

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

**BEFORE: SHRI ABY T. VARKEY, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No. 2589/Mum/2022
(Assessment Year :2018-19)**

Praveen Sambhaji Raorane, Block No. 5, 2 nd floor, Shivkrupa Apartment, Near Bank of India, Station Road, Kalwa (west), Thane, Pin-400 605	Vs.	ITO-Ward 3(3), 6 th floor, Ashar IT Park, Wagle Estate, Thane (west), Pin-400 604
PAN/GIR No. ALCPR2853H		
(Appellant)	..	(Respondent)

Assessee by	Shri Dharan Gandhi, Ld. AR
Revenue by	Shri Vaibhav Jain, Ld. DR
Date of Hearing	14/12/2022
Date of Pronouncement	20/12 /2022

आदेश / O R D E R

PER M. BALAGANESH (A.M):

This appeal in ITA No. 2589/Mum/2022 for A.Y. 2018-19 arises out of the order by the Ld. Commissioner of Income Tax (Appeals) - NFAC in appeal No. ITBA/NFAC/S/250/2022-23/ 1045755318(1) dated 21/09/2022 (ld. CIT(A) in short) against the order of assessment passed u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 17.06.2020 by the ld. Assessing Officer (hereinafter referred to as ld. AO).

2. The only issue to be decided effectively in this appeal is as to whether the assessee is entitled for foreign tax credit in the facts and circumstances of the instant case.

3. We have heard the rival submissions and perused the materials placed on record. The assessee is an individual derived income from salaries. During the financial year 2017-18, assessee went to Australia on secondment basis from 03.10.17 to 20.12.17. During the period of secondment, he earned salary income from foreign country and also paid taxes there. Accordingly, being the resident of India, he is liable to tax in the capacity of 'resident' in accordance of the provisions of the Act. The foreign salary income also would be liable to tax in India and assessee is also eligible to claim foreign tax credit. Accordingly, the assessee filed the return of income for AY 2018-19 on 20.07.2018 wherein foreign tax credit of Rs. 3,55,960/- was claimed by the assessee. The assessee filed Form-67 being the prescribed form under Rule 128 of the Income Tax Rules dated 20.07.2018 along with original return of income. But the assessee by inadvertence mentioned the foreign tax credit of Rs. 3,55,960/- u/s 91 of the Act instead of section 90 of the Act in Form 67 filed along with the original return of income. Based on this error, the Ld. CPC, Bangalore while processing the return of assessee did not give credit of foreign tax credit of Rs. 3,55,960/- to the assessee. The intimation u/s 143(1) of the Act passed by Ld. CPC was on 17.06.2020. The assessee thereafter filed revised Form-67 along with revised return of income for AY 2018-19 on 18.07.2020 wherein the figure of Rs. 3,55,960/- being the foreign tax credit was correctly claimed u/s 90 of the Act.

4. The only difference between section 90 and 91 of the Act is availability of DTAA with the concerned countries. In the instant case, there is absolutely no doubt that assessee had derived salary income from

Australia with which Indian Government had entered into DTAA. Hence, the correct provision would be section 90 of the Act.

5. We find that assessee had also preferred the rectification application u/s 154 of the Act, which was rejected by the Ld. AO. The assessee preferred the appeal before Ld. CIT(A) against the intimation passed u/s 143(1) of the Act. Ld. CIT(A) dismissed the appeal of the assessee on the ground that pursuant to order passed u/s 154 of the Act, the intimation u/s 143(1) got merged with the order u/s 154 of the Act and that the intimation u/s 143(1) of the Act lost its individual identity. With these observations, Ld. CIT(A) had dismissed the appeal of the assessee.

6. From the above, it can be observed that Ld. CIT(A)/NFAC had not adjudicated the grievance of the assessee on merits. Admittedly, the appeal has been preferred by the assessee against the intimation framed u/s 143(1) wherein assessee was indeed denied foreign tax credit which is otherwise legitimately and legally available to the assessee as per law. Ld. CIT(A) had chosen the convenient method to deny the said benefit to the assessee by going into the technical ground stating that intimation u/s 143(1) had lost its identity pursuant to section 154 order passed by Ld. AO. As per the provisions of the Act, against the intimation u/s 143(1) of the Act, the appeal shall lie to the Ld. CIT(A). Ld. CIT(A) need not take cognizance of section 154 proceedings which had happened subsequent to the filing of appeal. Though, the revised return in the instant case had been filed by the assessee beyond the time limit prescribed u/s 139(4) of the Act altogether with the revised Form-67, the grievance of the assessee had to be addressed on merits. Hence, we deem it fit and proper to remand this appeal to the file of Ld. AO to verify the veracity of the claim made by the assessee in the revised return and revised Form-67 in the interest of substantial justice to the assessee. We hold that the

substantial justice would prevail over technical considerations. Liberty is also given to the assessee to furnish further evidences, if any, in support of its contentions. Accordingly, the ground raised by the assessee is allowed for statistical purposes.

7. In the result, the appeal file by the assessee is **allowed for statistical purposes.**

Order pronounced on 20/ 12 /2022 by way of proper mentioning in the notice board.

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER

Mumbai; Dated 20/12/2022
Dhananjay, sr.ps

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai