

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

BEFORE SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T.A. No.1144/Mum/2023

(निर्धारण वर्ष / Assessment Year: 2019-20)

Pratap Teckchand Dadlaney 201, Poonam View, 60 ft. road, Rajawadi, Ghatkopar (East), Mumbai-400077.	बनाम/ Vs.	The Asst. Director of Income tax, CPC IT Office, Vashi Railway Station Building, Navi Mumbai-400703.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : BZRPD4936K		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Harsh Shah/Yash Ranglani
Revenue by:	Shri Dharmvir D Yadav (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 28/06/2023

घोषणा की तारीख /Date of Pronouncement: 30/06/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. CIT(A)-56, Mumbai dated 15.03.2023 for AY. 2019-20.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) confirming the action of the CPC making adjustment u/s 143(1) of the Income Tax Act, 1961 (hereinafter "the Act") by disallowing the Foreign Tax Credit (FTC) claimed of Rs.3,08,036/- u/s 90 of the Act.

3. Brief facts are that the assessee had filed return of income for AY. 2019-20 on 20.07.2019 declaring total income of Rs.16,85,740/- and claimed tax credit of foreign tax paid in USA equivalent to Rs.3,08,036/-. The statement in Form No. 67 was filed on 30.10.2020, but the CPC while processing the return u/s 143(1) of the Act by order dated 19.03.2021 disallowed the foreign tax credit of Rs.3,08,036/- on



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the ground that Form No. 67 was not filed within the prescribed time limit. On appeal by the assessee, the Ld. CIT(A) has noted that the reason given by assessee for delayed filing of Form No. 67 as ignorance of the law cannot be a valid ground for excuse. And therefore, according to Ld. CIT(A), since the assessee has not filed the Form No. 67 as mandated by Rule 128(9) of the Income Tax Rules, 1962 (hereinafter "the Rules") by filing Form No. 67 on or before the due date of filing of return of income for relevant assessment year, he confirmed the action of the CPC u/s 143(1) of the Act disallowing foreign tax credit of Rs.3,08,036/-. Aggrieved the assessee is before the Tribunal.

4. I have heard both the parties and perused the records. The facts stated above are not disputed. Therefore, for the sake of brevity and to avoid repetition, the same are not repeated. The only issue is whether the late filing of Form No. 67 by the assessee be a ground for disallowing the foreign tax credit or not. In this regard, it is noted that assessee had filed the return of income on 20.07.2019 and filed the Form No. 67 on 30.10.2020 and the CPC passed the intimation order u/s 143(1) of the Act dated 19.03.2021 which means the action of CPC was after the assessee had filed the Form 67 on 30.10.2020. Be that as it may, the question is whether the delayed filing of Form No. 67 can be valid ground for disallowing the foreign tax credit or not. This issue it is noted to be no longer *res-integra*. This Tribunal (Co-ordinate Bench of Chandigarh) in the case of Bachaspatimayum Umakanta Vs. DCIT (ITA. No. 740/Chd/2022 by order dated 18.04.2023) has



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considered similar issue wherein also the assessee had belatedly filed Form No. 67 like in the instant case i.e. before processing of return of income by the CPC. And the Tribunal held that the foreign tax credit cannot be denied to the assessee merely for the reason there was delay of filing of Form No. 67 while processing his return of income u/s 143(1) of the Act by holding as under: -

“5. During the course of hearing, the Ld. AR submitted that during the year under consideration, the assessee has shown income of Rs. 4,02,023/- on account of ESOP’s of Becton, Dickinson and Company being a foreign entity based out of USA on which tax of Rs. 1,64,464/- was deducted in respect of which the assessee has claimed foreign tax relief while filing the return of income. It was submitted that Form No. 67 which was required to be filed as per the Rule 128 was filed online with the Department on 18/10/2021 and same was on the record of the Department well before the processing of the return of income by CPC under section 143(1) dt. 24/12/2021.

5.1 It was submitted that while processing the return of income, the CPC Bangalore has not taken cognizance of Form No. 67 which was duly filed by the assessee which has resulted in the tax demand so raised by the CPC in terms of intimation issued under section 143(1) of the Act. It was submitted that neither Section 90 nor DTAA provides that Foreign Tax Credit (FTC) shall be disallowed for non compliance with any procedural requirement. It was submitted that FTC is the assessee’s vested right as per Article 24(4)(a) of the DTAA r.w.s 90 of the Act.

5.2 It was further submitted that Rule 128(9) provides that Form No. 67 should be filed on or before the due date of filing the return of income as prescribed under section 139(1) of the Act.



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However, the Rule nowhere provides that if the said Form is not filed within due date, the benefit of FTC would be denied. It was submitted that there are many section in the Income Tax Act that specifically deny deduction or exemption or relief if the return is not filed within the prescribed time limit such as Section 80-IA(7). However such language is not used in Rule 128(9). Further reliance was placed on the decision of Coordinate Bangalore Benches in case of Ms. Brinda Rama Krisna Vs. ITO-193 ITD 840 and 42 Hertz Software India (P) Ltd. vs. ACIT 139 Taxmann.com 448, Coordinate Mumbai Benches in case of Sonakshi Sinha Vs. CIT(A) 142 taxmann.com 414, Anuj Bhagwati Vs. DCIT in ITA No. 1844/Mum/2022 and Nirmala Murli Relwani Vs. ADIT in ITA No. 2094/Mum/2022.

