IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI
BEFORE SHRI N. K. CHOUDHRY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 3034/Mum/2023 (A.Y. 2021-22)
&
ITA No. 3035/Mum/2023 (A.Y. 2021-22)

Saimaa Technologies LLP,
11, Ground floor, C-Wing,
Building No. 1, Kailas Industrial
Company, Veer Savarkar Marg,
Park Site, Vikhroli (West)
Maharashtra -400 079 ..... Appellant

Vs.

ITO Ward-14(3)(1),
R. No. 554, Aayakar Bhavan,
M. k. Road, Mumbai-400 020
PAN – ADAFS3888F ..... Respondent

Appellant by	:	Shri B. V. Jhaveri & Ms. Bhargavi Raval, Ld. ARs
Respondent by	:	Shri Mahesh Parwani, Ld. DR
Date of hearing	:	21/12/2023
Date of pronouncement	:	25/01/2024

ORDER

PER GAGAN GOYAL, A.M:

These appeals by assessee are directed against the order of National Faceless Appeal Centre (NFAC), Delhi dated 26.07.2021 u/s. 250 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2021-22 respectively. The assessee has raised the following grounds in ITA No. 3404/Mum/2023 for AY 2021-22:-

1. *The Commissioner (Appeals) erred in not granting adjournment as per the adjournment application dated 15th July, 2023 seeking adjournment up to 1st August, 2023, and therefore, the order passed by the Commissioner (Appeals) on 26th July, 2023 is against the principles of natural justice and fair play and hence the same is required to be set aside.*
2. *The Commissioner (Appeals) erred in holding that the appellant firm filed the return of income after time prescribed u/s. 139(1) of the I.T. Act, 1961, and therefore, the credit of Foreign Tax paid cannot be allowed under rule 128 of the I.T. Rules, 1962.*
3. *The Commissioner (Appeals) failed to appreciate that while processing the ITR, the ACIT, CPC Bengaluru has acknowledged, admitted and allowed appellant's claim of FTC of Rs. 32 ,64,190/- as evident from Annexure TR (as computed) forming part of the Intimation u/s. 143(1), however while computing final tax liability, the ACIT, CPC has not given credit of foreign tax paid of Rs. 32,64,190/-*
4. *The Commissioner (Appeals) erred in holding that the amendment to Rule 128(9) of the I.T. Rules, 1962, is applicable from 1st April, 2022 and not for earlier years and therefore, the appellant firm cannot get the credit of foreign tax paid as it has filed the ITR beyond the time prescribed u/s. 139(1) of the I.T. Act, 1961.*
5. *The Commissioner (Appeals) failed to appreciate that section 90 of the IT Act, 1961 read with Article 25(2) of the DTAA with Singapore, the tax paid in Singapore shall be allowed as a credit against the Indian tax and neither sec. 90 nor DTAA with Singapore provides that FTC shall be disallowed for non-compliance with any procedural requirements and therefore, disallowance of FTC is bad in law and without jurisdiction.*
6. *The Commissioner (Appeals) failed to appreciate that the CBDT has power to prescribe procedure for granting FTC but the CBDT does not have power to prescribe a condition or provide for disallowance of FTC and hence the procedure prescribed in Rule 128 should be interpreted in this context.*
7. *The Commissioner (Appeals) failed to appreciate that Rule 128(9) nowhere provides that if Form No. 67 is not filed within the time prescribed u / s 139(1) of the Act, the relief sought by the appellant u/s. 90 of the Act would be denied.*
8. *The Commissioner (Appeals) failed to appreciate that filing of Form No. 67 is a procedural/directory requirement and is not a mandatory requirement and violation of procedural norm does not extinguish the substantive right of claiming the credit of*

Foreign Tax paid as held by the Supreme Court in the case of Sambhaji & Ors. V. Gangabai & Ors. [(2008) 17 SCC 117]

9. *The Commissioner (Appeals) failed to appreciate that the amendment of Rule 128(9) with effect from 1st April, 2022 is curative in nature and therefore, it should be applied retrospectively and hence the amended Rule 128(9) should be applied to the facts of the appellant for A.Y. 2021-22.*
10. *The Commissioner (Appeals) failed to appreciate that there is no condition prescribed in DTAA that the FTC can be disallowed for non-compliance of any procedural provisions and the provisions of DTAA overrides the provisions of the I.T, Act, 1961 and therefore, the appellant has vested right to claim the FTC under the Tax Treaty which cannot be disallowed for mere delayed in compliance of a procedural provisions.*
11. *The Commissioner (Appeals) failed to appreciate that Form No.67 was available before the A.O. in his records when the Intimation u/s. 143(1) of the Act was issued on 11th October, 2021 and therefore, there is no reason for disallowing credit of foreign tax paid by the appellant.*
12. *The order of the Commissioner (Appeals) is contrary to the decision of the Income-tax Appellate Tribunal in the case of Brinda Rama Krishna v. I.T.O. (135 taxmann.com 358, Bangalore).*
13. *The Commissioner (Appeals) failed to appreciate that the decision of the Bangalore Bench in the case of Brinda Rama Krishna v. I.T.O. is followed by the other benches of the Appellate Tribunal in the following cases:*

    (i) Hertz Software (1) Pvt. Ltd. V ACIT [(2022) Taxpub (DT) 1975]

    (ii) Vithal Srinivasan v ADIT, CPC in ITA No. 1087/Bang/2022

    (iii) Sonakshi Sinha v. (ITCA) NFAC, in ITA No. 1704/Mum/2022 dated 20/09/2022

    (iv) Priya Savina Murzello v DCIT, CPC in ITA No.3238/Mum/2022 dated 17/02/2023

14. *The order of the Commissioner (Appeals), NFAC, is bad in law and without jurisdiction and hence it may be set aside and quashed.*
15. *Your appellant craves leave to add to, alter, amend or delete any of the foregoing grounds of appeal.*

2. The brief facts of the case are that assessee is a Limited Liability Partnership firm carrying on the business of trading in electronics parts, components and accessories used by Cable TV industry and having a branch at Singapore. The profits of the branch were incorporated in the audited accounts of the firm for

the year ended 31-03-2021 and accordingly income-tax was paid in India on the total income. As the appellant firm had paid income-tax in Singapore in respect of the profits of the branch, it claimed the credit of the said tax paid at Singapore against the tax liability on its total income in India as per the DTAA entered into between India and Singapore, filed its return of income on 31.03.2022 as belated return u/s. 139(4) of the Act. Return of the assessee was processed u/s. 143(1) of the Act and intimation was issued vide dated 16.11.2022.

3. Vide the intimation mentioned (supra), assessee's claim of Rs. 32, 64, 190/- as foreign tax credit was not allowed. It is contended by the assessee that this disallowance of foreign tax credit (FTC), CPC, Bengaluru neither assigned any reason nor any opportunity of being heard was given, while observing the documents and submissions, we found this contention to be correct. Although to rectify this intimation, assessee itself filed an application u/s. 154 of the Act, but that also did not change the status. Assessee being aggrieved with this action of CPC Bengaluru u/s. 143(1) of the Act and section 154 of the Act preferred an appeal before the Ld. CIT (A), who in turn confirmed the adjustments done by CPC Bengaluru u/s. 143(1) of the Act. Assessee being further aggrieved with this order of Ld. CIT (A) passed u/s. 250 of the Act preferred these present appeals before us.

4. We have gone through the intimation issued u/s. 143(1) of the Act, order of the Ld. CIT (A) u/s. 250 of the Act and submissions of the assessee alongwith grounds raised before us. We observed that there is no dispute among us the revenue and the assessee except that FTC of Rs. 32,14,190/- was not allowed to the assessee on the ground that Form 67 as prescribed under rule 128(8) of the

Income Tax Rules was not filed within the time specified under rule 128(9) of the Rules. For sake of ready reference and better understanding of the issue, we are reproducing herein below the provisions of Rule 128 of the Rules in *verbatim*:-

Rule - 128, Income-tax Rules, 1962

[**Foreign Tax Credit.]**

128. (1) An assessee, being a resident shall be allowed a credit for the amount of any foreign tax paid by him in a country or specified territory outside India, by way of deduction or otherwise, in the year in which the income corresponding to such tax has been offered to tax or assessed to tax in India, in the manner and to the extent as specified in this rule:

Provided that in a case where income on which foreign tax has been paid or deducted, is offered to tax in more than one year, credit of foreign tax shall be allowed across those years in the same proportion in which the income is offered to tax or assessed to tax in India.

(2) The foreign tax referred to in sub-rule (1) shall mean,—

(*a*) in respect of a country or specified territory outside India with which India has entered into an agreement for the relief or avoidance of double taxation of income in terms of section 90 or section 90A, the tax covered under the said agreement;

(*b*) in respect of any other country or specified territory outside India, the tax payable under the law in force in that country or specified territory in the nature of income-tax referred to in clause (*iv*) of the *Explanation* to section 91.

(3) The credit under sub-rule (1) shall be available against the amount of tax, surcharge and cess payable under the Act but not in respect of any sum payable by way of interest, fee or penalty.

