rightly disclosed the income under the Head Income from Business. It cannot be treated as 'income from the house property'. We, accordingly, allow this appeal and set aside the judgment of the High Court and restore that of the Income Tax Appellate Tribunal. No orders as to costs.*

We find that the facts of the present case are identical in nature since the main objective of the assessee company was to deal in real estate of varied nature and the rental income was the main source of income for the assessee. Our view is further fortified by the cited CBDT circular No. 16/2017 and judgment of this Tribunal rendered in the case of assessee's sister concern under identical situation. Even otherwise, the revenue has accepted the stand of assessee in several other years and rule of consistency demands that similar stand be taken under identical circumstances. Therefore, we conclude that rental income earned by the assessee was chargeable under the head *Business Income* only as against *Income from House Property* taken by lower authorities. Resultantly, this ground of assessee's appeal succeeds.

6. The assessee, in other grounds, is aggrieved by disallowance of various expenditure viz. depreciation, business expenses, interest expenses etc. These were disallowed by the lower authorities since the rental income earned by the assessee, as per their opinion, was chargeable under the head *Income from house Property* against which

the assessee was eligible for fixed statutory deduction of 30%. Since, we have already allowed assessee's appeal *qua* head under which rental income would be assessable, we deem it fit to restore the matter of allowance of various expenditure to the file of jurisdictional Assessing Officer with a direction to re-appreciate the same and verify their allowability as per law. The assessee, in turn, is directed to substantiate the same forthwith failing which Ld. AO shall be at liberty to dispose-off the same on the basis of material available on record. Resultantly, all other grounds stands allowed for statistical purposes. Finally, the assessee's appeal stands partly allowed.

7. Now, we take up Assessee's Appeals ITA Nos.724/Hyd/2010 for AY 2006-07 & ITA No. 308/Hyd/2012 for AY 2008-09. The assessee, in both these appeals is similarly aggrieved and have raised *identical worded* grounds of appeal. We find that the issues involved are identical except for figures and minor variations etc. Therefore, there being no change in facts or circumstances, our observation, decision and conclusion *mutatis mutandis* apply to the same. Accordingly, we hold that the rental income earned by assessee in both these years shall be chargeable under the head *business income* whereas the issue of allowance of various expenses is restored back to the file of jurisdictional AO for re-adjudication with similar direction. Resultantly, both these appeals stands partly allowed.

8. The solitary issue involved in assessee's appeal ITA No. 1992/Mum/2013 for AY 2009-10 is disallowance of interest expenditure on loans advanced to sister concerns since Ld. CIT(A), in this year, has granted partial relief to the assessee by holding that rental income was

assessable under the head *Business Income*. Since, we have already restored the identical issue in earlier years to the file of Ld. AO, taking the same stand, this issue is also remitted back to the file of Ld. AO with similar directions. Resultantly, the assessee's appeal stands allowed for statistical purposes.

9. Now, we take up Assessee's appeal ITA Nos. 1133/Hyd/2010 & ITA No. 1010/Hyd/2009 for AY 2004-05. In this year, the original assessment was completed u/s 143(3) on 30/11/2006 at loss of Rs.25,81,745/- by assessing rental income under the head *Business Income.* Subsequently, Ld. CIT by invoking revisional jurisdiction u/s 263 on 25/04/2008 directed Ld. AO treat the same as *Income from House Property* with further directions to verify the loans taken by the assessee & also verify allowability of expenditure claimed by the assessee. The Ld. AO, in the consequential assessment, *re-computed* the income of the assessee at Rs.49,46,570/-. The assessee, in ITA No. 1010/Hyd/2009 has contested the invocation of revisional jurisdiction u/s 263 and in ITA No. 1133/Hyd/2010 has contested the consequential assessment order. Therefore, the issues being identical, we allow assessee's ground of appeal *qua* treating rental income as *Business Income* and restore the issue of admissibility of expenses to the file of Ld. AO with similar directions. Resultantly, the assessee's appeal ITA No. 1133/Hyd/2010 stands partly allowed whereas ITA No. 1010/Hyd/2009 stands dismissed, being *infructuous.*

10. Now, we take up revenue's appeal ITA No. 897/Hyd/2010 for AY 2006-07 where the revenue is aggrieved by certain relief provided to the assessee by Ld. CIT(A) *qua* interest expenditure. Since in assessee's

appeal, we have already restored the issue of allowance of expenditure to the file of Ld. AO for re-adjudication, the revenue's appeal stands allowed for statistical purposes.

11. In revenue's appeal ITA Nos. 2745/Mum/2013 & 2748/Mum/2013 for AYs. 2007-08 & 2009-10, identical worded grounds has been raised. The revenue is aggrieved by the stand of Ld. CIT(A) that certain interest income earned by the assessee on advances and FDRs was assessable under the head *Business Income* as against *Income from other sources* taken by Ld. AO. Since, we have restored the issue of interest in all other appeals to the file of Ld. AO, the same is also restored back to the file of Ld. AO to re-adjudicate the same in the light of our decision in this appeal. Resultantly both these appeals stands allowed for statistical purposes.

12. As a logical consequence, Ld. AO is directed to *re-compute* the book profits u/s 115JB and carry forward of losses etc., if required.

13. All the appeals stands disposed-off in terms of above order.

Order pronounced in the open court on 04th October, 2017.

Sd/-	Sd/-
(D.T. Garasia)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 04.10.2017
Sr.PS:- Thirumalesh

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**