5.3 It was submitted that similar contention were raised before the Ld. CIT(A) and reliance was placed on the aforesaid Coordinate Benches decisions however the Ld. CIT(A) has relied on the decision of another Coordinate Visakhapatnam Bench in case of Muralikrishna Vaddi Vs. ACIT/DCIT [2022] 142 taxmann.com 32. It was submitted that the Ld. CIT(A) has acknowledged the fact that the various other Coordinate Benches have decided the matter in favour of the assessee, however given the fact that there is no jurisdictional Tribunal or High Court decision on the matter, he has relied on the decision taken by the Visakhapatnam Bench which is in favour of the department. It was submitted that it is a settled legal proposition that where there are no decision of the jurisdictional Tribunal and there are conflicting decisions of different Benches of the Tribunal wherein the contrary view have been taken, the view in favour of the assessee should be adopted while deciding the matter.



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5.4 It was further submitted that even though the decision of the Bangalore Bench of the Tribunal in case of M/s 42 Hertz Software India (P) Ltd. Vs. ACIT (Supra) was brought to the notice of the Visakhapatnam Benches as evident from the order itself, however without considering the same, the matter has been decided. It was accordingly submitted that the said decision of the Coordinate Visakhapatnam Bench cannot therefore be held as binding precedent and the view taken by the Mumbai and Bangalore Benches which are consistently in favour of the assessee be followed.

6. Per contra, the Ld. DR has drawn our reference to the findings of the Ld. CIT(A),NFAC, Delhi and it was submitted that in order to claim relief under section 90/90A, the assessee is required to file Form No. 67 within the time limit as provided under Rule 128(9) of the Income Tax Rules and filing of Form No. 67 is mandatory in nature and not just procedural requirement as claimed by the assessee.

7. We have heard the rival contentions and perused the material available on the record. The limited issue under consideration is where there is a delay in filing of Form No. 67 as required under Rule 128 of the Income Tax Rules, would the same result in denial of the FTC which the assessee is otherwise eligible to claim and has duly claimed while filing the return of income and which has been duly computed and acknowledged by the CPC, Bangalore as so claimed by the assessee while processing the return of income so filed by the assessee.

8. In this regard, we refer to the decision of Coordinate Bangalore Benches in case of Ms. Brinda Rama Krishna Vs. ITO (supra) wherein the assessee had claimed FTC under section 90 r/w Article 24 of the India – Australia Tax Treaty in



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the revised returned income. However the assessee did not file Form No. 67 before filing the return of income. On realizing the same, the assessee filed Form No. 67 subsequently and thereafter the revised returned income was processed by CPC and intimation under section 143(1) was issued disallowing the claim of FTC. In the said factual background, the Coordinate Bangalore Benches vide its order dated 17/11/2021 has held that Rule 128(9) of the Rules does not provide for disallowance of FTC in case of delay in filing Form No. 67. It was further held that filing Form No. 67 is not mandatory but a directory requirement and further DTAA overrides the provisions of the Act and the Rules cannot be contrary to the Act and the matter was accordingly decided allowing the necessary relief to the assessee.

8.1 Thereafter, Coordinate Bangalore Benches in another decision dated 7/03/2022 in case of M/s 42 Hertz Software India (P) Ltd. Vs. ACIT(supra) following the earlier decision in case of Ms. Brinda Rama Krishna Vs. ITO (supra) has held that on perusal of provisions of Rules 128(8) and 128(9), it is clear that one of the requirement of Rule 128 for claiming FTC is that Form No. 67 is to be submitted by the assessee before filing the return of income and the said requirement cannot be treated as mandatory rather it is directory in nature for the reason that Rule 128(9) does not provide for disallowance of FTC in case of delay in filing Form No. 67. It was further held that it is a trite law that DTAA overrides the provisions of the Act and the Rules and therefore the FTC cannot be denied to the assessee.

8.2 Subsequently, the Mumbai Benches in case of Sonakshi Sinha Vs. CIT (supra) has taken a similar view and the relevant



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findings are contained at para 12 of the order dated 20/09/2022 which read 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 subsection (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 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



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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.”

8.3 In the aforesaid decision, the Coordinate Mumbai Benches have taken note of the amendment to Rule 128(9) wherein the time limit has been extended for filing Form 67 on or before the



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end of the assessment year and have also referred to the Hon'ble Supreme Court decision in case of Wipro Ltd and has held that delay in filing Form 67 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 and therefore, even though there is a delay in filing Form 67, the same cannot lead to denial of foreign tax credit.

8.4 We find that the similar view has been taken in case of Anuj Bhagwati Vs. DCIT (supra) by the Coordinate Mumbai Benches in its decision dt. 20/09/2022 wherein it was held that filing of Form No. 67 is not mandatory but its directory in nature. Similarly, following the earlier decision, in the case of Nirmala Murli Relwani Vs. Asst. DIT (supra), the Coordinate Mumbai Benches vide its order dt. 01/12/2022 has held that mere delay in filing Form No. 67 as per the provisions of Rule 128(9) will not preclude the assessee from claiming the benefit of FTC in respect of tax paid outside India.

8.5 We, therefore, find that the various Coordinate Benches have consistently held that the delay in filing Form No. 67 cannot result in denial of the FTC as the same have to be read as directory and not mandatory in nature.

8.6 In the instant case, it is not in dispute that the assessee has not filed Form No. 67 while filing the return of income however, the same has been filed well before the processing of the return of income and thereafter the intimation under section 143(1) has been issued by the CPC. We therefore find that the CPC has erred in not considering the Form No. 67 so filed by the assessee while processing the return of income and therefore the claim of the FTC by the assessee has been wrongly denied to the assessee.



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8.7 As far as the decision of the Coordinate Visakhapatnam Benches in case of Muralikrishna Vaddi (supra) is concerned, in that case, Form No. 67 was filed after scrutiny proceedings were initiated by the AO and that too with a delay of more than two years and in the said factual and distinguishable background however taking into consideration the provision of Rule 128(9) of the Income Tax Rules, the Coordinate Bench vide its order dated 14/06/2022 has held that the word “shall” has been used in Rule 128(9) which shows that filing of Form 67 within prescribed time limit is mandatory in nature and not directory. Here we find that firstly the relevant provisions of the DTAA as well as Act which allow relief to the assessee towards FTC and overrides the rules has apparently not been brought to the notice of the Coordinate Bench and thus not been taken into consideration by the Coordinate Bench and secondly, even the earlier decision of Coordinate Bangalore Benches in case of M/s 42 Hertz Software India (P) Ltd. though brought to its notice has not been considered while passing the said order. Further, as we have noted above, there are series of decisions which have been rendered by the various Coordinate Benches both prior to and even subsequent to the aforesaid decision where a consistent view has been taken holding that the delay in filing Form No. 67 cannot result in denial of the FTC as the same have to be read as directory and not mandatory in nature. We therefore find that the said decision of Coordinate Visakhapatnam Benches cannot act as a binding precedent specially taking into consideration the fact that the relevant provisions of the Act r/w DTAA have not been considered and the fact that a consistent view has been taken by the various Benches of the Tribunal which have held



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that the provisions of Rule 128(9) as directory in nature and not mandatory.

8.8 In the instant case, the Id CIT(A) NFAC, having acknowledged the fact that there are series of decisions rendered by different Benches of the Tribunal in favour of the assessee, has decided to follow the solitary decision of the Vishakapatnam Benches which is in favour of the department for the reason that there are conflicting views taken by the different Benches of the Tribunal and there is no decision of the jurisdictional Tribunal and therefore, he follows the decision of the Vishakhapatnam Benches. Firstly, the Id CIT(A), NFAC is acting as a quasi judicial authority and is not acting as an tax administrator and therefore, what is relevant for him to appreciate is that where there is no decision of the jurisdictional Tribunal Benches and conflicting decisions rendered by the non-jurisdictional Tribunal Benches, there are two reasonable construction possible in the facts and circumstances of the present case and it is a settled legal proposition that where two reasonable constructions of a taxing provision are possible in a given case, the construction in favour of the assessee should be followed and necessary relief be allowed to the assessee. In this regard, necessary guidance can be drawn from the decision of the Hon'ble Supreme Court in the matter of CIT vs. Vegetable Products Ltd. (1972) 88 ITR 192 (SC) wherein it was held that "if two reasonable constructions of a taxing provisions are possible, that construction which favours the assessee must be adopted". Therefore the mere fact that there is no jurisdictional Tribunal decision on the matter, the assessee cannot be denied the relief where there are decisions elaborating the construction of the FTC provisions as directory and not mandatory and in favour of



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the assessee and the Id CIT(A) NFAC therefore has erred in not following the said decisions even though rendered by the non-jurisdictional Benches of the Tribunal.

8.9 In view of the aforesaid discussion and in the entirety of facts and circumstances of the case, we are of the considered view that the assessee cannot be denied the claim of FTC merely for the reason that there was a delay in filing the Form No. 67 while processing his return of income and the matter is thus decided in favour of the assessee.”

5. In the light of the aforesaid precedent, it is directed that the Foreign Tax Credit claimed by assessee cannot be denied to the assessee merely for delay in filing of Form No. 67. The AO is directed to grant the foreign tax credit subject to verification of Form No. 67 which according to assessee has been filed on 30.10.2020. If the assertion made by the assessee is correct then, credit should be granted to assessee. The AO to pass order accordingly in accordance to law.

6. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 30/06/2023.

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 30/06/2023.
Vijay Pal Singh, (Sr. PS)



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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
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