

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI G.S. PANNU, PRESIDENT AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

**ITA No.1869/Del/2022
Assessment Year: 2020-21**

Bhaskar Dutta, S-84, First Floor, Greaker Kailash-1, New Delhi-1100 48	Vs.	DCIT, Int. Tax-1(2)(2), New Delhi.
PAN :AAGPD6844F		
(Appellant)		(Respondent)

Assessee by	Shri K. Sampath, Adv.
Respondent by	Shri Sanjay Kumar, Sr. DR

Date of hearing	03.01.2023
Date of pronouncement	11.01.2023

ORDER

PER SAKTIJIT DEY, JUDICIAL MEMBER:

This is an appeal by the assessee against order dated 28.07.2022 of learned Commissioner of Income-Tax (Appeals)-42, New Delhi pertaining to assessment year 2020-21.

2. The solitary ground raised by the assessee reads as under:

On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in confirming the following actions of the ADIT, CPC, Bangaluru [Circle Int. Tax 1(2)(2)] in not allowing relief claimed u/s 89/90 of the Act in a sum of Rs.25,43,643/- holding that Form 67 filed before filing revised return was out of time and thus not valid such. Such action being erroneous, unlawful and untenable, it is prayed, that the order as passed be quashed with directions for appropriate relief.

Grounds

3. Briefly the facts relating to the dispute are, the assessee is a non-resident individual. For the assessment year under dispute, assessee filed its return of income of Rs.1,59,95,120. While processing the return of income under Section 143(1) of the Income-Tax Act,1961, the Centralized Processing Centre (CPC), though, accepted the return of income filed by the assessee, however, it did not allow foreign tax credit on the ground that the assessee did not file Form 67 before the due date of filing of return of income. Subsequently, though, the assessee filed an application under Section 154 of the Act seeking rectification of the intimation issued under Section 143(1) of the Act, however, it was rejected by the CPC.
4. Being aggrieved, the assessee filed an appeal before the first appellate authority.

5. After considering the submission of the assessee, learned Commissioner (Appeals) observed that, though, the due date of filing of return of income for the year under consideration was 30.07.2020, however, the assessee filed Form 67 on 31.05.2021, much beyond the due date of filing the return. Referring to Rule 128 and CBDT Notification dated 19.09.2017, learned Commissioner (Appeals) held that the use of word 'shall' in the provision makes it mandatory on the part of the assessee to file Form 67 within the prescribed date. Thereafter, referring to certain judicial precedents, learned Commissioner (Appeals) upheld the disallowance of foreign tax credit.

6. We have heard Shri K. Sampath, learned counsel appearing for the assessee and Shri Sanjay Kumar, Departmental Representative.

7. It is the say of the assessee that on account of restriction imposed due to COVID-19, the Hon'ble Supreme Court extended the period of limitation in filing petition/suits/applications/appeals/all other proceedings, initially up to 08.03.2021. Thereafter, again, due to spread of new variant of COVID-19, the Hon'ble Supreme Court took suo motu cognizance and restored the order dated 23.03.2020

extending the period of limitation and held that period from 15.03.2020 till 28.02.2022 shall stand excluded for the period of limitation. Thus, he submitted, in view of the aforesaid decision of the Hon'ble Supreme Court, Form 67 filed by the assessee cannot be held to be barred by limitation.

8. Without prejudice, he submitted, the Tribunal in a number of cases has held that the provision contained in Rule 128(9) does not provide for disallowance of foreign tax credit in case of delay in filing Form 67 and further, filing of Form 67 is not mandatory but a directory requirement. In support of such contention, learned counsel relied upon the following decisions:

- 1) ITA No. 454/Bang/2021 in the case of Ms. Brinda Rama Krishna Vs. ITO.; &
- 2) ITA No.1704/Mum/2022 in the case of Sonakshi Sinha Vs. CIT(A)/National Faceless Appeal Centre (NFAC).

9. Learned Departmental Representative strongly relied upon the observations of learned Commissioner (Appeals) as well as the decision of the Tribunal in case of Murli Baddi Vs. ACIT (2022) – 142 Taxmann.com 32.

10. We have considered rival submissions and perused material on record.

11. In so far as the factual aspect of the issue is concerned, there is no dispute that the due date for filing the return for impugned assessment year was 31.10.2020, whereas, the assessee had filed his return of income on 18.08.2020 i.e. within the due date. However, Form 67 in support of claiming foreign tax credit was filed by the assessee along with revised return of income on 31.05.2021.

12. Undisputedly, assessee's claim of foreign tax credit was rejected both by CPC and first appellate authority, firstly, on the ground that it was not filed within the period prescribed under Rule 128 and secondly, the issue being a debatable one, cannot be a subject matter of rectification under Section 154 of the Act. At the outset, we will address the issue of limitation in filing Form 67. No doubt, as per the extant Rule, Form 67 in support of claim of foreign tax credit is to be filed within the due date of filing of return of income under Section 139(1) of the Act. The due date of filing of return for the impugned assessment year was 31.10.2020. It is a fact that the assessee filed the original return of income before the due date. However, Form 67 was

filed along with the revised return of income was filed on 31.05.2021. It is a fact that to prevent spread of COVID-19 Pandemic, the Government imposed various restrictions. Taking note of the difficulties faced by litigants in complying with the legal requirement of filing petitions/suits/applications/appeals/other proceedings due to COVID-19, Hon'ble Supreme Court took suo motu cognizance and vide order dated 20.03.2020 extended the period of limitation in filing petitions/suits/applications/appeals etc. till 08.03.2021. On 08.03.2021, Hon'ble Supreme Court passed an order bringing to end the extension of limitation. However, due to recurrence of COVID-19 and drastic surge in number of COVID cases across the country, the Hon'ble Supreme Court again, vide order dated 10.01.2022, restored its earlier order extending the period of limitation and observed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purpose of limitation and all persons shall have a limitation period of 90 days from 01.03.2022 to comply with legal requirements. Thus, in view of the aforesaid decision of Hon'ble Supreme Court, it has to be concluded that the assessee has filed Form 67 within the extended period of limitation as per the order of Hon'ble Supreme Court. That

being the case, assessee's claim of foreign tax credit has to be allowed.

13. Even, otherwise also, the assessee has a strong case on merit as well. In case of M/s.Brinda Ramakrishnan vs. ITO, supra, the Tribunal while dealing with an identical issue has held as under:

“16. I have given a careful consideration to the rival submission. I agree with the contentions put forth by the learned counsel for the Assessee and hold that (i) Rule 128(9) of the Rules does not provide the disallowance of FTC in case of delay in filing Form No. 67; (ii) filing of Form No. 67 is not mandatory but a directory requirement and (iii) DTAA overrides the provisions of the Act and the Rules cannot be contrary to the Act. I am of the view that the issue was not debatable and there was only one view possible on the issue which is the view set out above. I am also of the view possible on the issue which is the view set out above. I am also of the view that the issue in the proceedings u/s. 154 of the Act, even if it involves long drawn process of reasoning, the answer to the question can be only one and in such circumstances, proceedings u/s. 154 of the Act, even if it involves long drawn process of reasoning, the answer to the question can be only one and in such circumstances, proceedings u/s. 154 of the Act, can be resorted to. Even otherwise the ground on which the revenue authorities rejected the Assessee's application u/s. 154 of the Act was not on the ground that the issue was debatable but on merits. I therefore do not agree with the submission of the learned Departmental Representative in this regard.”

14. Further, in case of Sonakshi Sinha Vs. CIT (supra), the coordinate Bench while seized of an identical issue, held as under:

“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 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 Lakshmi pathi 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.”

15. The ratio laid down in these decisions, in our view, are not only logical but just interpretation of the statutory provisions keeping in view the provision, contained under Section 90 and 91 of the Act. Though, we are conscious of a contrary view taken by the Tribunal in the case of Murlikrishnan vs. ACIT (supra), however, we are inclined to agree with the view expressed in the decisions cited by learned counsel appearing for the assessee.

16. In view of the aforesaid, we direct the Assessing Officer to allow foreign tax credit to the assessee. Ground is allowed.

17. In the result, the appeal is allowed.

Order pronounced in the open court on 11th January 2023.

**Sd/-
(G.S. PANNU)
PRESIDENT**

**Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER**

*Dated: 11th January, 2023.
Mohan Lal*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi