

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "F": NEW DELHI  
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER  
AND  
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

ITA No. 3420/Del/2023  
(Assessment Year: 2021-22)

Power and Energy Consultants India Pvt. Ltd, House No. U-136, Vikas Marg, Shakarpur, New Delhi-110092 (Appellant)	Vs. ITO, Ward-19(1), Delhi
<b>PAN: AAACG3625J</b>	(Respondent)

Assessee by :	Shri Harish Chaudhary, Ca Shri Mohit Chaudhary, CA Ms. Neetu Jain, CA
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Revenue by:	Shri Vivek Vardhan, Sr. DR
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Date of Hearing	13/02/2024
Date of pronouncement	15/02/2024

O R D E R

**PER M. BALAGANESH, A. M.:**

1. The appeal in ITA No.3420/Del/2023 for AY 2021-22, arises out of the order of the National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'Id. CIT(A)', in short] in Appeal No. ITBA/NFAC/S/250/2023-24/1058066054(1) dated 20.11.2023 against the order of assessment passed u/s 154 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 10.01.2023 by the Assessing Officer, CPC, Bengaluru (hereinafter referred to as 'Id. AO').
2. The assessee has raised the following grounds of appeal:-

*"That on the facts and in the circumstances of the appellant's case, National Faceless Appeal Centre erred in law by merely dismissing the appeal without considering the submission of the appellant and sustained the addition only on the basis of conjecture*

*and surmises without deciding the matter on merits of the case. It is well known fact that filling of Form 67 before filing of return of income is directory in nature not mandatory in nature. Hence, dismissal of appellate order is in law and liable to be deleted."*

3. We have heard the rival submissions and perused the material available on record. The assessee has electronically filed its return of income u/s 139(1) of the Act on 15.01.2022 declaring total income of Rs. 1,20,61,610/- wherein, a sum of Rs. 30,10,546/- was claimed as foreign tax credit. This return was duly processed u/s 143(1) of the Act on 25.10.2022, wherein, the foreign tax credit of Rs. 30,10,546/- being the relief claimed u/s 90 of the Act was denied to the assessee on the ground that Form 67 was not filed by the assessee in support of the same. Subsequently, on 19.11.2022, the assessee filed Form 67 vide acknowledgement No. 811297900191122 claiming foreign tax credit of Rs. 30,58,484/- and filed rectification petition u/s 154 of the Act on 23.11.2022. The same was dismissed on the ground that Form 67 was not filed before the end of the relevant assessment year. The assessee preferred an appeal before the Id CIT(A) who also held that in order to claim relief u/s 90 of the Act, the assessee is bound to file Form 67 before the end of the relevant assessment year. The Id. CIT(A) observed that in the instant case, the assessee had filed Form 67 claiming foreign tax credit only on 19.11.2022 which is beyond the end of the relevant assessment year and accordingly, the assessee was not eligible for relief u/s 90 of the Act.

4. It is not in dispute that the assessee had duly claimed the foreign tax credit in income tax return filed on 15.01.2022 itself under the relevant column schedule FSI. For the sake of convenience, the provisions of Rule 128 , 128(1), 128(2), 128(8) and 128(9) of the Income Tax Rules (hereinafter referred to as the 'Rules') are reproduced hereunder:-

*"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.*

.....

*(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 therefrom or paid by the assessee,—*
  - (a) from the tax authority of the country or the 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."*

5. Admittedly in the instant case, the Form 67 was filed by the assessee before the ld AO before the due date prescribed u/s 139(4) of the Act. This issue is no longer res integra in view of the decision of the coordinate Bangalore Bench in the case of Brinda Ramakrishna Vs. ITO 193 ITD 840 is as under:-

*"4. The Assessee claimed FTC of Rs. 4,73,779/- u/s. 90 of the Act read with Article 24 of India Australia tax treaty ("DTAA") in a revised return of income filed on 31.8.2018. The Assessee had not filed the Form 67 before filing the return of income. On realising the same, the Assessee filed Form 67 in support of claim of foreign tax credit on 18.04.2020. The revised return of income was processed by Centralized Processing Centre (CPC) electronically and intimation u/s 143(1) of the Act on 28.05.2020 was passed disallowing the claim of FTC.*

