

**IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'SMC', KOLKATA**

[Before Shri Sonjoy Sarma, Judicial Member &  
Shri Rakesh Mishra, Accountant Member]

**I.T.A. No. 256/Kol/2024**  
**Assessment Year : 2021-22**

|                   |    |                            |
|-------------------|----|----------------------------|
| Basudev Sharma    | vs | ITO, Ward-2(3), Alipurduar |
| PAN: BBAPS 5455 H |    |                            |
| Appellant         |    | Respondent                 |

|                       |                                  |
|-----------------------|----------------------------------|
| Date of Hearing       | 23.04.2024                       |
| Date of Pronouncement | 24.04.2024                       |
| For the Assessee      | Shri Siddharth Agarwal, Advocate |
| For the Revenue       | Shri Subhro Das, Addl. CIT       |

**ORDER**

**Per Sonjoy Sarma, JM:**

The captioned appeal filed by the assessee pertaining to Assessment Year 2021-22 (in short 'AY') is directed against the order passed u/s 250 of the Income Tax Act, 1961 (in short the 'Act') by the Commissioner of Income-tax (Appeals), ADDL/JCIT(A), Thane [in short ld. 'CIT(A)'] dated 10.01.2024 which is arising out of the assessment order framed u/s 143(1) of the Act dated 27.06.2022. The assessee has raised the following grounds of appeal:

- "i. For that on the facts and in the circumstances of the case, the ld. ADDL/JCIT(A) was not justified in confirming the action of the AO (CPC) in disallowing the benefit of Rs. 5,90,423/- claimed u/s 90/90A while processing the return u/s 143(1).*
- ii. For that the ld. ADDL/JCIT(A) ought to have allowed relief of Rs. 5,90,423/- which was rightly claimed u/s 90/90A.*
- iii. For that the ld. ADDL/JCIT(A) failed to appreciate that belated filing of Form No. 67 was not fatal to the claim u/s 90.*

*iv. The appellant craves leave to add further grounds of appeal or after the grounds at the time of hearing.”*

2. The sole grievance of the assessee raised in the appeal is against the finding of ld. CIT(A) confirming the action of the CPC disallowing the foreign tax credit of Rs. 5,90,423/- claimed u/s 90 of the Act read with Article 22 of India-Bhutan agreement for avoidance of double taxation and prevention of fiscal evasion with foreign countries on account of late filing of Form-67.

3. At the outset, ld. counsel for the assessee submitted that the only reason for denying the alleged foreign tax credit was on account of late filing of Form-67. Apart from the said reason of late filing of Form-67 all other conditions required to be fulfilled for claiming foreign tax credit u/s 90 of the Act stands fulfilled. It was submitted that the case of the assessee is squarely covered by various judgments of Hon'ble Courts as well as Tribunals which are enumerated below:

*i) Decision of the Hon'ble Madras High Court in the case of Duraiswamy Kumaraswamy vs. PCIT [W.P.No. 5834 of 2022] dated 06-10-2023*

*ii) Decision of the Hon'ble Bangalore Tribunal in the case of Brinda Rama Krishna vs. ITO [ITA No. 454/Bang/2021]*

*iii) Decision of the Hon'ble Mumbai Tribunal in the case of Sonakshi Sinha vs. CIT(NFAC) (2023) 222 TTJ 376 (Mum) [ITA No. 1704/Mum/2022]*

*iv) Decision of the Hon'ble Kolkata Tribunal in the case of Atanu Mukherjee vs. ITO [ITA No. 439/Kol/2022]*

*v) Decision of the Hon'ble Kolkata Tribunal in the case of Sobhan Lal Gangopadhyay vs. ADIT [ITA No. 782/Kol/2022]*

*vi) Decision of the Hon'ble Kolkata Tribunal in the case of Mahua Bagchi -vs.-ACIT, Circle-61, Kolkata [ITA No. 3/Kol/2023]"*

4. Although, the ld. DR supported the order of lower authorities failed to controvert the fact that the only reason for denying the claim of foreign tax credit was late filing of Form-67.

5. We have heard rival contentions and perused the records placed before us. In the case of assessee foreign tax credit for assessment year in question was denied due to late filing of Form-67. The assessee earned income from Bhutan and claimed foreign tax credit. Except for the delayed uploading of Form-67 no other discrepancy has been noticed by the revenue authorities for allowing of foreign tax credit. This issue has come for our consideration on various occasions and it has been consistently held that filing of Form-67 is directive in nature and not mandatory and, therefore, just for the sake of delay in filing of Form-67, the assessee should not be denied the claim of foreign tax credit. In one of the decisions of this Tribunal in the case of Sobhan Lal Gangopadhyay (supra) releant finding of this Tribunal reads as under:

*"4. We have heard rival contentions and perused the material placed before us.*

*5. We observe that the assessee is an individual and filed its return of income on 06/10/2020 for Assessment Year 2020-21 declaring income of Rs.42,35,370/-. During the year under consideration, the assessee has claimed to be out of India for employment in South Korea from 16/04/2018 to 08/09/2019 under the assignment with Tata Daewood Commercial Vehicle Company Ltd. The fact about the assessee being*

outside India from 16/04/2018 to 08/09/2019, is not in dispute before us. In the return of income, assessee has claimed relief u/s 90 of the Act at Rs.3,50,106/- being tax paid in Republic of Korea. In the return processed u/s 143(1)(a) of the Act, the said claim of relief u/s 90 of the Act was not provided to the assessee on account of the reason that the prescribed Form No. 67 read with Clause 8 of Rule 128, was not filed belatedly i.e., after the due date of filing return u/ s 139(1) of the Act. For this very reason that Form No. 67, was not filed before the due date of filing of return, the said claim was denied.

6. Before us, ld. Counsel for assessee referred to the decision of the Coordinate Bench in the case of Sonakshi Sinha (supra), wherein it has been held that filing of Form No. 67 is directory in nature and not mandatory. Relevant extract of the Tribunal's decisions is reproduced hereunder:-

"011. The learned authorised representative submitted that honourable Supreme Court was seized of the matter where in the same subsection twin conditions were mentioned the honourable High Court and lower appellate authorities considered one of the condition as mandatory and one of the condition as directory. He submitted that here section 90 or 91 does not lay down any condition of filing any form. The requirement of filing of the form is provided under rule 128 of The Income Tax Rules. Therefore here the situation is quite different. He submitted that these conditions have been considered by the coordinate bench in case of Brinda Ramakrishna.

012. 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 139 in the manner specified for furnishing such return of income. We find that coordinate bench in 42 Hertz Software India (P.) Ltd v. ACIT [2022] 139 taxmann.com 448 (Bangalore - Trib.) wherein following its earlier order in the case of Ms. Brinda Rama Krishna vs. ITO [2022] 135 taxmann.com 358 (Bang - Trib) 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 No. 67. Same view is also taken by a coordinate division bench in Vinodkumar Lakshmipathi V CIT(A) NFAC ITA No.680/Bang/2022 06.09.2022. 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 then 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.

013. Other grounds of appeal are also revolving around the issue of claim of foreign tax credit and therefore those are allowed.

014. Accordingly appeal of the assessee is allowed."

7. Above finding of the Tribunal is squarely applicable on the facts of the case in hand and the same remains uncontroverted by the ld. D/R by way of placing reliance on any other binding precedents in its favour. We, therefore, respectfully following the same, are inclined to hold that the Assessing Officer ought not to have denied the relief u/s 90 of the Act merely for delay in filing of Form 67. Thus, effective ground of the assessee is allowed.

