

आयकर अपीलिय अधिकरण, चण्डीगढ न्यायपीठ "बी" , चण्डीगढ
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "B", CHANDIGARH

HEARING THROUGH: VIRTUAL MODE

श्री आकाश दीप जैन, उपाध्यक्ष एवं श्री विक्रम सिंह यादव, लेखा सदस्य
BEFORE: SHRI. AAKASH DEEP JAIN, VP & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं. / ITA NO. 750/Chd/2022

निर्धारण वर्ष / Assessment Year : 2019-20

Pawan Kumar 5119, Modern Housing Complex, Mani Majra, Chandigarh-160001	बनाम	The Asstt. CIT CPC, Bangaluru
स्थायी लेखा सं./PAN NO: AFQPK3452D		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारित की ओर से/Assessee by : Shri Rajiv Ahuja, Advocate and
Shri Pawan Kumar, Assesse

राजस्व की ओर से/ Revenue by : Shri Dharam Vir, JCIT, Sr. DR

सुनवाई की तारीख/Date of Hearing : 27/02/2024

उद्घोषणा की तारीख/Date of Pronouncement : 04/03/2024

आदेश/Order

PER VIKRAM SINGH YADAV, A.M. :

This is an appeal filed by the Assessee against the order of the Ld. CIT(A), NFAC, Delhi dt. 30/11/2022 pertaining to Assessment Year 2019-20 wherein the assessee has taken the following grounds of appeal:

- "1. That the learned Commissioner Income Tax (Appeals) has grossly erred both in law and on facts in not allowing the relief u/s 90/90A of the Income Tax Act, 1961 of Rs. 86,35,117/- towards the foreign tax paid by the appellant.
2. That having regard to the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) has further erred both in law and on facts in not allowing the relief under section 90 or 90A of the Income Tax Act amounting to Rs. 86,35,117/- on account of foreign taxes paid and that too by not recording any facts and findings and without observing the principal of natural justice and by disregarding evidences and material placed on record by the appellant.
3. That the appellant craves the leave to add, modify amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are with prejudice to each other."

2. Briefly the facts of the case are that the assessee filed his return of income on 21/03/2020 declaring total income of Rs. 6,51,41,832/-. In the return of income, the assessee has shown his foreign sourced income in form of capital gains amounting to Rs

6,05,94,361/- and income from other sources amounting to Rs 43,94,317/- and has claimed tax relief under section 90 / 90A amounting to Rs. 86,35,117/-. Separately, Form no. 67 was e-filed on the same date disclosing the foreign sourced income and eligibility for tax relief. The returned income was processed by CPC, Bangalore and intimation under section 143(1) was issued on 18/03/2021 wherein the returned income was accepted, however, the foreign tax relief amounting to Rs 86,35,117/- was not allowed to the assessee and an amount of Rs 80,81,029/- was determined as payable by the assessee.

3. The assessee thereafter filed a grievance petition before the Assessing officer on 07.10.2021 which was disposed off by the AO on 12.01.2022 stating that "rectification is not possible as Form 67 was filed by the assessee after due date of filing of return u/s 139(1). Now, no action is pending with this office, therefore, grievance of the assessee is being disposed off."

4. Against the aforesaid intimation, the assessee moved in appeal before the Ld. CIT(A), NFAC Delhi wherein the decision of the AO/CPC to disallow the relief claimed by the assessee was held to be as per law as the Form No. 67 which was required to be filed under Rule 128(9) of the Income Tax Rules 1962 has been filed after the time limit as prescribed.

5. Against the said findings and order of the Ld. CIT(A), NFAC Delhi, the assessee is in appeal before us.

6. During the course of hearing, the Ld. AR submitted that during the year under consideration, the assessee has shown foreign sourced income of Rs. 6,49,88,678/- and has claimed foreign tax relief of Rs 86,35,117/-being the taxes paid in USA while filing his return of income which was filed on 21/03/2020. It was submitted that Form No. 67 which was required to be filed as per the Rule 128 was filed online with the Department on the same date i.e, 21/03/2020 and our reference was drawn to assessee's paperbook pages 37-86 and same was on the record of the Department well before the processing of the return of income by CPC and issue of intimation under section 143(1) dt. 18/03/2021.

7. It was submitted that while processing the return of income, the CPC Bangalore has not taken cognizance of Form No. 67 which was duly filed by the assessee which has resulted in the tax demand so raised by the CPC in terms of intimation issued under section 143(1) of the Act. It was submitted that neither Section 90 nor India-USA DTAA provides that Foreign Tax Credit (FTC) shall be disallowed for non compliance with any procedural requirement. It was submitted that FTC is the assessee's vested right as per Article 25(2)(a) of the India-USA DTAA r.w.s 90 of the Act.

