THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Pawan Singh (JM)

I.T.A. No. 4768/Mum/2018 (Assessment Year 2009-10)

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| Luxora Infrastructure Pvt. Ltd.<br>A-1207, 02 Commercial Building, 23-24 Minerva Industrial Estate, Mulund-W<br>Mumbai-400 080.<br><br>PAN : AABCL2854K | Vs. | ITO-6(3)(2)<br>Mumbai |
| (Appellant) | | (Respondent) |

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| Assessee by | Shri K.P. Dewani |
| Department by | Shri Michael Jeralad |
| Date of Hearing | 21.02.2020 |
| Date of Pronouncement | 18.03.2020 |

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against order of learned CIT-A dated 31.5.2018 and pertains to assessment year 2009-10.

2. The grounds of appeal read as under :-

> The learned CIT(A) erred in confirming the penalty levied by learned ITO of Rs. 4,69,785/- for furnishing incorrect and inaccurate particulars of deduction u/s. 35D even through there is no concealment.

3. Brief facts of the case leading to the levy of penalty under :-

A.O. has levied penalty u/s 271(1)(c) of IT. Act 1961 read with Explanation-1 for furnishing inaccurate particulars of income at Rs.4,69,785/- in respect to addition made for disallowance of part claim of Rs. 15,65,9507- u/s 35D of I.T. Act,1961. The assessee had claimed deduction u/s 35D at Rs.18,60,950/- in the computation of income. Assessee for the purpose of capital employed had included share premium as share capital to compute claim u/s 35D of IT Act 1961. The claim of assessee was in terms of judicial

view rendered by Hon'ble ITAT, Ahmedabad Bench in case of JCIT Vs. Sirhind Steel Ltd. reported at 97 ITD 502 (Ahd.). The Assessing Officer on the basis of examination of balance sheet which was submitted along with return of income excluded the share premium from the computation of capital employed to compute allowable deduction u/s 35D at Rs.2,95,000/- as against claimed in return of income at Rs.18,60,950/- to make addition at the hands of assessee for Rs. 15,65,9507-. Hence, the A.O. has levied penalty u/s 271(1)(c) at Rs.4,69,785/- in respect to aforesaid addition made.

4. Upon assessee's appeal in this regard learned CIT(A) upheld the order of the assessing officer. The learned CIT(A) inter alia rejected the assessee's contention that it was a mistake on the part of assessee due to advice by the consultant. Learned CIT(A) held that a wrong advice by such a highly placed consultant is not acceptable in absence of necessary evidence.

5. Against this order assessee is in appeal before us.

6. We have heard both the parties and perused the records. The submission of the learned counsel of the assessee is summarised as under :-

> "Addition made by A.O. is on the basis of documents submitted alongwith return of income and was apparent from the details submitted by assessee. A.O. had not to investigate to find out the details to make addition for which penalty is sought to be levied. Particulars submitted by assessee are not inaccurate. Assessment order as well as penalty order does not indicate that any fact reported by the assessee in return is inaccurate or false. On above facts levy of penalty u/s 271(1)(c) is unjustified and unsustainable.
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> Disallowance of any claim which is unsustainable cannot be visited with penalty u/s 271 (1 )(c) of IT. Act 1961. Reliance on the decision of CIT Vs. M/s. Reliance Petroproducts Pvt.Ltd. 322 ITR158 (SC).
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> Penalty levied for disallowance of deduction u/s 35D on the ground that assessee is not industrial undertaking held to be unsustainable by Hon'ble Jurisdictional High Court in case of CIT(III) Vs. Aditya Birla Nova Ltd. The ratio laid down by the aforesaid decision squarely applies to the facts in case of assessee.
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> Claim of assessee is supported by the decision of Hon'ble ITAT Ahmedabad Bench in case of JCIT Vs. Sirhind Steel Ltd. reported at 97 ITD 502 (Ahd.). In view of above, allowability of deduction u/s. 35D by including receipt of

share premium as share capital for the f purpose of capital employed under the provisions of section 35D is clearly debatable issue. No penalty u/s 271(1)(c) can be levied in respect to debatable claim made in return of income. Reliance on the decision of CIT Vs. Nayan Builders & Developer 231 Taxman 665 (Bom.)

A.O. has levied penalty by invoking Explanation 1 to section 271(1)(c) while levying penalty u/s 271(1)(c) for furnishing inaccurate particulars of income. Explanation-1 cannot be invoked for penalty to be levied u/s 271(1)(c) in respect to inaccurate particulars of income from bare reading of section. In view of above, penalty levied is without proper application of mind and thus is unjustified and unsustainable. Reliance on ITAT order in ITA No.1457/Del/2010 in the case of M/s. Tristar Intech (P) Ltd. vide order dated 07/09/2015.

In the notice issued for imposition of penalty u/s 271(1)(c) A.O. has not marked as to which limb of section 271(1)(c) the imposition of penalty is sought to be applied. The show cause notice issued u/s 271(1)(c) is not in accordance with law and consequent penalty levied is unsustainable. (P- 35-36) Reliance on Hon'ble High Court of Bombay at Goa in ITA No.24 of 2019 in the case of Goa Coastal Resorts and Recreation Pvt. Ltd. vide order dated 11/11/2019."

7. Per Contra learned departmental representative submitted that honourable Supreme Court in the case Berger Paints India Ltd. Vs. CIT (79 taxman.com 450) has already decided that share premium cannot be considered as capital employed for the purpose of computation of deduction under section 35D. Hence, he submitted that there is no infirmity in penalty levied in this regard.

8. In the rejoinder learned counsel of the assessee pleaded that this decision of honourable Supreme Court came much after the date when the assessee filed return of income or when the assessment was framed. Hence, it cannot be said that assessee's conduct was in violation of Supreme Court decision which was not even in existence at the time.

9. Upon careful consideration we find assessee has submitted all the details of its claim for deduction under section 35D. From the assesse's detail the assessing officer found out that for the purpose of computation of capital employed, share premium has also been considered. Hence from the above it is abundantly clear that there is no concealment or furnishing of inaccurate

particulars by the assessee. All the submissions in detail were available with the assessing officer. It has been held by honourable Supreme Court in the case of reliance Petro products that a denial of the claim of the assessee cannot ipso facto lead to a conclusion that assessee should be visited penalty. Similarly honourable Supreme Court by larger bench of 3 of their Lordships has expounded that the authority may not levy penalty if the conduct of the assessee is not found to be contumacious. Hindustan Steel Ltd. Vs. State of Orissa (83 ITR 26).

10. In the present case in our considered opinion a claim by the assessee has been rejected. On the touchstone of Supreme Court decision in the case of reliance Petro product the assessee should not be visited with the rigors of penalty, if such a claim is rejected. Similarly conduct of the assessee cannot the said to be contumacious to warrant levy of penalty. Furthermore the assessee submission that it had acted upon the advice of the consultant cannot be summarily rejected on the ground that such a reputed consultant cannot give erroneous advice. Honourable Supreme Court in the case of Price Waterhouse & Coopers Pvt. Ltd. Vs. CIT (CIVIL APPEAL NO. 6924/2012) has duly expounded that mistakes do happen even by reputed consultants and penalty cannot levied for bonafide mistakes. Furthermore, as submitted by the learned counsel of the assessee honourable Supreme Court in the case of Aditya Birla Nava Nova Ltd. (supra) has duly expounded that disallowance of deduction of section 35D cannot lead to the levy of penalty.

11. As regards the decision of honourable court in the case of Berger Paints (supra) submitted by the learned departmental representative, we note that the said decision was rendered on 28.3.2017. Hence it is abundantly clear that the said decision was not available when the assessee filed its return of income or when the assessment was framed or even when the penalty order is dated 20.1.2014. When the decision of the honourable Supreme Court was not in existence at that time it cannot be said that assessee should have taken that into account. It is settled law that nobody can be asked to do the impossible. It

is also clear that at that time of filing of return of income there was Tribunal decision in the case of JCIT Vs. Srihind Steel Ltd. (supra) which supported the case of the assessee. Hence assessee's claim cannot be labeled to be ex facie wrong. The Hon'ble Supreme Court decision in the case of Mepco Industries Ltd. Vs. CIT (319 ITR 208) supports this point. In that case Hon'ble Supreme Court has referred with approval the Hon'ble Calcutta High Court decision in the case of Jiyajeerao Cotton Mills Ltd. (310 ITR 710) that subsequent decision of Hon'ble Supreme Court did not obliterate the conflict of opinion prior to it. Hence, the assessee's claim cannot be said to be not bonafide or contumacious or in conflict with a debatable point already decided by Hon'ble Supreme Court.

12. Accordingly in the background of aforesaid discussion and precedent in our considered opinion the assessee doesn't deserve to be visited with the rigours of penalty under section 271(1)(c) of the Act.
Accordingly set aside the orders of authorities below and delete the penalty.

13. In the result, appeal by the assessee is allowed.

Order has been pronounced in the Court on 18.3.2020.

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| Sd/- | Sd/- |
| (PAWAN SINGH) | (SHAMIM YAHYA) |
| JUDICIAL MEMBER | ACCOUNTANT MEMBER |

Mumbai; Dated : 18/03/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai

*PS*