8. In the result, appeal of the assessee is allowed.”

6. Recently, Hon'ble Madras High Court in the case of Duraiswamy Kumaraswamy (supra) dealt with the similar issue and decided the writ petition in favour of the assessee which reads as follows:

“9. In the present case, the petitioner initially worked at Kenya and subsequently, he became the resident of Indian from the assessment year 2018-2019 and 2019-2020. The petitioner admitted the fact that he has filed his return in India on 10.08.2019. The intimation under Section 143(1) was issued on 26.03.2020. However, he has filed the return without Form-67 which is required to be filed under Rule 128 to claim the benefit of FTC and the same came to be filed on 02.02.2021 which was well before the completion of the assessment year. The intimation under Section 143(1) was issued from the CPC only on 26.03.2021.

10. According to the learned counsel appearing for the respondent, the procedure under Rule 128 is mandatory and cannot be considered as directory in nature. The petitioner has filed his return including his Kenya income along with his Indian Income tax and claimed the benefits of FTC. However, the petitioner would submit that it is not mandatory. The Rule cannot make anything mandatory and it can be directory in nature, that too before the Assessment, the claim to avail the benefits of FTC is filed. Therefore, it would be the amounts to due compliance under the Act. The petitioner referred to the Judgment of the Hon'ble Supreme Court in the case of Commissioner of Income Tax, Maharashtra vs. G.M. Knitting Industries (P) Limited in Civil Appeal Nos.10782 of 2013 and 4048 of 2014 dated 24.06.2015, wherein it was held that Form 3AA is required to be filed along with the return of income to avail the benefit and even if it

is not filed, but the same is filed during assessment proceedings but before the final order of assessment is made that would amount to sufficient compliance.

11. The law laid down by the Hon'ble Apex Court in *Commissioner of Income-Tax, Maharashtra v. G.M.Knitting Industries (P) Limited* in Civil Appeal Nos.10782 of 2013 and 4048 of 2014 dated 24.06.2015, which was referred above, would be squarely applicable to the present case. 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 Hon'ble Supreme Court had held in the above cases when the returns were filed without furnishing Form 3AA and the same can be filed the subsequent to the passing of assessment order.

12. Further, in the present case, the intimation under Section 143(1) was issued on 26.03.2021, but the FTC was filed on 02.02.2021. Thus, the respondent is supposed to have provided the due credit to the FTC of the petitioner. However, the FTC was rejected by the respondent, which is not proper and the same is not in accordance with law. Therefore the impugned order is liable to be set aside.

13. Accordingly the impugned order dated 25.01.2022 is set aside. While setting aside the impugned order, this Court remits the matter back to the respondent to make reassessment by taking into consideration of the FTC filed by the petitioner on 02.02.2021. The respondent is directed to give due credit to the Kenya income of the petitioner and pass the final assessment order. Further, it is made clear that the impugned order is set aside only to the extent of disallowing of FTC claim made by the petitioner and hence, the first respondent is directed to consider only on the aspect of rejection of FTC claim within a period of 8 weeks from the date of receipt of copy of this order.”

7. Respectfully following the ratio laid down by the Hon'ble Courts referred (supra) and the consistent view taken by this Tribunal, we find merit in the contention of ld. counsel for the assessee and hold that since all the conditions are fulfilled for making such claim, the assessee deserves to get the foreign tax

credit for the assessment year in question, We, therefore, reverse the finding of ld. CIT(A) and allow the issue raised by the assessee against the disallowance of foreign tax credit.

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

Order pronounced in the open court on 24.04.2024.

Sd/-

Sd/-

(Rakesh Mishra)  
Accountant Member

(Sonjoy Sarma)  
Judicial Member

Dated: 24.04.2024

*Biswajit, Sr. PS*

Copy of the order forwarded to:

1. Appellant- Basudev Sharma, C/o. Subash Agarwal & Associates, Advocates, Siddha Gibson, 1, Gibson Lane, Suite 213, 2<sup>nd</sup> Floor, Kolkata – 700069.
2. Respondent – ITO, Ward-2(3), Alipurduar.
3. Ld. CIT
4. Ld. CIT(A)
5. Ld. DR

True Copy

By Order

Assistant Registrar  
ITAT, Kolkata Benches, Kolkata