*5. The Assessee filed a rectification application before the AO on 15.06.2020 & 25.02.2021 and submitted that credit for FTC as claimed in the return should be given. In the rectification order dated 10.03.2021, the AO upheld the action on the ground that the Assessee has failed to furnish Form 67 on or before the due date of furnishing the return of income as prescribed u/s 139(1) of the Act which is mandatory according to Rule 128(9) of the Rules.*

*6. On appeal by the Assessee, the CIT(A) vide Order dated 03.09.2021 confirmed the Order of AO. The CIT(A) held that the Assessee has not filed Form 67 before the time allowed under section 139(5) of the Act, and therefore Form 67 is non-est in law. The CIT(A) also held that provisions of Rule 128 are mandatory in nature. The CIT(A) rejected the contention of the Appellant that filing of Form 67 is a procedural requirement and non-compliance thereof does not disentitle the Assessee of the FTC.*

*7. Aggrieved by the order of the CIT(A), the Assessee is in appeal before the Tribunal. The learned counsel for the Assessee submitted that disallowance of FTC is bad in law. He submitted that Section 90 of the Act provides that Government of India can enter into Agreement with other countries for granting relief in respect of income on which taxes are paid in country outside India and such income is also taxable in India. Article 24 of India Australia DTAA provides for credit for foreign taxes. Article 24(4)(a) is relevant in the present context. Same is extracted below:*

*"4. In the case of India, double taxation shall be avoided as follows:*

*(a) the amount of Australian tax paid under the laws of Australia and in accordance with the provisions of this Agreement, whether directly or by deduction, by a resident of India in respect of income from sources within Australia which has been subjected to tax both in India and Australia shall be allowed as a credit against the Indian tax payable in respect of such income but in an amount not exceeding that proportion of Indian tax which such income bears to the entire income chargeable to Indian tax:*

*It was submitted by him that section 90 of the Act read with Article 24(4)(a) provides that Australian tax paid shall be allowed as a credit against the Indian tax but limited to proportion of Indian tax. Neither section 90 nor DTAA provides that FTC shall be disallowed for non-compliance with any procedural requirements. FTC is Assessee's vested right as per 24(4)(a) of the DTAA read with Section 90 and same cannot be disallowed for non-compliance of procedural requirement that is prescribed in the Rules.*

*8. It was further submitted by him that Section 295(1) of the Act gives power to the CBDT to prescribe Rules for various purposes. Section 295(2)(ha) gives power to the Board to issue Rules for FTC. The relevant extract is as follow:*

*"(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters*

*(ha) the procedure for granting of rehref or deduction, as the case may be, of any income-tax paid in any country or specified territory outside India, under section 90 or section 90A or section 91, against the income-tax payable under this Act,"*

*9. It was submitted that the Board has power to prescribe procedure to granting FTC. However, the Board does not have power to prescribe a condition or provide for disallowance of FTC. The procedure prescribed in Rule 128 should therefore be interpreted in this context. Rule 128 is therefore a procedural provision and not a mandatory provision*

*10. It was further submitted that Rule 128(9) provides that Form 67 should be filed on or before the due date of filing the return of income as prescribed u/s 139(1) of the Act. However, the Rule nowhere provides that if the said Form 67 is not filed within the above stated time frame, the relief as sought by the assessee u/s 90 of the Act would be denied. The learned counsel for the Assessee submitted that in case the intention was to deny the FTC, either the Act or the Rules would have specifically provided that the FTC would be disallowed if the assessee does not file Form 67 within the due date prescribed under section 139(1) of the Act. It was submitted that that there are many sections in the Act which specifically deny deduction or exemption or relief in case the return is not filed within prescribed time. Reference was made to section 80AC, 80-1A(7), 10A(5) and 10B(5). Such language is not used in Rule 128(9). Therefore, such condition cannot be read into Rule 128(9).*

