

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA BENCH "C", KOLKATA**

**BEFORE SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, HON'BLE ACCOUNTANT MEMBER**

**ITA No.285/Kol/2022
Assessment Year: 2019-20**

Soltek Insolation Pvt. Ltd.		ITO, Ward-7(1), Kolkata
C/o. S.N. Ghosh & Associates, Advocates, 2, Garstin Place, 2 nd Floor, Suite No. 203, Off Hare Street, Kolkata-700001.	Vs.	
(PAN: AATCS 0007 M)		
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Somnath Ghosh, Advocate
Revenue by : Smt. Ranu Biswas, Addl. CIT, DR

Date of Hearing : 03.11.2022
Date of Pronouncement : 12.01.2023

ORDER

PER SONJOY SARMA, JM:

The present appeal has been preferred by the assessee against the order dated 22.04.2022 of the National Faceless Appeal Centre [hereinafter referred to as 'CIT'] passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act'). The assessee has taken the following grounds of appeal:

"i. For that on a proper interpretation of the scope and ambit of the provisions of section 43B read with s. 36(1)(va) of the Income Tax Act, 1961, the ld. Commissioner of Income Tax (Appeals) – NFAC erred in upholding the action of the ld. Deputy Commissioner of Income Tax, CPC in resorting to the impugned disallowance of Rs. 42,35,172/- in the instant case and the purported finding on that behalf is absolutely arbitrary, unreasonable and perverse.

ii. For that the ld. Commissioner of Income Tax (Appeals) – NFAC was absolutely in error in upholding the disallowance in the sum of Rs. 42,35,172/- made u/s 2(24)(x) read with s. 36(1)(va) of the Income Tax Act, 1961 by the ld. Deputy Commissioner of Income Tax, CPC relying upon the amendment by Finance Act, 2021 misconstruing it to be retrospective in operation and the purported findings on that behalf is altogether unfounded, unjustified and untenable in law.

iii. For that the ld. Commissioner of Income Tax (Appeals) – NFAC acted unlawfully in upholding the impugned disallowance in the sum of Rs. 9,933/- made by the ld. Deputy Commissioner of Income Tax, CPC by invoking the mischief of s. 43B of the Act and such specious findings reached on that behalf is wholly illegal, illegitimate and infirm in law.

iv. For that the ld. Commissioner of Income Tax (Appeals) – NFAC was remiss in upholding the impugned disallowance to the extent of Rs. 40,000/- made by the ld. Deputy Commissioner of Income Tax, CPC by invoking the mischief of s. 37(1) of the Act and the impugned action on that behalf is wholly opposed to law.”

2. Brief facts of the case are that assessee filed its return of income on 28.10.2019 declaring total income of Rs. 17,35,970/-. Subsequently, order u/s 143(1) was passed on 07.05.2020 assessing the income of the assessee at Rs. 60,58,460/- by disallowing of Rs. 42,35,172/- u/s 36(1)(va) of the Act on account of delayed deposit of employee's contribution to PF & ESI, disallowance of Rs. 77,380/- u/s 37 of the Act. Further disallowance of Rs. 9,933/- by invoking the provisions of section 43B of the Act.

3. Dissatisfied with the above order, assessee preferred an appeal before the ld. CIT(A). The ld. CIT(A) elaborately noted the submission made by the assessee in respect of disallowance of Rs. 42,35,172/- and Rs. 9,933/- u/s 36(1)(va) of the Act on account of delayed deposit of employee's contribution to PF & ESI. However he was not convinced with the same and rejected the assessee's plea by observing in para 5 to 5.28 of his order as under:

“5.29. Thus the aforesaid Explanations inserted by Finance Act, 2021 have clarified that definition of due date as per section 43B is deemed never to have been applied for the purpose of employee's contribution. As discussed above, the said amendments are clarificatory in nature and are retrospective in operation. Therefore, the payment of employee's contribution made after the due date, by which the appellant is required as an employer to credit an employee's contribution to the employee's account in the relevant fund as per the employee provident fund scheme/ESI Act, is liable to be added to the income of appellant. In view of the above discussion in paras 5 to 5.28, the appeal on ground nos. 1 & 3 are dismissed.”

4. Similarly, in respect of another ground, the assessee challenged the disallowance of Rs. 77,380/- made u/s 37 of the Act before the ld. CIT(A) and the ld. CIT(A) after discussing the detailed issue in para 6.1 to 6.2 and partly allowed the ground raised by the assessee observing as follows:

“6.3. The appellant has itself stated in the written submission that the sum of Rs. 77,380/- comprised of fees on account of penalty under service tax amounting to Rs. 40,000/-, interest on account service tax amounting to Rs. 29,830/- and late fees under goods and service tax amounting to Rs. 7,550/-. Now the decision of the Hon’ble Supreme Court comes to the amount of Rs. 29,830/- and Rs. 7,550/-. To this extent, the appellant is granted relief. However, the amount of Rs. 40,000/- which is on account of penalty under service tax is not covered by the said decision of the Hon’ble Supreme Court. The addition on account of penalty of Rs. 40,000/- is upheld. Ground no. 2 is partly allowed.”

5. Aggrieved by the order of ld. CIT(A), assessee preferred an appeal before the Tribunal raising four grounds of appeal.

6. We have heard both the parties on this issue and perused the material available on record. The ld. counsel for the assessee fairly submitted that the decision of Hon’ble Supreme Court in the case Checkmate Services Pvt. Ltd. (2022) 143 taxmann.com 178 wherein it has been held that employee contribution to PF & ESI paid beyond due date and specified under the relevant Act then the same has to be added back to the income of the assessee. On the other hand, ld. DR has not any objection to such prayer made by the ld. AR. We after careful consideration of the submission made by the parties and following the decision rendered by the Hon’ble Supreme Court (supra), the issue raised by the assessee are covered. Therefore, ground raised by the assessee i.e. ground no. 1 to 3 are dismissed.

7. In respect of issue no. 4, the ld. AR of the assessee submitted that the impugned disallowance to the extent of Rs. 40,000/- made by the Deputy Commissioner of Income Tax, CPC is bad in law by invoking the provisions of section 37(1) of the Act and it is against the law, therefore, it required to be set aside. On the other hand, ld. DR supported the action of the ld. authorities below. He further submitted that the ld. DCIT disallowed the sum of Rs. 77,380/- which comprised of fees on account of penalty under

service tax of Rs. 40,000/- interest on account of service tax amounting to Rs. 29,830/- and late fees under goods and service tax amounting to Rs. 7,550/-. Ld. CIT(A) already granted relief to the assessee in respect of interest on account of service tax amounting to Rs. 29,830/- and late fees under goods and service tax amounting to Rs. 7,550/- by following the decision of Hon'ble Supreme Court. However, the sum of Rs. 40,000/- which is on account of penalty under service tax is not covered by the decision of the Hon'ble Supreme Court. Therefore, ld. CIT(A) rightly upheld the addition on account of penalty of Rs. 40,000/- made by the ld. DCIT, CPC. We find that addition made by the authorities below by disallowing the claim of the assessee towards payment made on account of penalty of Rs. 40,000/- under service tax is in the form of penal in nature and it was levied for violation of law, therefore, the said penalty of Rs. 40,000/- is not admissible as an expenditure as per Explanation 1 to Section 37(1) of the Act. Consequently, we viewed that the addition made by the authorities below on account of penalty is sustained and ground raised by the assessee is dismissed.

8. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 12.01.2023.

**Sd/-
 (GIRISH AGRAWAL)
 ACCOUNTANT MEMBER**

**Sd/-
 (SONJOY SARMA)
 JUDICIAL MEMBER**

Kolkata, Dated:12.01.2023.
 Biswajit, Sr. P.S.

Copy to:

1. The Appellant: Soltek Insolation Pvt. Ltd.
2. The Respondent: ITO, Ward-7(1), Kolkata
3. The CIT, Concerned, Kolkata
4. The CIT (A) Concerned, Kolkata
5. The DR Concerned Bench

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By Order

Assistant Registrar
 ITAT, Kolkata Benches, Kolkata