(4) No credit under sub-rule (1) shall be available in respect of any amount of foreign tax or part thereof which is disputed in any manner by the assessee:

Provided that the credit of such disputed tax shall be allowed for the year in which such income is offered to tax or assessed to tax in India if the assessee within six months from the end of the month in which the dispute is finally settled, furnishes evidence of settlement of dispute and an evidence to the effect that the liability for payment of such

foreign tax has been discharged by him and furnishes an undertaking that no refund in respect of such amount has directly or indirectly been claimed or shall be claimed.

(5) The credit of foreign tax shall be the aggregate of the amounts of credit computed separately for each source of income arising from a particular country or specified territory outside India and shall be given effect to in the following manner:—

(*i*) the credit shall be the lower of the tax payable under the Act on such income and the foreign tax paid on such income:

Provided that where the foreign tax paid exceeds the amount of tax payable in accordance with the provisions of the agreement for relief or avoidance of double taxation, such excess shall be ignored for the purposes of this clause;

(*ii*) The credit shall be determined by conversion of the currency of payment of foreign tax at the telegraphic transfer buying rate on the last day of the month immediately preceding the month in which such tax has been paid or deducted.

(6) In a case where any tax is payable under the provisions of section 115JB or section 115JC, the credit of foreign tax shall be allowed against such tax in the same manner as is allowable against any tax payable under the provisions of the Act other than the provisions of the said sections (hereafter referred to as the "normal provisions").

(7) Where the amount of foreign tax credit available against the tax payable under the provisions of section 115JB or section 115JC exceeds the amount of tax credit available against the normal provisions, then while computing the amount of credit under section 115JAA or section 115JD in respect of the taxes paid under section 115JB or section 115JC, as the case may be, such excess shall be ignored.

(8) Credit of any foreign tax shall be allowed on furnishing the following documents by the assessee, namely:—

(*i*) a statement of income from the country or specified territory outside India offered for tax for the previous year and of foreign tax deducted or paid on such income in Form No. 67 and verified in the manner specified therein;

(*ii*) certificate or statement specifying the nature of income and the amount of tax deducted there from or paid by the assessee,—

(*a*) from the tax authority of the country or specified territory outside India; or

(*b*) from the person responsible for deduction of such tax; or

(*c*) signed by the assessee:

Provided that the statement furnished by the assessee in clause (*c*) shall be valid if it is accompanied by,—

(*A*) an acknowledgement of online payment or bank counter foil or challan for payment of tax where the payment has been made by the assessee;

(*B*) Proof of deduction where the tax has been deducted.

[*(9) 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 end of the assessment year relevant to the previous year*** *in which the income referred to in sub-rule (1) has been offered to tax or assessed to tax in India and the return for such assessment year has been furnished within the time specified* ***under sub-section (1) or sub-section (4) of section 139:***

Provided *that where the return has been furnished under sub-section (8A) of section 139, 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) to the extent it relates to the income included in the updated return, shall be furnished on or before the date on which such return is furnished.*]

(10) Form No. 67 shall also be furnished in a case where the carry backward of loss of the current year results in refund of foreign tax for which credit has been claimed in any earlier previous year or years.

Explanation.—for the purposes of this rule "telegraphic transfer buying rate" shall have the same meaning as assigned to it in *Explanation* to rule 26.]

5. In this case, return filed by the assessee is covered by section 139(4) of the Act i.e. belated return and Rule 128 of the Rules for the relevant assessment year talks about filing of Form no. 67 on or before the due date specified for furnishing the return of income under sub section 1 of section 139 of the Act i.e. in this case 15th March 2022. Thereafter there is a change in Rule 128(9) of the Rules w.e.f. 01.04.2022 as mentioned (supra) in bold with underline portion. In this case,

assessee is fulfilling both the conditions as prescribed in revised Rule 128(9) of the Rules. But as decided by the Ld. CIT (A) that this change in Rule 128(9) is w.e.f. 01.04.2022. For this, we relied upon the law laid down by Hon'ble Supreme Court in the case of **[2014] 49 taxmann.com 249 (SC) CIT (Central)-I, New Delhi *v.* Vatika Township (P.) Ltd.** as under:

> *"For the sake of completeness, that where a benefit is conferred by legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. [Para 33]*
>
> *It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective."*

6. Relying upon the decisions of Hon'ble Supreme Court reproduced (supra), we respectfully agreed that amendment in Rule 128(9) of the Rules is curative in nature, hence applied retrospectively and assessee cannot be deprived of this benefit simply because amendment in the Rule came w.e.f. 01.04.2022. Further, it is pertinent to mention that filing of Form No. 67 in compliance to Rule 128 of the Rules cannot override the provisions of Income Tax Act granting benefit to the assessee. Rule 128 of the Rules is a subordinate legislation which cannot override the legislation itself passed by the Parliament. It is further submitted that filing of Form No. 67 is a procedural/directory requirement and is not a mandatory requirement. By filing the Form No. 67 late but much before the assessment is taken up for scrutiny, in no way violates any provisions of the DTAA or Sec. 90 of

the Act or adversely affects the purpose of the Department to collect revenue for the Government. It is, therefore, submitted that violation of procedural norm does not extinguish the substantive right of claiming the credit of Foreign Tax Paid by the appellant firm.

7. Reliance is placed on the decision of the Hon'ble Supreme Court, in the case of Sambhaji & Ors. v. Gangabai & Ors. [(2008) 17 SCC 117] (Pages 1 to 11) wherein their Lordships held:

> *"12. Procedural law is not to be a tyrant but servant, not an obstruction but an aid to justice. A procedural prescription is the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."*

8. It is submitted that filing of Form No. 67 as per the provisions of section 90 of the Act read with Rule 128(9) of the Rules is a procedural law and it cannot control or nullify the claim of FTC. It is further submitted that even in the context of sections 32AB, 80HHC (4), 80-IA (7), 10A (5) etc. of the Act, wherein there is a specific provision for disallowance of deduction / exemption if audit report is not filed along with the return, various High Courts of India have taken a view that filing of audit report is directory and not mandatory. Reliance in this regard is placed on the following cases:

> *1. CIT vs. Shivanand Electronics [209 ITR 63 (Bom. HC)]-Sec. 80J (6A)*
>
> *2. CIT vs. IA & IC Pvt. Ltd. [239 ITR 1 (Bom. HC)] - Sec. 32A (2B)*

9. In view of above, we observed that Form No. 67 filed in compliance to Rule 128 of the Rules by the assessee was very well available on record while the return of the assessee processed u/s. 143(1) of the Act and it is simply a

procedural requirement which in case of delay cannot be deprived the assessee of benefit as granted in section 90 of the Act. In the case of Brinda Rama Krishna vs. ITO [135 taxmann.com 358, Bangalore] the Coordinate Bench has directed the revenue to allow relief of FTC u/s. 90 of the Act where the Form 67 was filed after the due date, held that:

> *"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 (ii) 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."*

The ratio of the above judgment has been followed by the Bangalore Bench in the case of:

> *(a) 42 Hertz Software India (P) Ltd vs ACIT (IT Appeal no 29 of 2021) [2022 Tax pub . (DT) 1975]*
>
> *(b) Vithal Srinivasan vs. ADIT, Central Processing Centre, Bengaluru. [ITA No.1087/Bang./2022]*

The Mumbai Bench of the Appellate Tribunal has also followed the decision in the case of Brinda Rama Krishna v. ITO in:

(i) Sonakshi Sinha vs. CIT (A), National Faceless Appeal Centre (ITA No.1704/Mum/2022)

(ii) *(ii) Priya Savina Murzella vs. DCIT, CPC, Bengaluru (ITA No. 3238/Mum./2022)*

10. A useful reference can also be made to the decision of the Hon. Appellate Tribunal in the case of Shri Ritesh Kumar Garg v. ITO in ITA No.261/JP/2022 dated 15-9-2022 wherein in the identical circumstances the Hon. Tribunal held that the credit of the foreign tax paid cannot be disallowed on the ground that Form No. 67 is filed after the due date for filing the return of income u/s. 139(1) of the Act more so when the said For No. 67 was available on the record of the ITO while issuing the Intimation u/s. 143(1) of the Act.

11. In view of above discussion, we observed that stand of the revenue while processing the return of the assessee and overlooking the judicial precedents in favour of assessee by the Ld. CIT (A) while passing order u/s. 250 is not sustainable, rather it's a case of judicial indiscipline at the end of the Ld. CIT (A) which cannot be appreciated. In above terms, grounds of appeal taken by the assessee are allowed.

12. **In the result, appeal of the assessee is allowed.**

ITA No. 3035/Mum/2023 for AY 2021-22

13. Since we have already decided the similar grounds of appeal raised by the assessee in its favour vide ITA No. 3504/Mum/2023 for AY 2021-22 and this

appeal filed by the assessee pertains to proceedings u/s. 154 of the Act (which was filed with reference to intimation u/s 143(1) of the Act), now became academic in nature, hence no separate adjudication is required.

14. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 25th day January, 2024.

Sd/-	Sd/-
(N. K. CHOUDHRY)	(GAGAN GOYAL)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 25/01/2024

Sr. PS (Dhananjay)

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Asstt. Registrar)
ITAT, Mumbai