*11. It was further submitted that Filing of Form 67 is a procedural/directory requirement and is not a mandatory requirement. It was submitted that violation of procedural norm does not extinguish the substantive right of claiming the credit of FTC. Reliance was*

*placed on the decision of the Hon'ble Supreme Court, in the case of Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner, (1992 Supp (1) Supreme Court Cases 21) wherein it observed that:*

*"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 maymerely 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."*

*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 80IA(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 Fases:*

- CIT vs Axis Computers (India) (P.) Ltd [2009] 178 Taxman 143 (Delhi)*
- PCIT, Kanpur vs Surya Merchants Ltd [2016] 72 laxmann.com 16 (Allahabad)*
- CIT. Central Circle vs American Data Solutions India (P.) Ltd [2014] 45 taxmann.com 379 (Karnataka)*
- CIT-II vs Mantec Consultants (P.) Ltd [2009] 178 Taxman 429 (Delhi)*
- CIT vs 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) o Engineering Analysis Centre of Excellence P Ltd v CIT (2021) 125 taxmann.com 42 (SC) (Pg 106-109 of PB 2-Para 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."*

6. We find that the issue in dispute is governed by the provisions of Article 25 of DTAA between India and Bangladesh which reads as under:-

"ARTICLE 25 of DTAA

*"Subject to the provisions of Indian tax laws regarding the allowance as a credit against Indian tax of tax payable in any country other than India the Bangladesh tax payable under the laws of Bangladesh and in accordance with this Convention, whether directly or by deduction in respect of income from sources within Bangladesh which has been subjected to tax both in Bangladesh and India shall be allowed as a credit against Indian tax payable in respect of that income. The credit shall not, however, exceed that proportion of Indian tax which the income from sources within Bangladesh bears to the entire income subject to Indian tax."*

7. We find that Section 90 of the Act read with Article 25 provides that tax paid in Bangladesh shall be allowed as a credit against the Indian tax but limited to proportion of Indian tax. Neither section 90 of the Act nor DTAA provides that FTC shall be disallowed for non-compliance with any procedural requirements. FTC is Assessee's vested right as per Article 25 of the DTAA read with Section 90 of the Act and the same cannot be disallowed for non-compliance of procedural requirement that is prescribed in the Rules.

8. We find that, on perusal of the Rule 128(9) of the Rules, it is nowhere provided that if the said Form 67 is not filed within the prescribed time, the relief as sought by the assessee u/s 90 of the Act would be denied. Either way the disallowance of FTC u/s 90 of the Act is not provided in the Act or in the Rules. Hence, it can be safely concluded that the intention of the legislature is not to deny the FTC merely on the ground that Form 67 was filed belatedly. This makes the filing of Form 67 a procedural requirement and hence to be construed only directional in nature and not mandatory. It is trite law that violation of procedural norms does not extinguish the substantive right of claiming the FTC credit. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of Mangalore Chemical and Fertilizer Vs. Dy. Commission of Commercial Tax and others reported in 1992 AIR 152 dated 02.08.1991.

9. In our considered opinion, there are many sections in the Act which specifically deny deduction or exemption or relief in case the return/form is not filed within prescribed time limits such as sections 80AC, 80-1A(7), 10A(5) and 10A(5) etc, wherein

there is specific provision for disallowance of deduction/exemption if audit report is not filed along with the return. We find that various Hon'ble High Courts have taken a view that filing of audit report is directory and not mandatory. Such language is not used in Rule 128(9) of the Rules. Therefore, such condition cannot be read into Rule 128(9) of the Rules. Similar view has been taken by Delhi Tribunal in the case of Ajay Kumar Mishra Vs. DCIT in ITA No. 1835/Del/2022 dated 17.04.2023 for AY 2018-19.

10. In view of the aforesaid observations and respectfully following the judicial precedents, we direct the Id AO to grant FTC to the assessee. Accordingly, the ground raised by the assessee is allowed.

11. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 15/02/2024.

-Sd/-  
**(AMIT SHUKLA)**  
**JUDICIAL MEMBER**

-Sd/-  
**(M. BALAGANESH)**  
**ACCOUNTANT MEMBER**

Dated:15/02/2024

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi