

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

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND  
SHRI RAVISH SOOD, JUDICIAL MEMBER**

**ITA NO. 2386/MUM/2013 : (A.Y : 2009-10)**

M/s. Luxora Infrastructure Pvt. Ltd. Vs. ITO-6(3)(2), Mumbai  
208, Parvati Indl. Estate, (Respondent)  
Sunmill Compound, Lower Parel,  
Mumbai 400 013.  
**PAN : AABCL2854K** (Appellant)

**Appellant by : None**  
**Respondent by : Shri Rajesh Kumar Yadav**

**Date of Hearing : 05/06/2018**

**Date of Pronouncement : 05/06/2018**

**ORDER**

**PER G.S. PANNU, AM :**

The captioned appeal by the assessee is directed against the order of CIT(A)-12, Mumbai dated 03.12.2012 pertaining to the Assessment Year 2009-10, which in turn has arisen from the order passed by the Assessing Officer, Mumbai dated 12.12.2011 u/s 143(3) of the Income Tax Act, 1961 (in short 'the Act').

2. In spite of issuance of notice, none appeared on behalf of the assessee at the time of hearing, therefore, we proceed to decide the appeal *ex parte*

*qua* the assessee after hearing the Ld. DR on merit in terms of Rule 24 of the Appellate Tribunal Rules, 1963.

3. In this appeal, assessee has raised two Grounds of appeal which we shall deal in seriatim. Insofar as the first issue is concerned, the same relates to the action of income-tax authorities in restricting the assessee's claim of deduction u/s 35D of the Act to Rs.2,95,000/- as against Rs.18,60,950/- claimed by the assessee in the return of income.

4. In this context, the relevant facts are that in the assessment order it is noted that assessee is engaged in construction and development of integrated township at Pipla, Nagpur which was in the stage of work-in-progress. The Assessing Officer noted that assessee had worked out deduction u/s 35D of the Act at Rs.18,60,950/- considering the amount of 'capital employed in the business' at Rs.156.21 crores, which was inclusive of premium received on issue of share capital. The Assessing Officer, however, based on the decision of the Hon'ble Delhi High Court in the case of *Berger Paints India Ltd. vs CIT, 292 ITR 658 (Delhi)*, held that the share premium receipt was liable to be excluded for computing the 'capital employed in the business' for the purpose of Sec. 35D of the Act. This aspect has been affirmed by the CIT(A), against which the assessee is in further appeal before us.

5. At the time of hearing, the Id. DR appearing for the Revenue referred to the judgment of the Hon'ble Supreme Court in the case of *M/s. Berger Paints India Ltd. vs CIT in Civil Appeal Nos. 2162 and 2163 of 2007* dated 28.03.2017 wherein it has been held that the share premium collected by a

company on its subscribed share capital cannot be taken as a part of 'capital employed in the business' for the purposes of Sec. 35D of the Act. In view of the said decision of the Hon'ble Supreme Court, we find no reasons to interfere with the decision of the lower authorities, which we hereby affirm. Thus, on this aspect, assessee fails.

6. The second issue is with regard to the action of the income-tax authorities in treating the interest income earned by the assessee on fixed deposit as 'income from other sources'. It is discernible from the orders of the authorities below that the stand of the assessee has been that the income earned on fixed deposits was assessable as 'business income' whereas the Assessing Officer as well as the CIT(A) treated it to be 'income from other sources'. In particular, we notice that in para 5.2 of his order, the CIT(A) noted that the investment in FDRs was neither linked to the business of the assessee of construction and development of integrated township and nor was it done as part of the business procedure.

7. Before us, the Id. DR has reiterated the stand of the authorities below.

8. Having considered the orders of the authorities below as well as the stand of the Id. DR, we find no reasons to interfere with the conclusion drawn by the lower authorities. Ostensibly, the CIT(A) has arrived at a factual finding that the investment in FDRs has not been found to be for the advancement of business and, therefore, the interest income thereof has been rightly assessed under the head 'income from other sources'. The action of CIT(A) is hereby affirmed and on this aspect also, assessee fails.

9. In the result, appeal of the assessee is dismissed as pronounced in the open court at the conclusion of hearing on 05.06.2018 in the presence of Id. Departmental Representative.

Sd/-  
**(RAVISH SOOD)**  
**JUDICIAL MEMBER**

Sd/-  
**(G.S. PANNU)**  
**ACCOUNTANT MEMBER**

Mumbai, Date : 5<sup>th</sup> June, 2018

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "A" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar  
I.T.A.T, Mumbai