

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

SHRI M. BALAGANESH, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 20/MUM/2022
(ASSESSMENT YEAR: 2018-19)

Tom Thomas
C 2302, Imperial Heights, Best Nagar,
Goregaon (west), Mumbai-400104
[PAN:ABOPT1252C]

..... Appellant

Vs

The Assistant Director of Income Tax-
(CPC), Bangalore
Post Bag No.2 Electronic City Post
Office, Bangalore- 560500

..... Respondent

Appearances

For the Appellant/Assessee : Shri Bhavin Shah
For the Respondent/Department : Shri Chintamani V. Divgankar

Date of conclusion of hearing : 29.09.2022
Date of pronouncement of order : 29.11.2022

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant/Assessee has challenged the order, dated 22.11.2021, passed by the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2018-19, whereby the Ld. CIT(A) had been partly allowed the appeal filed by the Appellant against the Rectification Order, dated 31.07.2020 passed under Section 154 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. That the appellant has raised three grounds of appeal, all, directed against the order of CIT(A) confirming the action of Assistant Director of Income Tax, CPC, Bangalore in rejecting the claim of the Appellant for the foreign tax credit of INR 4,30,399/- under Section 90 of the Act in respect of taxes paid in Singapore.
3. The relevant facts, in brief, are the Appellant was working in India with Asian Paints Ltd (hereinafter referred to as 'the Company'). During the Financial Year 2017-18 the Appellant was transferred to the Singapore unit of the Company with effect from January 2018. Thus, based on the numbers of days of stay of the Appellant in India, the residential status of the Appellant was 'Resident and Ordinarily Resident' ('ROR') in India for the Assessment Year 2018-19. Accordingly, the global income of the Appellant was taxable in India. Thus, Appellant was liable to pay tax on Singapore salary income in Singapore as well as India. The Appellant filed its return of income in India offering salary income from Singapore in India.
4. The appellant had earned total overseas salary of SGD 40,309 (equivalent to INR 19,35,446/-) on which income tax payable in Singapore was SGD 8,990/- (equivalent to INR. 430,399/-). This amount was reimbursed by the Company and therefore, the Appellant filed a revised income tax return in India on 28.03.2019 offering INR 4,30,399/- as taxable perquisite and claiming Foreign Tax Credit (FTC) of INR 430,399/- as per section 90(2) of the Act read with Article 25 of the India-Singapore Tax Treaty ('the Tax Treaty'). Along with the revised return the Appellant also filed Form 67 support his claim for FTC of INR. 430,399/-.
5. The revised return filed by the Appellant was processed and Intimation under Section 143(1) of the Act was issues. While the additional income of INR 4,30,399/- was considered, the claim for FTC

of INR 4,30,399/- was denied. Therefore, on 25.07.2020 the Appellant filed online Rectification Application under Section 154 of the Act which was dismissed vide order dated 31.07.2020 passed by the CIT(A).

6. Being aggrieved, the Appellant preferred appeal before CIT(A). The CIT(A) disposed off the appeal vide order, dated 22.11.2021, holding as under:

"5.3 The claim of the appellant was duly considered in the light of the documents submitted and the same is not found correct. Firstly, the foreign tax has not been paid by the appellant, but by his foreign employer. Hence, the appellant is not eligible for claiming the credit of the tax paid by his employer, by way of treating the same as his income. Further, the Form 67 was required to be filed before the due date of filing of Income Tax Return u/s 139(1) of the I.T. Act. In this case the same has been filed belated. Hence, the claim for Foreign Tax Credit cannot be allowed.

5.4 However, it appears that the appellant has filed such claim for foreign tax credit as well as the revised return due to misconception. While giving effect to this order, the Assessing Officer should recompute the correct income on the basis of original return as well as computation of income filed, charge correct amount of tax and give credit for prepaid taxes. Grounds 1 and 2 are thus partly allowed.

5.5 Ground 3 is regarding charging/enhancing of interest u/s 234B and C which is consequential and ground 4 is general in nature. These are not separately adjudicated.

6. In effect, the appeal is Partly Allowed".

7. Being aggrieved the appellant is now, before us challenging the order, dated 22.11.2021 passed by the CIT(A).
8. The learned Authorized Representative for the Appellant submitted that language used in Rule 128(9) of the Income Tax Rules, 1962 (For Short 'Rules') does not provide for disallowance of FTC in case Form 67 is not filed before the due date prescribed for filing return under Section 139(1) of the Act. Therefore, the time limit for provided in Rule 128(9) of the Rules should be considered as directory and not mandatory. Even if, for the sake of arguments, it is taken that

Section 90 of the Act read with Rule 128(9) of the Rules provide for disallowance of FTC where Form 67 is not filed within the specified time limit, the provisions contained in Article 25 of the Tax Treaty would override the same. Article 25 of the Tax Treaty do not provide for furnishing of Form 67 on or before a specified date as a condition precedent to claiming FTC.

9. The Learned Authorised Representative for Appellant contended that the FTC of INR 4,30,399/- was claimed by the Appellant as per the provisions of Section 90(2) of the Act read with Article 25 of the Tax Treaty. Even if, for the sake of arguments, it is taken that Section 90 of the Act read with Rule 128(9) of the Income Tax Rules, 1962 (For Short 'Rules') provide for disallowance of FTC where Form 67 is filed beyond due date of tax return as per Section 139(1) of the Act, the Tax Treaty would override the Act, and the Appellant would be entitled to get FTC as per Article 25 of the Tax Treaty since Article 25 does not require that the Appellant should furnish Form 67 on or before a specified date. Further, placing reliance on the Notification No. 100 of 2022 dated 17.08.2022 issued by the Central Board of Direct Taxes, the Learned Authorised Representative for Appellant submitted that Rule 128(9) of the Rules has been amended to provide that Form 67 can be filed till the end of the Assessment year in which the foreign sourced income is offered to tax or is assessed to tax in India, where the return of such Assessment year has been furnished within the time limit specified under Section 139(1)/139(4) of the Act. According to the Learned Authorised Representative for Appellant this amendment being curative in nature should be applied retrospectively. While concluding his submission, Learned Authorised Representative for Appellant submitted that the issue stands decided in favour of the assessee in the following decisions:

- Sonakshi Sinha vs. CIT(A) NFAC, Delhi : ITA No. 1704/Mum/2022

- Brinda Ramakrishna vs. ITO (ITA 454/Bang/2021),
- Hertz Software India Pvt Ltd vs. ACIT:ITA No. 29/Bang/2021

10. Per contra, the Learned Departmental Representative has submitted that the Appellant has failed to file Form 67 alongwith his return filed under Section 139(1) of the Act. Since Form 67 was filed belatedly, the requirement of Rule 128 were not fulfilled. Hence, FTC has been rightly denied to the Appellant. He submitted that the FTC is to be allowed as per the procedure prescribed by the provisions of the Act and rules made thereunder.

11. We have carefully considered the rival contentions and perused all the judgments and documents relied upon by the parties. The issue involved in the present appeal is whether Appellant can be denied FTC on the ground that Form 67 has been filed by the Appellant after the due date specified for furnishing the return of income under Section 139(1) of the Act. We note that the aforementioned issue has been dealt with and decided in favour of the assessee by the Co-ordinate Bench of this Tribunal in the case of Sonakshi Sinha vs. CIT(A) NFAC, Delhi [ITA No. 1704/Mum/2022]. The relevant extract of the aforesaid decision reads as under:

“12. 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. (Supra)

wherein following its earlier order in the case of Ms. Brinda Rama Krishna (supra) 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) [IT Appeal No. 680/Bang/2022, 6-9-2022. 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" (Emphasis Supplied)

12. Respectfully following the above decision of the Tribunal, we hold that the requirement of filing Form 67 is directory in nature which is evident from the fact that Rule 128(9) does not contemplate disallowance of FTC in case of delay in complying with such condition. Our view also draws strength from the decisions of the Tribunal in the case of Ms. Brinda Ramakrishna vs. ITO : [ITA 454/Bang/2021, dated 17.11.2021] and [Hertz Software India Pvt Ltd vs. ACIT : ITA No. 29/Bang/2021, dated 07.03.2022] which were taken into

consideration by the Tribunal in the above decision in the case of Sonakshi Sinha (supra).

13. In the present case there is no dispute regarding the availability of FTC, however, the same was denied to the Appellant on the ground of filing Form 67 belatedly. It is an admitted position that Form 67 was filed by the Appellant alongwith the Revised Return on 28.03.2019 whereby foreign income of INR 4,30,399/- was offered to tax and FTC was claimed. We, accordingly, hold claim of the Appellant's claim for FTC cannot be denied for the reasons mentioned by the CIT(A). The Appellant is entitled to claim FTC of INR 4,30,399/- on the strength of Form 67 filed along with the revised return and the Assessing Officer is directed to grant the same. Ground No. 1 to 3 raised in the present appeal are allowed.
14. In result the appeal preferred by the Assessee is allowed.

Order pronounced on 29.11.2022.

Sd/-
(M. Balaganesh)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 29.11.2022
Alindra, PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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