8. It was further submitted that Rule 128(9) provides that Form No. 67 should be filed on or before the due date of filing the return of income as prescribed under section 139(1) of the Act. However, the Rule nowhere provides that if the said Form is not filed within due date, the benefit of FTC would be denied which the assessee is otherwise eligible to and in respect of which, necessary claim has been made in the return of income.

9. It was submitted that the matter is covered by the decisions of various Benches of the Tribunal and reliance was placed on the decisions of Coordinate Bangalore Benches in case of Ms. Brinda Rama Krishna Vs. ITO 193 ITD 840 and 42 Hertz Software India (P) Ltd. vs. ACIT 139 Taxmann.com 448, Coordinate Jaipur Benches in case of Suresh Kumar Doodi vs ACIT (ITA No. 164/JP/2023 dated 28/07/2023) and Ritesh Kumar Garg vs ACIT (ITA No. 261/JP/2022 dated 15/09/2023), Coordinate Calcutta Benches in case of Mahua Bagchi vs ACIT (ITA No. 03/kol/2023 dated 19/07/2023) and the recent decision of the Hon'ble Madras High Court in case of Duraiswamy Kumaraswamy vs PCIT reported in 2023 SCC online Mad 8026.

10. Per contra, the Ld. DR has drawn our reference to the findings of the Ld. CIT(A),NFAC, Delhi and it was submitted that in order to claim relief under section 90/90A, the assessee is required to file Form No. 67 within the time limit as provided under Rule 128(9) of the Income Tax Rules and filing of Form No. 67 is mandatory in nature and not just procedural requirement as claimed by the assessee. It was submitted that in the instant case, the assessee had filed the return of income u/s 139(4) of the Act wherein he has claimed credit for the foreign taxes paid, however, Form 67 has not been filed within the prescribed time period within the due date u/s 139(1) of

the Act and therefore, the claim has been rightly rejected by the AO and sustained by the Id CIT(A). It was submitted that both rules and notification dated 19.09.2017 in explicit terms provides that necessary forms for claiming tax credit have to be filed before the due date for filing return of income under section 139(1) of the Act. Further, reference was drawn to notification no. 100/2022 dated 18/08/2022 whereby the due date for filing and claiming foreign tax credit has been extended to the end of the assessment year as per section 139(4) of the Act. It was submitted that said relaxation has been made applicable from 1/04/2022 and no such relaxation is available to the assessee for the period relevant to assessment year 2019-20.

11. We have heard the rival contentions and perused the material available on record. We have dealt with a similar issue in case of **Bachaspatimayum Umakanta Sharma vs DCIT, Central Circle -1, Chandigarh** (in ITA NO. 740/Chd/2022 dated 18/04/2023) and the relevant findings therein read as under:

"7. We have heard the rival contentions and perused the material available on the record. The limited issue under consideration is where there is a delay in filing of Form No. 67 as required under Rule 128 of the Income Tax Rules, would the same result in denial of the FTC which the assessee is otherwise eligible to claim and has duly claimed while filing the return of income and which has been duly computed and acknowledged by the CPC, Bangalore as so claimed by the assessee while processing the return of income so filed by the assessee.

8. In this regard, we refer to the decision of Coordinate Bangalore Benches in case of Ms. Brinda Rama Krishna Vs. ITO (supra) wherein the assessee had claimed FTC under section 90 r/w Article 24 of the India – Australia Tax Treaty in the revised returned income. However the assessee did not file Form No. 67 before filing the return of income. On realizing the same, the assessee filed Form No. 67 subsequently and thereafter the revised returned income was processed by CPC and intimation under section 143(1) was issued disallowing the claim of FTC. In the said factual background, the Coordinate Bangalore Benches vide its order dated 17/11/2021 has held that Rule 128(9) of the Rules does not provide for disallowance of FTC in case of delay in filing Form No. 67. It was further held that filing Form No. 67 is not mandatory but a directory requirement and further DTAA overrides the provisions of the Act and the Rules cannot be contrary to the Act and the matter was accordingly decided allowing the necessary relief to the assessee.

8.1 Thereafter, Coordinate Bangalore Benches in another decision dated 7/03/2022 in case of M/s 42 Hertz Software India (P) Ltd. Vs. ACIT(supra) following the earlier decision in case of Ms. Brinda Rama Krishna Vs. ITO (supra) has held that on perusal of provisions of Rules 128(8) and 128(9), it is clear that one of the requirement of Rule 128 for claiming FTC is that Form No. 67 is to be submitted by the assessee before filing the return of income and the said requirement cannot

be treated as mandatory rather it is directory in nature for the reason that Rule 128(9) does not provide for disallowance of FTC in case of delay in filing Form No. 67. It was further held that it is a trite law that DTAA overrides the provisions of the Act and the Rules and therefore the FTC cannot be denied to the assessee.

