

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

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.2177/Mum./2022
(Assessment Year : 2020-21)

Bhagwandas Tikamdas Khinani
1, Laxmi Bhavan, 15-F, M.B. Raut Road
Shivaji Park, Mumbai 400 028
PAN – AAYPK1237H

..... Appellant

v/s

Commissioner of Income Tax (Appeals)
National Faceless Appeal Centre, Delhi

.....Respondent

Assessee by : Shri Hari S. Raheja
Revenue by : Shri Chetan M. Kacha

Date of Hearing – 29/11/2022

Date of Order – 01/12/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee against the impugned order dated 08/07/2022, passed under section 250 of the Income Tax Act, 1961 (*'the Act'*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [*'learned CIT(A)'*], which in turn arose from the intimation dated 24/12/2021, issued under section 143(1), for the assessment year 2020-21.

2. In this appeal, the assessee has raised the following grounds:

"1. The CIT(A) has grossly erred in upholding the Intimation u/s. 143(1) of the Income tax Act, 1961 for assessment year 2020-21 dated 24-12-2021, wherein credit for the appropriate amount of foreign tax paid by appellant has not been given by the Assessing Officer.

2. The CIT(A) has grossly erred in disregarding the Form 67 along with certificates and statements filed by the appellant under Rule 128 of the Income-tax Rules, 1962, for the claim of foreign tax credit.

3. The CIT (A) was not justified in not allowing the claim under DTAA in respect of tax paid by the appellant in USA and upholding the adjustment made u/s 143(1) which adjustment was beyond the powers granted under the section.

4. The appellant prays that the Assessing Officer be directed to grant credit for tax paid in USA and grant the refund due to the appellant as claimed."

3. The only grievance of the assessee is against the denial of foreign tax credit under section 90/90A of the Act due to delay in filing Form no.67.

4. The brief facts of the case as emanating from the record are: The assessee is an individual and is a resident of India. For the year under consideration, the assessee filed his return of income on 30/03/2021, declaring the total income of appeal Rs. 16,08,080. During the year, the assessee earned income from salary and income from other sources. During the year, the assessee also earned salary, dividend, and interest income in the USA and on which tax was paid in the USA. While filing his return of income, the assessee claimed credit for such foreign tax paid amounting to Rs. 1,82,192, as per the provisions of section 90/90A of the Act. The assessee also filed Form No. 67 on 30/03/2021, along with certificates/statements specifying the nature of income and amount of tax paid in order to claim the credit of foreign tax paid. The return filed by the assessee was processed vide intimation dated 24/12/2021, issued under section 143(1) of the Act, whereby the foreign tax credit of Rs. 1,82,192, claimed by the assessee under section

90/90A of the Act was denied. The learned CIT(A) vide impugned order dismissed the appeal filed by the assessee on this issue on the basis that Form No. 67 was not filed by the assessee before the due date of furnishing the return of income under section 139(1) of the Act, as per the provisions of Rule 128(9) of the Income Tax Rules, 1962. Being aggrieved, the assessee is in appeal before us.

5. During the hearing, the learned Authorised Representative (*'learned AR'*) submitted that in the present case the assessee filed his return of income on 30/03/2021, after the extended due date. On the very same date, the assessee also filed Form No. 67 along with the relevant certificate/statement in order to claim the credit of tax paid in the USA on salary, dividend, and interest income earned by the assessee in the USA as per provisions of section 90/90A of the Act. Learned AR also submitted that the provisions of section 90/91 of the Act are substantive provisions and provisions of Rule 128, cannot override the same. In support of its submission, reliance was placed upon the decisions of the coordinate bench of the Tribunal.

6. On the contrary, the learned Departmental Representative (*'learned DR'*) vehemently relied upon the order passed by the learned CIT(A).

