

IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

ITA No. 1704/Mum/2022

(Assessment Year 2018-19)

Sonakshi Sinha
49A, Ramayan,
9th Road, JVPD Scheme,
Mumbai-400 049

Vs.

Commissioner of Income-tax
(Appeals)
National Faceless Appeal
Centre (NFAC)
Delhi

(Appellant)

(Respondent)

PAN No. BEPPS6007F

Assessee by : S/Shri K. Gopal &
Om Kandalkar, ARs
Revenue by : Shri Ajay Singh, DR

Date of hearing: 08.09.2022
Date of pronouncement : 20.09.2022

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by assessee against appellate order passed by National Faceless Appeal Centre (NFAC)[learned CIT (A)] for assessment year 2018 – 19 on 27/4/2022 denying foreign tax credit of ₹ 2,921,327/-.

02. Assessee has raised following grounds:-

"i. on the facts and circumstances of the case and in law, Commissioner of Income tax (Appeals), National faceless appeal Centre (NFAC) has erred by not considering the explanation , documents and

disclosures made with regard to the claim of relief u/s 90 of the income tax act 1961

ii. the CIT (A), National faceless appeal Centre has erred in passing an order and disallowing the claim of relief of foreign tax credit u/s 90 of the income tax act, 1961 amounting to ₹ 2,921,327/- on the same income of ₹ 14,610,080/- offered in the same year, which has been doubly taxed in the United Kingdom and in India.

iii. On the facts and circumstances of the case, the CIT (A), NFAC has not disputed the allowability of the foreign tax credit. He has only disallowed the credit on the ground that form 67 has not been filed on or before the due date of filing of return of income as per rule 128 (9) of the income tax rules, 1962.

iv. On the facts and circumstances of the case and in law, the CIT (A) NFAC failed to appreciate the fact that during the course of assessment proceedings, the learned AO had erred in not issuing any show cause notice providing any opportunity to the appellant to explain as to why the disallowance of the credit should not be made and passed the assessment order disallowing the foreign tax credit of ₹ 2,921,327/-.

v. The CIT (A) NFAC failed to appreciate the fact that the appellant on realizing the mistake of not filing form 67 for assessment year 2018 - 19, had filed the form on 20/1/2020 being later than the time

limit specified Under rule 128 (9) of the income tax rules, 1962. The act of late filing of form 67 clearly shows the intention of the appellant to rectify the procedural lapse that was made at the time of filing the return of income u/s 139 (1) of the income tax act 1961 for claiming the foreign tax credit.

03. Assessee is an individual who is an actor acting in films and provides services for promotion and marketing of brands of goods, services, and events.
04. Assessee filed her return of income on 22/9/2018 at total income of ₹ 185,390,330/-. The case was selected for scrutiny under the limited scrutiny criteria for the issue of double taxation relief u/s 90/91. The requisite notice u/s 143 (2) of the act was issued.
05. The learned AO found that assessee has claimed foreign tax credit amounting to ₹ 2,921,327/- however from the filing portal it was noted that assessee has uploaded form number 67 for claiming foreign tax credit on 20/1/2020. Fact that assessee has filed her return of income on 22/09/2018, within the due date as per provisions of Section 139 (1) of the act. Thus, the issue is that form number 67, required to be filed for claiming foreign tax credit on or before the date of filing of the return terms of rule 128 (9) of the Income Tax Rules 1962, was filed belatedly. This is also confirmed by notification number 9 on 19 September 2017. Therefore the AO was of the view that assessee has failed to comply with letter and spirit of

the instruction number 9 dated 9/9/2017 as well as the provisions of rule 128 of the Income Tax Rule, 1962 and therefore foreign credit claimed by the assessee is not allowable. It was further noted by the AO that notice u/s 143 (2) was issued to the assessee on 29/9/2019 showing specifically for examination of the double taxation relief u/s 90/91 and further notice was issued on 10/1/2020 and therefore after 2 notices served on the assessee, form number 67 was then uploaded. Accordingly assessment order u/s 143 (3) read with Section 143 (3A) and 143 (3B) of the act dated 3/2/2021 was assessed and total income of the assessee was assessed at ₹ 185,390,330/- but the foreign tax credit of ₹ 2,921,327/- was not allowed.

06. Assessee aggrieved with the assessment order preferred appeal before National faceless appeal Centre. During the appellate proceedings assessee explained the nature of income, the foreign income received in India, she offered for taxation and tax credit available of foreign taxes. Assessee submitted that at the time of filing of the return of income she claimed the foreign tax credit of ₹ 2,921,327/- paid on the income earned in United Kingdom, however form number 67 was filed on 20/1/2020 i.e. after the due date u/s 139 (1) of the act. Assessee claimed that filing of form number 67 is a procedural requirements and not a mandatory requirement for claiming of the foreign tax credit. Merely because form number 67 was not filed within the due date

prescribed in Section 139 (1) of the act but during the course of assessment proceedings, the assessee should have been allowed credit for foreign taxes paid. Assessee further relied on the decision of Brinda Ramakrishna versus Income Tax Officer 5 (3) (1) Bangalore (2021) ITA No. 454/bang/2021 dated 17/11/2021 along with several other decisions stating that rule 128 being merely a procedural provision, any default in its compliance shall not result in disallowance of the credit eligible to be allowed and claimed.

07. The learned CIT – A held that for the purpose of claiming foreign tax credit relief, form number 67 was notified on 27 June 2016 which is required to be furnished on or before the due date specified for furnishing the return of income. After quoting rule 128 of The Income Tax Rules, it was held that furnishing of form number 67 on or before the due date of furnishing the return of income is mandatory. It also rejected the claim of the assessee that such form can be filed at any time, for the reason that it does not have any logical legal background and such an interpretation would make the rule absurd. It also held that all the beneficial provision should be interpreted strictly as held by Honourable Supreme Court in 116 taxmann.com 885. Accordingly, the appeal of the assessee was dismissed.
08. Assessee aggrieved with the same has preferred appeal before us. The learned authorised representative filed a

paper book. He submitted that this issue is squarely covered in favour of the assessee by the decision of Brinda Ramakrishna versus ITO and 42-Hertz software India private limited versus ACIT. He submitted that the claim of the assessee was made in the return of income but form number 67 as mandated by the rules and not the act, which is required to be filed on or before the due date of filing of the return of income, is directory in nature. Even otherwise, at the time of making, the assessment such form was available before the assessing officer and therefore the tax credit should not have been denied.

09. The learned departmental representative vehemently supported the orders of the lower authorities and submitted that form number 67 is required to be filed on before the due date of filing of the return of income as provided Under Rule 128 is mandatory in nature. It is further stated that merely because the time limit for filing of the form is mentioned in the rules, it cannot be said that it is not mandatory. He submitted that for claiming of the tax credit, which is a beneficial to assessee, therefore, the conditions prescribed therein should be strictly followed. He further submitted that non-filing of form number 67 on or before the due date of filing of the return of income results into consequence of denial of foreign tax credit, therefore, the time limit provided Under Rule 128 cannot be said to be directory in nature. Therefore, it is mandatory. As assessee failed to fulfil the

mandatory condition of claiming foreign tax credit, same is denied correctly.

010. We have also put before the learned authorised representative decision of the honourable Supreme Court in civil appeal number 1449 of 2022 in case of PCIT versus Wipro Ltd dated 11 July 2022 as to why the condition of filing form number 67 on or before the due date of filing of the return of income should not be considered as mandatory in nature.
011. The learned authorised representative submitted that honourable Supreme Court was seized of the matter where in the same subsection twin conditions were mentioned, the honourable High Court and lower appellate authorities considered, one of the condition as mandatory and one of the condition as directory. He submitted that here section 90 or 91 does not lay down any condition of filing any form. The requirement of filing of the form is provided under rule 128 of The Income Tax Rules. Therefore, here, the situation is quite different. He submitted that these conditions have been considered by the coordinate bench in case of Brinda Ramakrishna.
012. We have carefully considered the rival contention and perused the orders of the lower authorities. Short question in this appeal is whether assessee is entitled to foreign tax credit even when form number 67 required to be filed according to the provisions of rule 128 (9) of the Income

Tax Rules on or before the due date of filing of the return of income, not complied by the assessee, but same was filed before the completion of the assessment proceedings. Precisely, the fact shows that assessee filed return of income u/s 139 (1) of the income tax act. In such a return of income, she claimed the foreign tax credit. However, form number 67 was filed during the course of assessment proceedings and not before the due date of filing return. Rule 128 (9) of the Income Tax Rules 1962 provides that the statement in Form No. 67 referred to in clause (i) of sub-rule (8) and the certificate or the statement referred to in clause (ii) of sub-rule (8) shall be furnished on or before the due date specified for furnishing the return of income under sub-section (1) of section 139, in the manner specified for furnishing such return of income. We find that coordinate bench in 42 Hertz Software India (P.) Ltd v. ACIT [2022] 139 taxmann.com 448 (Bangalore - Trib.) wherein following its earlier order in the case of Ms. Brinda Rama Krishna v. ITO [2022] 135 taxmann.com 358 (Bang - Trib) it was held 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 and that 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. Same view is also taken by a coordinate division bench in Vinodkumar Lakshmipathi V CIT(A) NFAC ITA No.680/Bang/2022 06.09.2022. It is

well settled that while laying down a particular procedure, if no negative or adverse consequences are contemplated for non-adherence to such procedure, the relevant provision is normally not taken to be mandatory and is considered to be purely directory. Admittedly, Rule 128 does not prescribe denial of credit of FTC. Further the Act i.e. section 90 or 91 also do not prescribe timeline for filing of such declaration on or before due date of filing of ROI. Further rule 128 (4) clearly provides the condition where the foreign tax credit would not be allowed. Rule 128 (9) does not say that if prescribed form would not be filed on or before the due date of filing of the return no such credit would be allowed. Further by the amendment to the rule with effect from 1 April 2022, the assessee can file such form number 67 on or before the end of the assessment year. Therefore, legislature in its own wisdom has extended such date which is beyond the due date of filing of the return of income. Further, the fact in the present case is quite distinct than the issue involved in the decision of the honourable Supreme Court in case of Wipro Ltd (supra). Here it is not the case of violation of any of the provisions of the act but of the rule, which does not provide for any consequence, if not complied with. Therefore, respectfully following the decisions of the coordinate bench on this issue, we hold the assessee is eligible for foreign tax credit, as she has filed form number 67 before completion of the assessment, though not in accordance with rule 128 (9) of The Income Tax Rules,



which provided that such form shall be filed on or before the due date of filing of the return of income. Accordingly, ground number 2 of the appeal of the assessee is allowed.

013. Other grounds of appeal are also revolving around the issue of claim of foreign tax credit and therefore those are allowed.

014. Accordingly, appeal of the assessee is allowed.

Order pronounced in the open court on 20.09.2022.

Sd/-
(SANDEEP SINGH KARHAIL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 20.09.2022

Sudip Sarkar, Sr.PS/dragon

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//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai