

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

**BEFORE SHRI ABY T. VARKEY, JM**

आयकर अपील सं/ I.T.A. No.10/Mum/2023  
(निर्धारण वर्ष / Assessment Year: 2017-18)

Saltwater Studio LLP 103, Corporate Corner, Sunder Nagar, Near Dalmia College, Malad (West)- 400064.	<b>बनाम/</b> Vs.	ACIT-30(2) 520, 5 <sup>th</sup> Floor, Kautilya Bhavan, C-41 to C-43, G Block, Bandra Kurla Complex, Bandra (E), Mumbai-400051.
<b>स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ACKFS1653D</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Ms. Mitali Gopani
Revenue by:	Shri Anil Gupta

सुनवाई की तारीख / Date of Hearing: 28/02/2023  
घोषणा की तारीख /Date of Pronouncement: 31/03/2023

**आदेश / ORDER**

**PER ABY T. VARKEY, JM:**

This is an appeal preferred by the assessee against the order of the Ld. CIT(A)/NFAC, Delhi dated 04.11.2022 for AY. 2017-18.

2. At the outset, the Ld. AR of the assessee Ms. Mitali Gopani submitted that even though the assessee has raised ten (10) grounds of appeal. The assessee before the Tribunal is only pressing two (2) grounds i.e. ground no. 3 and ground no. 6 which reads as under: -

“3. On the facts and circumstances of the case, the Ld. CIT(A) has erred in law and in facts in not condoning the delay in filing appeal.

6. On the facts and circumstances of the case, the Ld. CIT(A) ought to have allowed the deduction of interest paid on late payment of service tax amounting to Rs.3,27,026/-.”

3. Since the assessee has not pressed the other grounds namely ground no. 1, 2, 4, 5, 7, 8, 9 & 10, they stands dismissed.



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4. Ground no. 3 is against the action of the Ld. CIT(A) in not condoning the delay in filling of appeal. It is noted that the AO had passed the assessment order for AY. 2017-18 by order dated 10.12.2019. And thereafter, the assessee received the same, after few days and had instructed the Ld. AR to file an appeal before the Ld. CIT(A)/NFAC. However, according to the Ld. AR, due to the Covid-19 Pandemic which started spreading from China by the end of December 2019, and lock-downs were ordered from last week of March, 2020, and therefore the appeal could not be filed with in the time. And that the Ld. AR was able to file appeal only in the month of Aug, 2021. Therefore, the time period excluding Covid-19 only should be counted to calculate the delay caused for filling of appeal, then it will be less than ninety (90) days as per the Suo-Motto order of Hon'ble Apex Court on 28 February 2022, which gave another 3 months extended period. According to the Ld. AR, the ninety (90) days also was due to the mis-communication/misplacement of file. Therefore, the assessee should not be penalized taking into consideration the "*Force Majeure*" (Superior or irresistible force i.e. unforeseen happening beyond control). It is noted that the Ld. CIT(A) has not admitted the appeal of the assessee since the assessee failed to file application for condonation the delay. Since the delay caused for delayed filing of appeal was mainly due to the Pandemic/Covid-19 which brought the country to stand-still from March, 2020 to end of 2021 and since the AO has passed the order in Dec, 2019 and even though the assessee had directed the Ld. AR to file the same in January, 2020 due to mis-placement of file the same couldn't be filed



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and thereafter due to the Covid-19 (lock-down), the Ld AR could not file the appeal. Taking into consideration the fact that assessee had filed the appeal on 28.08.2021, in the light of the aforesaid facts, when the period of Pandemic is excluded, the delay is around ninety days (90) days which was due to the mis-placement of file/miscommunication between the assessee and the Ld. AR of the assessee. Therefore, the assessee cannot be penalized for the omission caused in not filing of the appeal before the Ld. CIT(A). So the same is condoned. So this ground of assessee is allowed.

**5.** Coming to the ground no. 6 which is against the disallowance of interest paid on late payment of service tax amounting to Rs.3,27,026/.

**6.** Brief facts is that the AO noted that the assessee has filed returned of income on 31.10.2017 declaring total income of Rs.21,21,750/-. Thereafter, the case of the assessee was selected for scrutiny under CASS. And the AO issued show cause notice raising inter-alia the issue of assessee's claim of expense of Rs. 3,27,026/- (on account of interest paid on late payment of service tax). And the AO notes that when he asked the assessee as to why it should not be added back, the assessee accepted its mistake and offered the same for taxation i.e. the interest expense of Rs.3,27,026/- on account of late payment of service tax. According to the Ld. AR, even though the assessee accepted the same as a mistake (claiming as expenditure) before the AO, there is no estoppel against law. Further according to the Ld. AR, the interest paid on late payment of service tax is compensatory in nature and cannot be held it to be penal in nature and cited the decision of Co-ordinate Bench decision in the case of M/s.



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Neelkamal Realtors Suburban Pvt. Ltd. Vs. ACIT (ITA. No. 86/Mum/2021 dated 28.04.2022) wherein the Tribunal inter-alia has decided ground no. 2 a similar issue wherein also that assessee (M/s. Neela kamal) has claimed interest expense on delayed payment of service tax amounting to Rs.1590/- and the Tribunal has held as under:

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“08. Ground no. 2 is with respect to disallowance of ₹44,651/- under section 37(1) of the Act in respect of delayed payment of service tax, provident fund, and VAT. During previous year assessee paid interest on delayed payment of service tax amounting to ₹1590/-, Interest on delayed payment of provident fund of ₹15,934/- and interest on VAT of ₹27,127/-. The assessee explained that this interest is compensatory in nature and therefore the same is allowable as expenditure. The learned Assessing Officer held that such payment is penal in nature and therefore disallowable. The learned CIT (A) confirmed the disallowance by affirming the reasons given by the learned Assessing Officer.

09. We have carefully considered the rival conditions. We find that identical issue has been decided by the co-ordinate Bench in case of Emdee Digitronics Pvt. Ltd Vs. PCIT in ITA No. 361/Kol/2019 dated 28th June, 2019, wherein the co-ordinate Bench in Para No.12 relying on the decision of M/s Naaraayani Sons Pvt. Limited, in ITA No. 1796- 1798/Kol/2017, order dated 21.08.2018 held that interest expense on late deposit of VAT, service tax, TDS etc are allowable expenditure under section 37(1) of the Act. In view of the above fact, respectfully following the decision of Kolkata Bench of ITAT, we hold that such expenses are not disallowable under section 37(1) of the



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Act. Further, VAT laws, provident laws and service tax laws clearly provide for payment of interest if there is a delay in payment of fees. Therefore, it is apparent that those respective laws allowed the belated payment along with interest. Therefore, those are not affected by explanation-1 to section 37(1) of the Act. In view of this ground no. 2 of the appeal is allowed.”

7. It is noted that the assessee has claimed as expense the interest incurred to the tune of Rs. 3,27,026/- which was due to belated payment of service tax which has been disallowed by the AO holding it to be penal in nature, whereas it is noted that the interest paid by the assessee on delayed payment of service tax is compensatory in nature and is allowable expenditure u/s 37(1) of the Income Tax Act, 1961 (hereinafter “the Act”). It is noted that the Service Tax Act itself provide for payment of interest to the Government-Treasury if there is delay in payment of Service Tax. And since the Service Tax Act itself allowed belated payment of the Tax along with interest, I am of the considered opinion that the Explanation-1 to 37 of the Act is not attracted. And therefore, ground no. 6 (supra) is allowed.

8. In the result, all the appeals of the assessee is partly allowed.

Order pronounced in the open court on this 31/03/2023.

Sd/-  
(ABY T. VARKEY)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 31/03/2023.  
Vijay Pal Singh, (Sr. PS)



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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

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