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

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 1068/Ahd/2023

(**निर्धारण वर्ष /** Assessment Year : 2018-19)

Niravsinh Kishoresinh Gehlot Shivam Vasant Chowk, Dharmaj, Petlad Dist Anand, Anand, Gujarat 388430	**बनाम**/ Vs.	**CPC** Bangalore **Present Jurisdiction -** Income Tax Officer Ward 5(3)(2), Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AJTPG6241P		
(Appellant)	..	**(Respondent)**

अपीलार्थी ओर से /**Appellant by :**	Shri Balaji V., AR
प्रत्यर्थी की ओर से/**Respondent by :**	Shri Sushil Kumar Katiar, Sr. DR

Date of Hearing	01/02/2024
Date of Pronouncement	08/02/2024

O R D E R

PER Ms. MADHUMITA ROY - JM:

The instant appeal filed at the instance of the appellant is directed against the order dated 26.10.2023 passed by the Commissioner of Income Tax (Appeals) -3, Chennai ('CIT(A)') arising out of the intimation order dated 20.03.2020 passed by the Assessing Officer, under Section 143(1) of the Act for Assessment Year 2018-19.

2. We have heard the rival submissions made by the respective parties and we have also perused the relevant materials available on record.

3. The appellant was a salaried individual and was employed with Shell India Market Private Limited and was sent on an international assignment to Australia from 27th November, 2017 to 14th November, 2018. As the appellant worked in Australia, he was required to offer salary income earned therein for the period commencing from 27th November, 2017 to 14th November, 2018 to tax in Australia and accordingly tax was duly paid on the salary earned in Australia. Naturally, the tax on such salary income earned by the appellant in Australia is not to be paid in India as the same would be paid twice. In order to avoid double taxation on salary income for the period commencing from 27th November, 2017 to 31st March, 2018, the appellant claimed Foreign Tax Credit ('FTC') to the tune of Rs.6,38,960/- for taxes already paid in Australia as per Section 90 read with Article 24(4) of the India-Australia Double Taxation Avoidance Agreement ('DTAA') read with CBDT Circular 333 dated 2nd April, 1982. The appellant in support of such claim of FTC filed Form No.67 on 11th March 2019. The Ld. AO (CPC) has denied the claim of appellant in respect of FTC on the ground that the appellant had not filed Form No.67 read with Rule 28 of the IT Rules i.e. the statement of income from a country or specified territory outside India and FTC within the time limit prescribed under Section 139(1) of the Act.

4. The case of the appellant before the First Appellate Authority and before us as well is this that he had verified and submitted Form No. 67 on the Income Tax Portal on 11th March, 2019 as against due date of 31st July, 2018 when the return of

income was submitted under Section 139(5) of the Act. Further that, the claim of FTC categorically disallowed for filing of Form No.67 after the due date of filing of return of income under Section 139(1) of the Act as the crux of the case made out by the appellant. However, the appeal preferred by the appellant against the intimation under Section 143(1) of the Act issued for the return of income filed under Section 139(5) of the Act on 11th March, 2019 was rejected, particularly, on this ground that the JCIT has not been conferred with any such delegation of power to codone the delay in filing Form No.67. It was further mentioned in the order impugned before us that the appellant, in that event, requires to approach the appropriate competent authority to get the delay in filing Form No.67 condoned. At the time of hearing of the instant appeal, the Ld. Counsel appearing for the assessee before us stated that the issue is squarely covered by the judgment passed in the Co-ordinate Bench in the case of Kewal Niraj Hutheesing vs. ITO in ITA No. 559/Ahd/2022 for A.Y. 2019-20, the copy whereof is annexed with paper book filed by the appellant before us.

5. On the contrary, the Ld. DR relied upon the order passed by the authorities below.

6. On the basis of the available fact it appears that the appellant had already offered tax to Australia on income earned therein from the period from 27th November, 2017 to 31st March, 2018 and in order to avoid double taxation of salary income for that period, the

appellant had claimed FTC to the tune of Rs.6,38,960/- for taxes already paid in Australia as per Section 90 of the Act read with Article 24(4) of the India-Australia Double Taxation Avoidance Agreement ('DTAA') read with CBDT Circular 333 dated 2nd April, 1982. In fact, we find that the appellant has a vested right to claim FTC under such treaty which ought not to have been disallowed by the authorities below merely on the ground of delay in filing Form No.67. Delay in filing Form No.67 is a procedural delay, is not a mandatory one but a directory requirement. Moreso, double taxation avoidance agreement overrides the provision of the Act and the Rules cannot contrary to the Act. On this aspect, we have further considered the judgment relied upon by the Ld. AR in the case of Keval Niraj Hutheesing vs. ITO (Supra). While dealing with the identical issue, the Hon'ble Court was pleased to pass orders relying upon the judgment passed by the Bangalore Bench in case of Vinodkumar Lakshmipathi vs. CIT, wherein ratio laid down by the Hon'ble Apex Court in the case of Mangalore Chemicals & Fertilizers Ltd. vs. DCIT, reported in (1992 Supp (1) SCC 21) was followed. The relevant observation whereof is as follows:

> *"7. Heard both the parties and perused all the relevant material available on record. It is pertinent to note that the assessee has paid the taxes on the income earned in United Kingdom in that country and assessee is asking for credit of the same while filing the return of income. The CIT(A) held that the assessee has not filed Form 67 before time allowed under Section 139(5) of the Act and therefore, Form 67 is non-est in law does not categorically discussed the assessee's case as the assessee has already paid taxes in UK and as per Article 24(2) of the DTAA between India and UK the foreign income cannot be taxed twice. The decision of Bangalore Tribunal in case of Vinodkumar Lakshmipathi vs. CIT is dealing on the identical situation and the Tribunal has taken cognizance of the same in light of the decision of Hon'ble Supreme Court in case of Mangalore Chemicals & Fertilizers Ltd. vs. DCIT (1992 Supp (1) SCC 21) wherein it was observed as under:*

"The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve."

The Tribunal further held that:

Further reliance was placed on the decision of the Hon'ble Supreme Court, in the case of Sambhaji and Others v. Gangabai and Others, reported in [2008] 17 SCC 117, wherein it has been held that procedure cannot be a tyrant but only a servant. It is not an obstruction in the implementation of the provisions of the Act, but an aid. The procedures are handmaid and not the mistress. It is a lubricant and not a resistance. A procedural law should not ordinarily be construed as mandatory; the procedural law is always subservient to and is in aid to justice. It was submitted that filing of Form 67 as per the provisions of section 90 read with rule 128(9) is a procedural law and should not control the claim of FTC.

12. It was further submitted that even in the context of 80-IA(7), 10A(5) etc, wherein there is specific provision for disallowance of deduction/exemption if audit report is not filed along with the return, various High Courts have taken a view that filing of audit report is directory and not mandatory. Reliance in this regard was placed on the following cases:

- *CIT v. Axis Computers (India) (P.) Ltd. [2009] 178 Taxman 143 (Delhi)*
- *PCIT, Kanpur v. Surya Merchants Ltd. [2016] 72 taxmann.com 16 (Allahabad)*
- *CIT, Central Circle v. American Data Solutions India (P.) Ltd [2014] 45 taxmann.com 379 (Karnataka)*
- *CIT-II v. Mantec Consultants (P.) Ltd. [2009] 178 Taxman 429 (Delhi)*
- *CIT v. ACE Multitaxes Systems (P.) Ltd [2009] 317 ITR 207 (Karnataka).*

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 v. Azadi Bachao Andolan [2003] 263 ITR 706 (SC)
CIT v. Eli Lily & Co. (India) (P.) Ltd. [2009] 178 Taxman 505 (SC)
GE India Technology Centre (P.) Ltd. v. CIT [2010] 193 Taxman 234 (SC)
Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT [2021] 125 taxmann.com 42 (SC) (Pgs. 106-109 of PB 2-Paras 25 & 26)

CBDT Circular No. 333 dated 2/4/82 137 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 DR reiterated the stand of the revenue that rule 128(9) of the Rules, 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 AO when the intimation u/s. 143(1) of the Act dated 28-5- 2020 was passed. He pointed out that the AO or the CIT(A) did not dismiss the Assessee application for rectification u/s. 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 u/s. 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 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 DR in this regard.

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

8. Thus, the facts are identical in the present case as well and therefore, we direct the Assessing Officer to give credit for foreign tax as per Form 67 dated 05.04.2021 filed by the assessee prior to the filing of the appeal before the CIT(A) after due verification.

9. In result, appeal of the assessee is partly allowed for statistical purpose."

7. We find that it has been held by the Hon'ble Apex Court on identical issue that the Rule 128(9) of the IT Rules does not provide for disallowance of FTC in the case of delay in filing Form No.67. Filing of such Form 67 is not mandatory but a directory requirement. Moreso, when DTAA overrides the provision of the Act, the Rules cannot be contrary to the Act and hence, this right to claim of FTC is a vested right of the appellant, cannot be denied. We find sufficient case has been made out by

the appellant. Hence, respectfully relying upon the same, we allow the appeal on this aspect of filing of Form No. 67. We condone the delay, if any. We, thus, direct the Ld. CIT(A) to pass orders on merit strictly in accordance with law upon giving an opportunity of being heard to the appellant and upon considering the evidence on record or any other evidence which the appellant may choose to file at the time of hearing of the matter.

8. In the result, the appeal preferred by the assessee is allowed for statistical purposes.

This Order pronounced on 08/02/2024

Sd/-	Sd/-
(WASEEM AHMED)	(MADHUMITA ROY)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 08/02/2024

S. K. SINHA *True Copy*

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

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

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad