

IN THE INCOME TAX APPELLATE TRIBUNAL  
“F” BENCH, MUMBAI

BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 3595 & 3597/Mum/2023  
(A.Y:2020-21 & A.Y:2022-23)

Vipul Parimal Thakore, 307,Beach Haven 1, Juhu Tara Road, Juhu S.O, Mumbai-400049.	Vs.	ADIT-CPC, Kautilya Bhavan, Bandra KurlaComplex, Mumbai-400051.
PAN/GIR No. : AAOPT7541H		
Appellant	..	Respondent

Appellant by :	Shri.Anuj Krisnadwala.AR
Respondent by :	Smt.Usha Gaikwad.Sr. DR

Date of Hearing	12.02.2024
Date of Pronouncement	13.02.2024

आदेश / O R D E R

**PER BENCH:**

These are the two appeals filed by the assessee against the separate orders of the National Faceless Appeal Centre, Delhi (NFAC) /CIT(A) passed u/sec 143(1) and U/sec 250 of the Act.

2. At the time of hearing, the Ld.AR of the assessee submitted that there is a delay of 10 days in filing the appeals before the Hon'ble Tribunal and has filed the application for condonation of delay. Whereas, the facts

mentioned in the application are reasonable and the Ld. DR has no specific objections. Accordingly, we condone the delay and admit the appeals.

3. Since the issues involved in these appeals are common and interlinked, for the sake of convenience, we shall take up the ITA No. 3595/Mum/2023 for the A.Y 2020-21 as lead case and facts narrated. The assessee has raised the following grounds of appeal:

*1. On the fact and circumstances of the case and in law, the intimation u/s 143(1) is bad in law.*

*2. On the fact and circumstances of the case and in law, the AO erred in not granting the foreign tax credit of Rs. 3,11,083/-*

*3. On the fact and circumstances of the case and in law, the AO erred in charging the excess interest u/s 234A, 234B and 234C of the Act respectively.*

*The appellant craves leave to add to, alter, amend, delete or modify any of the above-referred grounds of appeal.*

4. The briefs facts of the case are that, the assessee is an individual and derives income from salary and income from other sources. The assessee has filed the return of income- ITR 2 for the A.Y. 2020-21 on 31-03-2021 disclosing a total income of Rs.3,30,46,760/-Whereas, the assessee has included the foreign salary income of Rs.3,12,65,754/- in the total income disclosed

and also tax of Rs.3,11,083/- paid/deducted in USA was claimed as Foreign Tax Credit(FTC), as 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 USA and the return of income was processed under section 143(1) of the Act 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 the total income was assessed at Rs.3,30,46,770/- and the tax demand determined payable of Rs.4,23,600/- vide order dated 24-12-2021.

5. Aggrieved by the 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, as the Form.no.67 was not filed before the due date U/sec139(1) of the Act and the CIT(A) 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.

6. 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 paid in USA whereas the assessee has filed the Form.no. 67 along with return of income under section 139(4) of the Act and the Ld.AR substantiated the submissions with the paper book and the judicial decisions and prayed for allowing the appeal. Per Contra, the Ld. DR supported the order of the CIT(A).

7. 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 u/sec139(1) of the Act but before 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 31.03.2021 in order to comply with Rule 128 of Income Tax Rules. The CIT(A) has considered the fact of filing Form No.67 before the due date U/sec139(1) of the Act and is of the opinion that it is a mandatory requirement as per the I T Rules and the revenue has followed. 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.

8. We find 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. The Ld. AR relied on the following judicial decisions:

1. *Duraiswamy Kumaraswamy Vs. Pr.CIT [336 CTR 108(Madras)*
2. *Sonakshi Sinha Vs. CIT(A) [197 ITD 263 (MUM)*
3. *Shishir Agarwal Vs. ADIT (ITA No. 3029/Mum/2023)*

9. We find Hon'ble Tribunal in ITA No.29/Bang/2021 in M/s 42 Hertz Software India Pvt. Ltd., Vs. ACIT-3(1)(1), Bangalore dated 07.03.2022 has considered the facts & law on the filing of Form. No. 67 and observed at Page 4 Para 4 to 8 of the order 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 trite 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.*

10.. 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 Form No. 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 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 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."*

11. The Honble High Court of Madras in the case of Duraiswamy Kumaraswamy Vs. Pr.CIT (156 taxmann.com 445) dated 6-10-2023 has observed as under:

*"Section 90 of the Income-tax Act, 1961, read with rule 128 of the Income-tax Rules, 1962 and article 24 of DTAA between India and Australia - Double taxation relief - Where agreement exists (Elimination of double taxation - Eligibility of relief) Assessment year 2019-20 Whether filing of FTC in terms of rule 128 is only directory in nature - Held, yes - Whether where assessee claimed foreign tax credit (FTC) and filed Form-67 after due date specified for furnishing return under section 139(1) but before completion of assessment proceedings, and an intimation under section 143(1) was issued after filing of Form-67, rejection of assessee's FTC claim was not proper - Held, yes [Paras 11, 12 and 13] [In favour of assessee]"*

**HELD**

*In the present case, the returns were filed without FTC, however the same was filed before passing of the final assessment order. The filing of FTC in terms of the rule 128 is only directory in nature. The rule is only for the implementation of the provisions of the Act and it will always be directory in nature. This is what the Supreme Court had held that when the returns were filed without furnishing Form 3AA and the same can be filed the subsequent to the passing of assessment order. [Para 11]*

*Further, in the present case, the intimation under section 143(1) was issued on 26-3-2021, but the FTC was filed on 2-2-2021. Thus, the revenue is supposed to have provided the due credit to the FTC of the petitioner. However, the FTC was rejected by the revenue, which is not proper and the same is not in accordance with law. Therefore the impugned order is liable to be set aside. [Para 12]*

*Accordingly the impugned order is set aside. While setting aside the impugned order, the matter is remitted back to the revenue to make reassessment by taking into consideration of the FTC filed by the assessee. The revenue is directed to give due credit to the Kenya income of the assessee and pass the final assessment order. [Para 13]"*

12. 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.

13. In the result, the appeal filed by the assessee is allowed for statistical purposes.

**ITA No. 3597/Mum/2023, A.Y 2022-23.**

14. As the facts and circumstances in this appeal is identical to ITA No 2250/Mum/2023, for the A.Y 2020-21 (except variance in figures) and the decision rendered in above paragraph would apply mutatis mutandis for this appeal also. Accordingly, we allow the grounds of appeal of the assessee for statistical purposes.

15. In the result, both the appeals filed by the assessee are allowed for statistical purpose.

Order pronounced in the open court on 13.02.2024.

Sd/-

(GAGAN GOYAL)  
**ACCOUNTANT MEMBER**

Sd/-

(PAVAN KUMAR GADALE)  
**JUDICIAL MEMBER**

Mumbai, Dated .02.2024

KRK, PS

**Copy of the Order forwarded to :**

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

आदेशानुसार/ BY ORDER,