8.2 Subsequently, the Mumbai Benches in case of Sonakshi Sinha Vs. CIT (supra) has taken a similar view and the relevant findings are contained at para 12 of the order dated 20/09/2022 which read as under:

"12. We have carefully considered the rival contention and perused the orders of the lower authorities. Short question in this appeal is whether assessee is entitled to foreign tax credit even when form number 67 required to be filed according to the provisions of rule 128 (9) of the Income Tax Rules on or before the due date of filing of the return of income, not complied by the assessee, but same was filed before the completion of the assessment proceedings. Precisely, the fact shows that assessee filed return of income u/s 139 (1) of the income tax act. In such a return of income, she claimed the foreign tax credit. However, form number 67 was filed during the course of assessment proceedings and not before the due date of filing return. Rule 128 (9) of the Income-tax Rules, 1962 provides that 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 due date specified for furnishing the return of income under sub-section (1) of section 119, in the manner specified for furnishing such return of income. We find that coordinate bench in 42 Hertz Software India (P.) Ltd. (Supra) wherein following its earlier order in the case of Ms. Brinda Rama Krishna (supra) it was held 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 and that 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 67. Same view is also taken by a coordinate division bench in Vinodkumar Lakshmiopathi v. CIT(A)[IT Appeal No. 680/Bang/2022, 6-9-2022. It is well settled that while laying down a particular procedure, if no negative or adverse consequences are contemplated for non-adherence to such procedure, the relevant provision is normally not taken to be mandatory and is considered to be purely directory. Admittedly, Rule 128 does not prescribe denial of credit of FTC. Further the Act i.e. section 90 or 91 also do not prescribe timeline for filing of such declaration on or before due date of filing of ROI. Further rule 128 (4) clearly provides the condition where the foreign tax credit would not be allowed. Rule 128 (9) does not say that if prescribed form would not be filed on or before the due date of filing of the return no such credit would be allowed. Further by the amendment to the rule with effect from 1 April 2022, the assessee can file such form number 67 on or before the end of the assessment year. Therefore, legislature in its own wisdom has extended such date which is beyond the due date of filing of the return of income. Further, the fact in the present case is quite distinct than the issue involved in the decision of the honourable Supreme Court in case of Wipro Ltd (supra). Here it is not the case of violation of any of the provisions of the act but of the rule, which does not provide for any consequence, if not complied with. Therefore, respectfully following the decisions of the coordinate bench on this issue, we hold the assessee is eligible for foreign tax credit, as she has filed form number 67 before completion of the assessment, though not in accordance with rule 128 (9) of The Income-tax Rules, which provided that such form shall be filed on or before the due date of filing of the return of income. Accordingly, ground number 2 of the appeal of the assessee is allowed."

8.3 In the aforesaid decision, the Coordinate Mumbai Benches have taken note of the amendment to Rule 128(9) wherein the time limit has been extended for filing Form 67 on or before the end of the assessment year and have also referred to the Hon'ble Supreme Court decision in case of Wipro Ltd and has held that delay in filing Form 67 is not the case of violation of any of the provisions of the Act but of the rule, which does not provide for any consequence, if not complied with and therefore, even though there is a delay in filing Form 67, the same cannot lead to denial of foreign tax credit.

8.4 We find that the similar view has been taken in case of Anuj Bhagwati Vs. DCIT (supra) by the Coordinate Mumbai Benches in its decision dt. 20/09/2022 wherein it was held that filing of Form No. 67 is not mandatory but its directory in nature. Similarly, following the earlier decision, in the case of Nirmala Murli Relwani Vs. Asst. DIT (supra), the Coordinate Mumbai Benches vide its order dt. 01/12/2022 has held that mere delay in filing Form No. 67 as per the provisions of Rule 128(9) will not preclude the assessee from claiming the benefit of FTC in respect of tax paid outside India.

8.5 We, therefore, find that the various Coordinate Benches have consistently held that the delay in filing Form No. 67 cannot result in denial of the FTC as the same have to be read as directory and not mandatory in nature.

8.6 In the instant case, it is not in dispute that the assessee has not filed Form No. 67 while filing the return of income however, the same has been filed well before the processing of the return of income and thereafter the intimation under section 143(1) has been issued by the CPC. We therefore find that the CPC has erred in not considering the Form No. 67 so filed by the assessee while processing the return of income and therefore the claim of the FTC by the assessee has been wrongly denied to the assessee.

8.7 As far as the decision of the Coordinate Visakhapatnam Benches in case of Muralikrishna Vaddi (supra) is concerned, in that case, Form No. 67 was filed after scrutiny proceedings were initiated by the AO and that too with a delay of more than two years and in the said factual and distinguishable background however taking into consideration the provision of Rule 128(9) of the Income Tax Rules, the Coordinate Bench vide its order dated 14/06/2022 has held that the word "shall" has been used in Rule 128(9) which shows that filing of Form 67 within prescribed time limit is mandatory in nature and not directory. Here we find that firstly the relevant provisions of the DTAA as well as Act which allow relief to the assessee towards FTC and overrides the rules has apparently not been brought to the notice of the Coordinate Bench and thus not been taken into consideration by the Coordinate Bench and secondly, even the earlier decision of Coordinate Bangalore Benches in case of M/s 42 Hertz Software India (P) Ltd. though brought to its notice has not been considered while passing the said order. Further, as we have noted above, there are series of decisions which have been rendered by the various Coordinate Benches both prior to and even subsequent to the aforesaid decision where a consistent view has been taken holding that the delay in filing Form No. 67 cannot result in denial of the FTC as the same have to be read as directory and not mandatory in nature. We therefore find that the said decision of Coordinate Visakhapatnam Benches cannot act as a binding precedent specially taking into consideration the fact that the relevant provisions of the Act r/w DTAA have not been considered and the fact that a consistent view has been taken by the various Benches of the Tribunal which have held that the provisions of Rule 128(9) as directory in nature and not mandatory.

8.8 In the instant case, the Id CIT(A) NFAC, having acknowledged the fact that there are series of decisions rendered by different Benches of the Tribunal in favour of the assessee, has decided to follow the solitary decision of the Vishakapatnam Benches which is in favour of the department for the reason that there are conflicting views taken by the different Benches of the Tribunal and there is no decision of the jurisdictional Tribunal and therefore, he follows the

decision of the Vishakhapatnam Benches. Firstly, the Id CIT(A), NFAC is acting as a quasi judicial authority and is not acting as an tax administrator and therefore, what is relevant for him to appreciate is that where there is no decision of the jurisdictional Tribunal Benches and conflicting decisions rendered by the non-jurisdictional Tribunal Benches, there are two reasonable construction possible in the facts and circumstances of the present case and it is a settled legal preposition that where two reasonable constructions of a taxing provision are possible in a given case, the construction in favour of the assessee should be followed and necessary relief be allowed to the assessee. In this regard, necessary guidance can be drawn from the decision of the Hon'ble Supreme Court in the matter of CIT vs. Vegetable Products Ltd. (1972) 88 ITR 192 (SC) wherein it was held that "if two reasonable constructions of a taxing provisions are possible, that construction which favours the assessee must be adopted". Therefore the mere fact that there is no jurisdictional Tribunal decision on the matter, the assessee cannot be denied the relief where there are decisions elaborating the construction of the FTC provisions as directory and not mandatory and in favour of the assessee and the Id CIT(A) NFAC therefore has erred in not following the said decisions even though rendered by the non-jurisdictional Benches of the Tribunal.

8.9 In view of the aforesaid discussion and in the entirety of facts and circumstances of the case, we are of the considered view that the assessee cannot be denied the claim of FTC merely for the reason that there was a delay in filing the Form No. 67 while processing his return of income and the matter is thus decided in favour of the assessee."

12. Further, we find that the **Hon'ble Madras High Court** in case of **Duraiswamy Kumaraswamy vs PCIT** (*supra*), following the Hon'ble Supreme Court decision in case of CIT vs G.M. Knitting Industries (P) Ltd 376 ITR 456, has upheld the aforesaid view and has held that filing of Form 67 for claiming foreign tax credit in terms of Rule 128 is only directory in nature as the rules are only for implementation of the provisions of the Act and will always be directory in nature. Further, in the facts of the relevant case before it, the Hon'ble High Court held that where the Form 67 was filed well before processing of the return of income and issue of intimation u/s 143(1), the Revenue was supposed to provide due credit for foreign tax credit and rejection of the said claim was not proper and cannot be sustained in accordance with law.

13. In the instant case as well, we find that the assessee has filed his return of income u/s 139(4) on 21/03/2020 and on the same date, Form 67 has been e-filed, therefore, both the return of income and Form 67 was very much on record before the processing of return of income and issue of intimation by CPC u/s 143(1) on 18/03/2021 and therefore, there is no legal and justifiable basis to deny the claim of relief of foreign

taxes paid against the tax liability determined under the provisions of the Act. The AO is accordingly directly to allow the necessary relief of foreign taxes paid as so claimed by the assessee and the matter is accordingly decided in favour of the assessee.

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

Order pronounced in the open Court on 04/03/2024.

Sd/-

आकाश दीप जैन
(AAKASH DEEP JAIN)
उपाध्यक्ष / VICE PRESIDENT

Sd/-

विक्रम सिंह यादव
(VIKRAM SINGH YADAV)
लेखा सदस्य/ ACCOUNTANT MEMBER

AG

Date: 04/03/2024

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
5. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar