IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI N.K PRADHAN, ACCOUNTANT MEMBER

ITA no.5478/Mum/2016
(Assessment Year : 2009–10)

M/s. Damask Projects Pvt. Ltd.
167, Readymoney Terrace
Dr. Annie Besant Road ……. Appellant
Worli Naka, Mumbai 400 018
PAN – AACCD5994P

v/s

Asstt. Commissioner of Income Tax
Circle–6(2), Mumbai ……. Respondent

Assessee by : Shri Firoz B. Andhyarujina
Revenue by : Shri Saurabh Deshpande

Date of Hearing – 15.06.2018	Date of Order – 20.06.2018

O R D E R

PER SAKTIJIT DEY, J.M.

This is an appeal by the assessee against order dated 20th July 2016, passed by the learned Commissioner (Appeals)–12, Mumbai, sustaining the penalty imposed of ₹ 12,88,849 under section 271(1)(c) of the Income Tax Act, 1961 (for short *"the Act"*) for the assessment year 2009–10.

2. Brief facts are, for the assessment year under dispute the assessee filed its return of income on 30th September 2009, declaring nil income. During the assessment proceedings, the Assessing Officer on verifying the return of income filed by the assessee found that against the rental income offered under the head *"Income From Business and Profession"* amounting to ₹ 1,21,78,644, the assessee has claimed expenditure of ₹ 1,01,29,908. After calling for details of expenditure claimed by the assessee and verifying them, the Assessing Officer disallowed expenditure to the tune of ₹ 41,71,036, claimed under various heads and accordingly he completed the assessment under section 143(3) of the Act determining the total income at ₹ 11,59,696. As stated before us, though, the assessee filed an appeal before the learned Commissioner (Appeals) challenging the disallowances made by the Assessing Officer, however, subsequently he withdrew the appeal. Accordingly, vide order dated 27th December 2013, learned Commissioner (Appeals) dismissed the appeal as withdrawn. When the matter stood thus, learned Commissioner of Income Tax calling for and examining the assessment records for the impugned assessment year was of the view that the assessment order passed was erroneous and prejudicial to the interest of Revenue, as the Assessing Officer has assessed the rental income under the head *"Business"* as against *"Income From House Property*". Thus, after issuing notice under section 263 of the Act on 10th February 2014 and

considering the submissions of the assessee, the learned Commissioner passed an order under section 263 of the Act on 14th March 2014 setting aside the assessment order passed under section 143(3) of the Act with a direction to the Assessing Officer to assess the rental income as income from house property. In the meanwhile, on the basis of disallowances / addition made in the assessment order passed under section 143(3) of the Act, the Assessing Officer had initiated proceedings for imposition of penalty under section 271(1)(c) of the Act by issuing a show cause notice dated 7th December 2011, under section 274 r/w section 271(1)(c) of the Act. Though, the assessee objected to the initiation of penalty proceedings by stating that provisions of section 271(1)(c) of the Act are not attracted, however, the Assessing Officer passed an order on 30th March 2015, imposing penalty of ₹ 12,88,849 under section 271(1)(c) of the Act. Being aggrieved of the penalty order so passed, assessee preferred appeal before the first appellate authority. However, the learned Commissioner (Appeals) upheld the penalty imposed under section 271(1)(c) of the Act.

3. The learned Authorised Representative contesting the imposition of penalty under section 271(1)(c) of the Act submitted that the penalty order is invalid primarily for the reason that on 30thMarch 2015, the date on which the Assessing Officer passed the impugned

penalty order, the original assessment order on the basis of which the penalty order was passed stood revised by the order passed by the learned Commissioner under section 263 of the Act. Thus, he submitted, on the date of penalty order the assessment order passed under section 143(3) of the Act was not in existence. Therefore, the Assessing Officer could not have imposed penalty under section 271(1)(c) of the Act in respect of additions made in the said assessment order. The learned Authorised Representative fairly submitted, though, subsequently vide order dated 4th November 2015, the Tribunal set–aside the revision order passed under section 263 of the Act and restored the original assessment order passed under section 143(3) of the Act, however, that does not militate against the fact that on the date penalty order under section 271(1)(c) of the Act was passed, the original assessment order was not in existence. Therefore, the Assessing Officer had no jurisdiction to pass the penalty order under section 271(1)(c) of the Act. The learned Authorised Representative submitted, the very fact that on 30th March 2015, the date on which the Assessing Officer has passed the impugned penalty order, the Assessing Officer has issued a notice under section 274 r/w with 271(1)(c) of the Act proposing to impose penalty under section 271(1)(c) of the Act in respect of additions made in pursuance to the assessment order passed under section 143(3) r/w section 263 of the Act, indicates that there were two parallel penalty proceedings under

section 271(1)(c) of the Act in respect of the same income, which is not permissible under the Act. The learned Authorised Representative submitted, since, at the time of imposition of penalty under section 271(1)(c) of the Act the original assessment order was not in existence the Assessing Officer had no jurisdiction to impose penalty. In support of such contention, the learned Authorised Representative relied upon the following decisions:–

i) K.C. Builders v/s ACIT, [2004] 265 ITR 562; and

ii) CIT v/s S.M.J. Builders [2003] 262 ITR 60 Bom.

4. Without prejudice to the aforesaid submissions, the learned Authorised Representative submitted, in the show cause notice dated 7th December 2011, issued under section 274 r/w 271(1)(c) of the Act, the Assessing Officer has not indicated the specific limb of penalty provision of section 271(1)(c) which the assessee has violated to attract imposition of penalty under the said provision. He submitted, as the Assessing Officer has not struck off the inappropriate words in the show cause notice, the penalty order is invalid. For such proposition, he relied upon the decision of the Hon'ble Karnataka High Court in CIT v/s Manjunatha Cotton and Ginning Factory, [2012] 359 ITR 565 (Kar.). As regards the merits of the issue, the learned Authorised Representative submitted, out of the expenditure claimed by the assessee under various heads, a part was disallowed by the

Assessing Officer, that too on adhoc basis. He submitted, nowhere the Assessing Officer has alleged that the expenditure claimed by the assessee is bogus. The learned Commissioner (Appeals) has also not given any factual finding on the merit of the issue as to how the disallowance made was due to furnishing of inaccurate particulars of income by the assessee. Thus, he submitted, imposition of penalty under section 271(1)(c) of the Act is unjustified.

5. The learned Departmental Representative relied upon the observations of the learned Commissioner (Appeals).

6. We have considered rival submissions and perused materials on record. We have also applied our mind to the decisions relied upon. As could be seen from the undisputed facts on record, in the return of income filed for the assessment year the assessee had offered the rental income received as income under the head *"Business"*. While completing the original assessment under section 143(3) of the Act on 7th December 2011, the Assessing Officer, though, accepted assessee's claim of business income, however, out of the total expenditure claimed of ₹ 1,01,29,908, the Assessing Officer disallowed part of amounting to ₹ 41,71,036. It also appears, though, the assessee challenged the aforesaid disallowance before the learned Commissioner (Appeals), however, subsequently the appeal was withdrawn. Thus, the assessee accepted the disallowance made by the

Assessing Officer. Subsequently, the learned Commissioner in exercise of power conferred under section 263 of the Act revised the assessment order passed under section 143(3) of the Act by directing the Assessing Officer to assess the rental income as income from house property. Thus, in the process the original assessment order, wherein, part of expenditure was disallowed stood revised under section 263 of the Act. In pursuance to the aforesaid revision order passed under section 263 of the Act, the Assessing Officer passed an order under section 143(3) r/w 263 of the Act on 30th March 2015, assessing the rental income as income from house property. However, on the very same day i.e., on 31st March 2015, the Assessing Officer passed the impugned penalty order imposing penalty under section 271(1)(c) of the Act on the basis of disallowance made in the original assessment order passed under section 143(3) of the Act on 7th December 2011. Thus, it is patent and obvious that on the date the penalty order under section 271(1)(c) of the Act was passed, the original assessment order dated 7th December 2011 was not in existence as it was set aside / revised by the learned Commissioner under section 263 of the Act vide order dated 14th March 2014. That being the case, the Assessing Officer could not have passed the impugned penalty order under section 271(1)(c) of the Act in the absence of the original assessment order passed under section 143(3) of the Act. The subsequent setting aside of the revision order passed

under section 263 of the Act by the Tribunal vide order dated 4th November 2015 is not material considering the fact that it has to be seen what is the status of the original assessment order on the date penalty order was passed by the Assessing Officer. Since, on the date of penalty order, the original assessment order under section 143(3) of the Act was not in existence, the impugned penalty order is also invalid. For this reason, the penalty order passed under section 271(1)(c) of the Act is legally unsustainable.

7. Even otherwise also, though, the Assessing Officer has imposed penalty under section 271(1)(c) of the Act alleging furnishing of inaccurate particulars of income, however, in the show cause notice dated 7th December 2011 issued under section 274 r/w 271(1)(c) of the Act the Assessing Officer has not struck off the inappropriate words to indicated the specific limb of section 271(1)(c) of the Act violated by the assessee to attract imposition of penalty. That being the case, impugned penalty order passed under section 271(1)(c) of the Act cannot be sustained in view of plethora of judicial precedents on this issue, including the decision of the Hon'ble Karnataka High Court in case of Manjunatha Cotton and Ginning Mills Ltd. (supra).

8. Even otherwise also, in our considered opinion, the Assessee also has a strong case on merit. Undisputedly, out of the total expenditure claimed of ₹ 1,01,29,908, the Assessing Officer has

disallowed an amount of ₹ 41,71,036. Thus, a major part of expenditure claimed by the assessee was accepted by the Assessing Officer. Even, in respect of the expenditure disallowed, there is no allegation by the Assessing Officer that such expenditures were not incurred by the assessee or they are bogus. The Assessing Officer has disallowed them only for the reason that the assessee failed to justify that such expenditures were required for the purpose of its business. Whereas, the learned Commissioner (Appeals) except analysing the provisions of section 271(1)(c) of the Act, has not at all discussed the factual aspect of the issue and has not recorded any factual finding whether the assessee has furnished inaccurate particulars of income in respect of the expenditure claimed. Thus, from the facts emerging on record, it is clear that certain expenditures were claimed by the assessee which the Assessing Officer did not accept. However, disallowance of part of the expenditure claimed by the assessee automatically will not lead to the conclusion that the assessee has furnished inaccurate particulars of income. In this context, one may refer to the decision of Hon'ble Supreme Court in CIT v/s Reliance Petro products Pvt. Ltd., 322 ITR 158 (SC). In view of the aforesaid, we hold that penalty imposed under section 271(1)(c) of the Act in the present case is not justified, hence, deleted. Grounds raised are allowed.

9. In the result, assessee's appeal is allowed.

Order pronounced in the open Court on 20.06.2018

Sd/-	**Sd/-**
N.K. PRADHAN	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 20.06.2018

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Sr. Private Secretary)
ITAT, Mumbai