

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'B' Bench, Hyderabad**

Before Shri Rama Kanta Panda, Accountant Member

AND

Shri K.Narasimha Chary, Judicial Member

ITA No.108/Hyd/2022		
Assessment Year: 2018-19		
Baburao Atluri Door No.3-2-206, N.K.Nagar Kothagudem-507 101 PAN : ABEPA7997D (Appellant)	Vs.	DCIT,Circle-1 Khammam (Respondent)

&

ITA No.118/Hyd/2022		
Assessment Year: 2019-20		
Baburao Atluri Door No.3-2-206, N.K.Nagar Kothagudem-507 101 PAN : ABEPA7997D (Appellant)	Vs.	DCIT,Circle-13(1) Hyderabad (Respondent)
Assessee by:	Shri Maitreya GBS & Shri Ravi Bharadwaj,CA	
Revenue by:	Shri YVST Sai,CIT-DR	
Date of hearing:	20.06.2022	
Date of pronouncement:	22.07.2022	

ORDER

Per Shri Rama Kanta Panda, A.M.

The above two appeals filed by the assessee are directed against the separate orders dated 06.12.2021 & 29.03.2022, National Faceless Appeal Centre(NFAC), Delhi for the AY 2018-19 & 2019-20 respectively. Since, common issues are involved in both these appeal, therefore, these were heard together and are being disposed-of by this common order.

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2. There is a delay of '66' days in filing of this appeal by the assessee for which the assessee has filed a condonation application along with an affidavit explaining the reasons for such delay. After considering the contents of the condonation application and after hearing the ld. DR , the delay in filing of this appeal by 66 days is condoned and the appeal is admitted for adjudication.

3. Facts of the case, in brief, are that the assessee is an individual and is proprietor of Adithya Enterprises and engaged in the business of Exporting Goods and providing Technical and management Services to Suncrest Engineering Limited Zambia. He filed his return of income 11.12.2018 declaring total income of Rs. 4,27,96,980/-. The case of the assessee was selected for scrutiny on account of the following two issues.

- i. double Taxation Relief u/s. 90/91
- ii. Details of Assets and Liabilities

4. The AO completed the assessment u/s.143(3) on 27.01.2021 accepting the return income. However, the AO in computation sheet has not given credit of relief u/s. 90/90A to the tune of Rs. 1,29,14,123/-. The assessee filed rectification application u/s. 154, but the AO rejected the same.

5. Before the ld.NFAC, the assessee submitted that the return of income was filed on 11.12.2018. Requisite Form No.67 claiming relief u/s. 90 was filed on 14.12.2018. It was submitted that Government of India notified Income tax(18th Amendment) Rules, 2016. with effect from 1st day of April, 2017 detailing about the Rules to be implemented and procedures to be followed for claiming Foreign Tax Credit u/s 90/90A of the I. T. Act. Clause 8

of Rule 128 of the above said rules stipulate that Form 67 which should be filed on or before the due date of Filing of Income Tax Return i.e., 30th November, 2018 in appellant's case for the subject assessment year. However, the appellant had filed the return of income on 11.12.2018 and the said Form 67 filed on 14th December, 2018 was late by 14 days from the due date of filing the return of income. It was submitted that the delay was due to reasons beyond the control of the appellant, inasmuch as the Tax Deduction Certificates were received from the foreign deductor from Zambia belatedly, the said Form No.67 was filed belatedly by 14 days. The reasons attributed by the Zambian deductor are that their tax jurisdiction follow different period for taxing the income and have different due dates for filing the return in comparison to India.

5.1 The assessee further submitted that the entitlement for claiming FTC emerges from the DTAA which India has entered with different countries. Referring to various decisions, it was argued that the Provision of DTAA always have an overriding effect over the provisions of Income Tax Act, 1961 and the Constitution of India provides that State shall endeavor to foster respect for International law and treaty obligations. Thus, the provisions of DTAA cannot be undermined by bringing in procedural requirements, in the matter of allowing FTC.

5.2 The assessee submitted that the AO in the scrutiny assessment order completed u/s 143(3), apart from considering the 40(a)(1a) disallowance twice had not discussed anything contrary to the delay in filing the FTC Form. However, in the computation, apparently for non-compliance of Rule 128, the said claim of FTC credit at Rs.1,29,14,123/- was not considered. Merely, filing Form 67 with delay doesn't point out to the fact of any incorrect claim made by the assessee and rejection of FTC

has resulted into huge demand, wherein taxes were paid abroad and a genuine claim for credit of those taxes paid

6. However, the ld. NFAC was not satisfied with the arguments advanced by the assessee and upheld the action of the AO in not granting credit of relief u/s. 90/90A amounting to Rs.1,29,14,123/- by observing as under:-

"5.4 I have carefully considered the claim of the appellant and the case laws relied upon. Admittedly, form 67 has been filed beyond the due date and because of this the appellant is not eligible for the Foreign Tax Credit. It is true that DTAA should take precedence over domestic laws, but that is relevant for determining the eligibility of FTC claim and not with regard to procedural requirements. The Income Tax provisions clearly stipulate the procedure and timeline for making a claim. CPC has followed the rule which is mandatory and hence non furnishing of Form No.67 before the due date u/s. 139(1) of the Act is a stringent requirement for the said claim. Hence, CPC made the disallowance. There is no defect in the intimation. So far as the reasonableness of the Foreign Tax Credit or eligibility is concerned, the CPC cannot ignore or waive the procedural requirement. As the present appellate authority also does not have the power to condone delay in filing the Form 67 for claim of Foreign Tax Credit, this ground is dismissed."

7. Aggrieved with such order of the NFAC, the assessee is in appeal before the Tribunal by raising the following grounds:-

1) The order of the Ld. CIT(A) is erroneous both on facts and in law in not allowing the Foreign Tax credit claimed under section 90/90A to the extent of Rs.1,29,14,123/-

2) The Ld. CIT (A) while observing so, totally ignored the settled principle that the requirement of filing of Form (Form No.67) 'along with the return' is 'directory' and not mandatory, as was held by various legal fora, including the Apex Court, particularly in the light of the fact that the quantum of relief claimed u/s 90/90A at Rs.1,29,14,123/- was not disturbed in any manner by the AO in the assessment order passed u/s 143(3) and also that DTAA should take precedence over domestic laws.

3) The CIT(A) ought to have appreciated that it is not mandatory to file Form 67 before filing return of income under section 139(1) to claim Foreign tax credit as Rule 128(9) of the Rules does not provide for disallowance of FTC in case of delay in filing Form No.67 and that filing of Form No.67 is not mandatory but a directory requirement.

8. The Id. Counsel for the assessee referring to the decision of the Bangalore Bench of the Tribunal in the case of M/s.42 Hertz Software India Pvt.Ltd vide ITA No.29/ Bang/2021 order dated 07.03.2022 for AY 2017-18 submitted that the Tribunal relying on various decisions has held that as per rule 128 for claiming Foreign Tax Credit Form No.67 to be submitted by the assessee before filing of the return is not mandatory but is directory in nature. He further submitted that the Tribunal in the said decision has held that DTAA overrides the provisions of the Act and the Rules. Therefore, merely because there is a delay in filing the Form-67, the Foreign Tax Credit cannot be denied to the assessee.

9. The Id.DR on the other hand, referring to the decision of the Vishakapatnam Bench of the Tribunal in the case of Muralikrishna Vaddi vs ACIT vide ITA No.267/Viz/2021 order dated 14.06.2022 for AY 2018-19 submitted that the Tribunal in the said decision has held that the word "shall" used in the Rule 128(9) is mandatory in nature and not directory. He accordingly submitted that order of the Id.CIT(A) and this issue to be upheld.

10. We have heard the rival arguments made by both the sides, perused the orders of the AO and NFAC and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the AO in the instant case did not allow the Foreign Tax Credit (FTC) on the ground that Form No.67 has been filed beyond the due date of filing of the return. We find the NFAC upheld the action of the AO, the reasons of which have already been reproduced in the proceeding paragraph. It is the submission of the Id.Counsel for the assessee that filing of foreign tax credit certificate in Form-67 is directory in nature

and not mandatory and therefore the NFAC is not justified in denying the Foreign Tax Credit.

11. We find the Bangalore Bench of the Tribunal in the case of M/s. 42 Hertz software India Pvt.Ltd(supra) while deciding an identical issue has held that FTC cannot be denied to the assessee, where the assessee filed FTC in Form No.67, although belatedly since filing of such Form 67 is not mandatory but directory in nature. The relevant observation of the Tribunal from para 6 onwards reads as under:-

“6. There is no dispute that the Assessee is entitled to claim FTC. On perusal of provisions of Rule 128 (8) & (9), it is clear that, one of the requirements of Rule 128 for claiming FTC is that Form 67 is to be submitted by assessee before filing of the returns. In our view, this requirement cannot be treated as mandatory, rather it is directory in nature. This is because, Rule 128(9) does not provide for disallowance of FTC in case of delay in filing Form No.67. This view is fortified by the decision of coordinate bench of this Tribunal in case of Ms.Brinda Kumar Krishna vs.ITO in ITA no.454/Bang/2021 by order dated 17/11/2021.

7. It's a trite law that DTAA overrides the provisions of the Act and the Rules, as held by various High Courts, which has also been approved by Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence (P.) Ltd. reported in (2021) 432 ITR 471.

8. We accordingly, hold that FTC cannot be denied to the assessee. Assessee is directed to file the relevant details/evidences in support of its claim. We thus remand this issue back to the Ld.AO to consider the claim of assessee in accordance with law, based on the verification carried out in respect of the supporting documents filed by assessee. Accordingly the grounds raised by assessee stands allowed for statistical purposes.”

12. We further find, in the instant case, the delay in filing of the FTC certificate in Form-67 was explained to be due to non receipt of the tax deduction certificate form the foreign deductor from Zambia within time for which the said Form-67 was filed belatedly by 14 days. It was stated that the tax jurisdiction of the Zambian deductor follow different period for taxing the income and have different due dates for filing the return as compared to India. So

far as the decision relied on by ld. DR in the case of Muralikrishna Vaddi(supra) is concerned, we find there is a delay of more than two years without any valid and reasonable cause. Therefore, the said decision in our opinion cannot be applicable to the facts of the present case. In any case, when there are two view possible, the view which is favourable to the assessee has to be followed as held by Hon'ble Supreme Court in the case of CIT vs. Vegetable Products Ltd. reported in (1972) 88 ITR 192. Since, the assessee in the instant case has filed FTC certificate in Form No.67 with delay of only '14' days, therefore following the decision of the Bangalur Bench of the Tribunal in the case of M/s. 42 Hertz Software India Pvt.Ltd.(supra), we direct the AO to allow the FTC after due verification. The grounds raised by the assessee are accordingly allowed.

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13. The grounds raised by the assessee are as under:-

1) The order of the Ld. CIT(A) is erroneous both on facts and in law in not allowing the Foreign Tax credit claimed under section 90/90A to the extent of Rs.1,03,57,519/-

2) the learned CIT(A) while agreeing that the DTAA should take precedence over domestic laws, erred in observing that the same is not applicable with regard to procedural requirements.

3) The Ld. CIT (A) while observing so, totally ignored the settled principle that the requirement of filing of Form (Form No.67) 'along with the return' is 'directory' and not mandatory, as was held by various legal fora, including the Apex Court, particularly in the light of the fact that the quantum of relief claimed u/s 90/90A at Rs.1,03,57,519/- was not disturbed in any manner by the AO.

14. After hearing both the sides, we find the grounds raised by the assessee are identical to the grounds of appeal in ITA No.108/Hyd/2022. We have already decided the issue and the grounds raised by the assessee have been allowed. Following

similar reasonings, these grounds raised by the assessee are allowed.

15. In the result, both the appeals filed by the assessee are allowed.

Order pronounced in the Open Court on 22nd July, 2022.

Sd/- (K.NARASIMHA CHARY) JUDICIAL MEMBER	Sd/- (RAMA KANTA PANDA) ACCOUNTANT MEMBER
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Hyderabad, dated 22nd July, 2022.

Thirumalesh/sps

Copy to:

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2	DCIT, Circle-1, Khammam & DCIT, Circle-13(1), Hyderabad
3	CIT(A), NFAC Delhi
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order