7. We have considered the rival submissions and perused the material available on record. In the present case, the due date for filing the return of income as per provision of section 139(1) of the Act, in the case of the assessee, was 31/07/2020, which was subsequently extended to 10/01/2021. However, the assessee filed his return of income on 30/03/2021 declaring

income earned from salary and income from other sources. It is the claim of the assessee that it has also earned salary, dividend, and interest income amounting to Rs. 17,08,080 in the USA on which tax was paid by the assessee in the USA. Accordingly, in order to claim the credit of foreign tax paid as per the provisions of section 90 of the Act, the assessee also filed Form No. 67 along with the relevant certificate/statement. The ADIT, CPC, Bengaluru, while processing the return of income vide intimation issued under section 143(1) of the Act denied the foreign tax credit of Rs. 1,82,192, claimed by the assessee under section 90/90A of the Act. In the impugned order, it has been held that Form No. 67 was filed by the assessee after the due date of filing the return of income under section 139(1) of the Act, as per the provisions of Rule 128(9) and thus claim of the assessee was rejected.

8. We find that under Rule 128(9), as it stood during the year under consideration, provided 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. Thus, during the year under consideration, the assessee was required to furnish Form No. 67 on or before the due date of filing the return of income under section 139(1) of the Act, as per the provisions of Rule 128(9). We further find that Rule 128(9) has recently been substituted by the Income-tax (Twenty-seventh Amendment) Rules, 2022, w.r.e.f. 01/04/2022 and the same reads as under:

"(9) 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 end of the assessment year relevant to the previous year in which the income referred to in sub-rule (1) has been offered to tax or assessed to tax in India and the return for such assessment year has been furnished within the time specified under sub-section (1) or sub-section (4) of section 139:"

9. Thus with effect from 01/04/2022, the time period for furnishing statement in Form No. 67 has been extended till the end of the assessment year in which the corresponding income has been offered/assessed to tax and the return of such assessment year has been furnished within the time specified under 139(1) or 139(4) of the Act.

10. We find that the coordinate bench of the Tribunal in Sonakshi Sinha vs CIT, in ITA No. 1704/Mum./2022, vide order dated 08/09/2022, while dealing with a similar issue wherein the taxpayer filed Form No.67, after the due date for filing the return of income under section 139(1), observed as under:

"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 Rule128 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 then 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.”

11. We further find that the coordinate bench of the Tribunal, in the aforesaid decision, also considered the decision of Hon'ble Supreme Court in PCIT vs Wipro Ltd., [2022] 140 Taxmann.com 223 (SC), upon which reliance was placed by the learned DR during the hearing.

12. We find that in another decision in Anuj Bhagwati vs DCIT, in ITAs No.1844 and 1845/Mum./2022, the coordinate bench of the Tribunal vide order dated 20/09/2022, while deciding a similar issue held that section 90/91 of the Act has not been amended insofar as grant of foreign tax credit is concerned and Rules cannot override the Act and therefore filing of Form No. 67 is not mandatory but it is directory. The relevant findings of the coordinate bench of the Tribunal in the aforesaid decision are as under:

"8. We considering the facts, circumstances provisions of the Act and judicial decisions are of the opinion that there is no amendment on these aspects in the Section 90 of the Act and the Rules cannot override the Act and therefore the filing of Form No 67 is not mandatory but it is directory. Accordingly, We restore the disputed issue to the file of the CIT(A) to adjudicate afresh on merits considering the observations in above paragraphs and the ratio of judicial decisions. Further the assessee should be provided adequate opportunity of hearing and shall cooperate in submitting the information for early disposal of appeal and allow the grounds of appeal of the assessee for statistical purposes."

13. Thus, respectfully following the aforesaid decisions of the coordinate bench of the Tribunal, we are of the considered opinion that mere delay in filing Form No. 67 as per the provisions of Rule 128(9), as they stood during the year under consideration, will not preclude the assessee from claiming the benefit of foreign tax credit in respect of tax paid outside India. Since in the present case, the claim of the assessee was denied on this technical aspect without going into the merits, therefore, we deem it appropriate to direct the jurisdictional Assessing Officer to decide the claim of the foreign tax credit on merits, after accepting the Form No. 67 and other related documents filed by the assessee. Accordingly, grounds raised by the assessee are allowed for statistical purposes.

14. In the result, the appeal by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 01/12/2022

Sd/-
OM PRAKASH KANT
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 01/12/2022

Copy of the order forwarded to:

- (1) The Assessee;*
- (2) The Revenue;*
- (3) The CIT(A);*
- (4) The CIT, Mumbai City concerned;*
- (5) The DR, ITAT, Mumbai;*
- (6) Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai