

IN THE INCOME TAX APPELLATE TRIBUNAL
“DB” BENCH JABALPUR
BEFORE SHRI OM PRAKASH KANT ACCOUNTANT MEMBER&
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER
ITA NO.90/JAB/2023
(A.Y.2021-22)

Gaurav Singh, C/O,Rajiv Narayan Singh, Parijat Niwas, Satna-485001. Madhya Pradesh,	ITO, Aayakar Bhawan, Civil Lines, Satna-485001. Madhya Pradesh,
Appellant	Respondent

PAN: BBDPS8879Q

Appellant by : Shri.Sapan Usrethe,Advocate. AR
Respondent by : Shri. Shiv Kumar. Sr.DR

Date of hearing :18.09.2023
Date of pronouncement : 20.09.2023

ORDER

PER PAVAN KUMAR GADALE, JM:

The appeal is filed by the assessee against the order of Commissioner of Income Tax Appeals (CIT(A))-National Faceless Appeal Centre Delhi, passed under Section 143(3) and 250 of the Income tax Act 1961. The assessee has raised grounds of appeal challenging the decision of the CIT(A) in denial of relief of foreign Tax Credit as the Form.No.67 was not filed before due date of filing of return of income U/sec139(1) of the Act.

2. At the time of hearing, the Ld.AR of the assessee submitted that there is a delay of 6 days in filing the

appeal before the Hon'ble Tribunal and filed the application for condonation of delay. Whereas, the facts mentioned in the application is reasonable and the Ld.DR has no specific objections. Accordingly, we condone the delay and admit the appeal.

3. The briefs facts of the case are that, the assessee is an individual and derives income from house property, income from capital gains, income from other sources and also receives salary from foreign country Maynmar. The assessee has filed the return of income ITR 2 for the A.Y. 2021-22 on 6-11-2021 disclosing a total income of Rs,57,36,000/-.Whereas, the assessee has included the foreign salary income of Rs.13,99,110/- in the total income disclosed and also tax of Rs.2,39,346/- paid/deducted in Maynmar was claimed as Foreign Tax Credit(FTC). The assessee is eligible to claim Tax Relief U/sec 90 of the Act as per Double Taxation Avoidance and Agreement (DTAA) with the government of Maynmar and the return of income was processed under section 143(1) of the Act on 05.07.2022 accepting the income as per the return of income filed by the assessee but the no relief was granted under Section 90 of the Act in respect of the Foreign Tax Credit(FTC) and raised the demand of Rs.3,36,030/.Subsequently. The assessee has filed rectification petition u/sec154 of the act and was rejected vide order dated 9-09-2022.

4. Aggrieved by the rectification order, the assessee has filed an appeal with the CIT(A), whereas the CIT(A) considered the

grounds of appeal, statement of facts and submissions of the assessee on the FTC tax relief. But the CIT(A) was not satisfied with the explanations on the claim of FTC and has confirmed the action of the A.O. and dismissed the assessee appeal. Aggrieved by the CIT(A) order, the assessee has filed an appeal with the Hon'ble Tribunal.

5. At the time of hearing, the Ld. AR submitted that the CIT(A) has erred in confirming the action of the Assessing officer overlooking the provisions of the Act and submissions on the grant of foreign Tax Credit and the Ld.AR substantiated the submissions with the factual paper book and relied on the judicial decisions and prayed for allowing the appeal. Per Contra, the Ld. DR supported the order of the CIT(A).

6. We heard rival submissions and perused the material on record. The assessee has raised the grounds of appeal challenging the action of the assessee officer which was confirmed by the CIT(A) in respect of the denial of foreign tax credit (FTC) as the assessee has filed the Form No. 67 beyond the due date and after processing of return of income U/sec143(1) of the Act . Whereas, the assessee has filed Form No 67 online on the portal of the Income Tax Department on 6.07.2022 in order to comply with Rule 128 of Income Tax Rules. The CIT(A) has considered the fact of filing Form No.67 and is of the opinion that it is a mandatory requirement as per the I T Rules and the revenue has fallowed and further the DTAA should take a

precedence over domestic laws for determining the eligibility of FTC claim and also there is no power to condone the delay in filling the Form No. 67 and the CIT(A) has confirmed the action of A.O and dismissed the appeal. We find in respect of foreign tax credit (FTC), the assessee is required to file Form.no. 67 with details of the statement of income from a country or specified territory outside India and foreign tax credit and further rule 128 of the income tax rules prescribes the procedure for claiming the foreign tax credit.

7. We find under Section 90 of the income tax Act allows double taxation relief in respect of agreements with foreign countries or specified territories and also Section 91 of the I T Act deals with the taxability of income where the countries which don't have agreements. Further there is no amendment in the Section 90 of the Act with regard to claim of FTC and in such cases Rule procedures are directory and not mandatory. We rely on the decision of the Hon'ble Tribunal ITA No.29/Bang/2021 in M/s 42 Hertz Software India Pvt. Ltd., Vs. ACIT-3(1)(1), Bangalore dated 07.03.2022 wherein the Hon'ble Tribunal has considered the facts & law on the filing of Form. No. 67 and observed at page 4 Para 4 to 8 read as under:

"4. It was submitted that when there is no condition prescribed in DTAA that the FTC can be disallowed for non-compliance of any procedural provision. As the provisions of DTAA override the provisions of the Act, the Assessee has vested right to claim the FTC under the tax treaty, the same cannot be disallowed for mere delay in compliance of a procedural provision.

5. *On the contrary, the Ld. DR submitted that fulfillment of requirement under rule 128(9) of the Rules, is mandatory and hence the Revenue authorities were justified in refusing to FTC. We have perused the submissions advanced by both sides in light of records placed before us.*

6. *There is no dispute that the Assessee is entitled to claim FTC. On perusal of provisions of Rule 128(8) & (9), it is clear 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. In our view, 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. This view is fortified by the decision of coordinate bench of this Tribunal in case of Ms. Brinda Kumar Krishna vs. ITO in IT A No. 454/Bang/2021 by order dated 17/11/2021.*

7. *It's a tribe law that DTAA overrides the provisions of the Act and the Rules, as held by various High Courts, which has also been approved by Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence (P) Ltd. reported in (2021) 432 ITR 471.*

8. *We accordingly, hold that FTC cannot be denied to the assessee. Assessee is directed to file the relevant details/evidence in support of its claim. We thus remand this issue back to the Ld. AO to consider the claim of assessee in accordance with law, based on the verification carried out in respect of the supporting documents filed by assessee.*

Accordingly the grounds raised by assessee stands allowed for statistical purposes.

In the result appeal filed by assessee stands allowed for statistical purposes.

8. Similarly, in the case of Ms. Brindra Rama Krishna, Vs. Income Tax Officer in ITA No 454/Bang/2021 for assessment year 2018-19 order dated 17.11.2021 the Hon'ble Tribunal has observed that the filling of FormNo.67 is not mandatory but directory in Para 13 to 17 of the order which is read as under:

13. *It was submitted that as per the provisions of Section 90(2) of the Act, where the Central Government of India has entered into a DTAA, the*

provisions of the Act would apply to the extent they are more beneficial to a taxpayer. Therefore, the provisions of DTAA override the provisions of the Act, to the extent they are beneficial to the assessee. Reliance in this regard is placed on the following cases and circulars.

- *Union of India Vs. Azadi Bachao Andolan (2003) 263 ITR 706 (Supreme Court)*
- *CIT Vs. Eli Lily & Co (India) P. Ltd (2009) 178 Taxman 505 (Supreme Court)*
- *GE India Technology centre P Ltd. Vs. CIT (2010) 193 Taxman 234 (Supreme Court)*
- *Engineering Analysis Centre of Excellence P Ltd Vs CIT (2021) 125 taxmann.com 42 (Supreme Court) (Pg 106-109 of Paper Book 2-Para 25 & 26)*
- *CBDT Circular No. 333 dated 02.04.82 137 ITR (St.)*

It was submitted that when there is no condition prescribed in DTAA that the FTC can be disallowed for non-compliance of any procedural provision. As the provisions of DTAA override the provisions of the Act, the Assessee has vested right to claim the FTC under the tax treaty, the same cannot be disallowed for mere delay in compliance of a procedural provision.

14. The learned Departmental Representative reiterated the stand of the Revenue that rule 128(9) of the Rues, is mandatory and hence the Revenue authorities were justified in refusing to give FTC. He also submitted that the issue was debatable and cannot be subject matter of decision in Sec. 154 proceedings which are restricted in scope to mistakes apparent on the face of the record.

15. In his rejoinder, the learned counsel for the Assessee submitted that Form No. 67 was available before the Assessing Officer when the intimation under Section 143(1) of the Act dated 28.05.2020 was passed. He pointed out that the Assessing Officer or the CIT(A) did not dismiss the Assessee application for rectification under Section 154 of the Act on the ground that the issue was debatable but rather the decision was given that the relevant rule was

mandatory and hence non furnishing of Form No. 67 before the due date under Section 139(1) of the Act was fatal to the claim for FTC.

16. I have given a careful consideration to the rival submissions. 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 for 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 that the issue in the proceedings under Section 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 under Section 154 of the Act can be resorted to. Even otherwise the ground on which the Revenue authorities rejected the Assessee's application under Section 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.

17. In the result, the appeal is allowed."

9. 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 considering the facts, circumstances and ratio of the judicial decisions restore the disputed issue for limited purpose to the file of the assessing officer to grant Foreign Tax Credit after verification and in accordance with the law. Further the assessee should be provided adequate opportunity of hearing and shall cooperate in submitting the information and allow the grounds of appeal of the assessee for statistical purposes.

10. In the result, the appeal filed by the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on the 20.09.2023.

Sd/-

Sd/-

(OM PRAKASH KANT)
ACCOUNTANT MEMBER

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Jabalpur, Dated 20.09.2023

KRK, PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT (Judicial)
4. The PCIT
5. DR, ITAT, Jabalpur
6. Guard File

सत्यापित प्रति //True Copy//

आदेशानुसार /BY ORDER,

(Asst. Registrar)
ITAT, Jabalpur