IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI RAKESH MISHRA, ACCOUNTANT MEMBER

ITA No.541/KOL/2024
Assessment Year: 2020-21

Ramakrishna Rao Chintalapudi C/o, Subash Agarwal & Associates, Advocates, Siddha Gibson, 1, Gibson Lane, Suite 213, 2nd floor, Kolkata-700069. (PAN: AQEPC5978R)	Vs	Income Tax Officer, Ward-2(3), Alipurduar
(Appellant)		**(Respondent)**

Present for:

Appellant by : Shri Siddarth Agarwal, Advocate
Respondent by : Shri Sailen Samadder, Addl. CIT, Sr. DR

Date of Hearing : 05.06.2024
Date of Pronouncement : 12.06.2024

O R D E R

PER RAKESH MISHRA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. Commissioner of Income Tax (Appeals), Addl/JCIT(A)-9, Mumbai (hereinafter referred to as "the Ld. CIT(A)" passed u/s. 250 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for AY 2020-21 vide Appeal No. ITBA/APL/S/250/2023-24/1057291834(1) dated 23.10.2023.

2. Grounds of appeal raised by the assessee are reproduced as under:

"1. 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.4,63,266/- claimed u/s. 90/90A while processing the return u/s. 143(1).

2. For that the Ld. Addl./JCIT (A) ought to have allowed relief of Rs.4,63,266/- which was rightly claimed u/s. 90/90A.

3. 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.

4. The appellant craves leave to add further grounds of appeal or alter the grounds at the time of hearing."

3. This appeal of the assessee is delayed by 84 days and a condonation petition along with an affidavit has been placed on file wherein the assessee has prayed that the delay in filing appeal before the Tribunal may kindly be condoned and the case be heard on merits. The affidavit sworn by the assessee, which is available in the file, is extracted as under:

"1. That the return filed by your petitioner for the A Y: 2020-21 was processed u/s 143(1) dated 15.12.2021 wherein the claim of relief u/s 90 to the tune of Rs.4,63,266/- had been denied.

2. That thereafter, your petitioner, had filed a rectification petition and CPC had passed a rectification order on 03.08.2022 wherein they once again denied the relief claimed u/s 90 to the tune of Rs. 4,63,266/-. However, your petitioner was not aware of that rectification order since the same was not communicated to him either physically or through email.

3. Later, in the beginning of the year 2023 when your petitioner checked the income tax portal thereupon the said rectification order was noticed.

4. Your petitioner then once again filed a rectification request on 23.02.2023. Thereafter, he also contacted Shri Rajeev Parik, CA on or around 2nd week of March, 2023 for second opinion and whereupon your petitioner was advised by Shri Rajeev Parik to file an appeal against the intimation order u/s. 143(1) before the Ld. CIT(A) and accordingly the appeal was filed before the Ld. CIT(A) with a delay of around of 437 days.

5. That the Ld. CIT(A) issued a single notice of hearing on 13.10.2023. However, no compliance could be made to the said since your petitioner, who is a senior citizen (aged about 75 years) was suffering from various ailments. Your petitioner did not know that the appellate order was passed on 23.10.2023 wherein the Ld. CIT(A) dismissed the appeal on the ground of delay. The appellate order and notice of hearing were never served physically.

6. That thereafter on or around 1st week of March, 2024 when the said appellate order was located while searching the old emails. Your petitioner immediately contacted Shri Siddharth Agarwal, Advocate and handed over all the necessary papers for filing an appeal against the said appellate order before the Ld. ITAT, Kolkata.

7. That then Sri Siddharth Agarwal, Advocate prepared the appeal papers and finally the same was filed on 15.03.2024 before the Hon'ble Tribunal with a delay of 85 days.

8. That your petitioner prays that in the facts and circumstances stated above, the delay of 85 days in filing appeal before the Ld. Tribunal be condoned and the appeal be heard on merit of the case."

3.1. The assessee has substantiated the reasons for the delay with the reason that he is a senior citizen aged about 75 years, was suffering from various ailments and was not aware that the appellate order was passed on 23.10.2023. Thereafter, on or around 1st week of March, 2024 when the said appellate order was located while searching the old e-mails, he immediately contacted his Advocate and handed over all the necessary papers for filing an appeal against the said appellate order. At the time of hearing, since ld. DR did not raise any serious objection for condoning the delay, we hereby condone the delay and admit the appeal for hearing.

4. Though the assessee has raised four grounds of appeal but the sole issue involved in this appeal is confirming the disallowance of Rs.4,63,266/- claimed u/s. 90/90A of the Income Tax Act, 1961 (hereinafter referred to as the "Act").

5. Brief facts of the case are that the assessee filed his return of income on 25.03.2021 declaring a taxable income of Rs.24,10,660/-. The AO, CPC assessed the same with a tax liability of Rs.4,77,170/- by an order u/s. 143(1) of the Act dated 15.12.2021. Thereafter, the assessee made a rectification petition u/s. 154 of the Act but the same was not allowed. Thereafter, the assessee preferred an appeal before the Ld. CIT(A), who, without going into the merits of the case, dismissed the assessee's appeal on account of delay of 254 days because the reasons assigned were not sufficient for condonation of delay. Aggrieved, the assessee is in appeal before the Tribunal.

6. We have heard the rival submissions and perused the material available on record. We note that the AO disallowed relief of Rs.4,63,266/- claimed u/s. 90/90A inspite of Form No. 67 being filed in due course of time and has in one way refused to take cognizance of material evidences like submission of Form No. 67 against the taxes paid in foreign country and also not provided a reasonable opportunity of being heard. We also note that the order of Ld. CIT(A) is an ex parte order dismissing the appeal of the assessee for the reason that the condonation of delay was not justified. We further note that section 250(6) casts a duty on the Ld. CIT(A) to pass an order in appeal which should state the points for determination and a decision as well as the reason for arriving at such decision. In the present case before us, even though the assessee has made its submissions along with supporting documents before the Ld. AO which are on record, the Ld. CIT(A) has not adjudicated the ground after examining the assessment records while disposing of the appeal. We also note that the Ld. CIT(A) upheld the view of the AO and has not passed a reasoned order for arriving at the decision, as is required u/s 250(6) of the Act. We further note that in Ajji Basha Vs. CIT (2019) 111 taxmann.com 348 it has been held that a speaking order on merits with reasons and findings is to be passed by the Commissioner (Appeals) on the basis of ground raised in the assessee's appeal. For the reason of being a senior citizen aged about 75 years and suffering from various ailments and apparently not well versed with the legal requirements and procedure for filing the appeal, the delay in filing the appeal ought to have been condoned by the Ld. CIT(A) and the appeal should have been decided on merit. A perusal of Form No. 35 shows that in the statement of facts in the appeal filed before the Ld. CIT(A), the assessee has mentioned that it had filed Form No. 67 vide Acknowledgment No. 306 dated 25.03.2021 and in the ground of appeal it has been mentioned that the Ld. AO/CPC did not

take cognizance of the relevant document/evidence/explanation submitted by the assessee in the course of assessment and the AO erred in disallowing relief of Rs.4,63,266/- claimed u/s. 90/90A of the Act inspite of submission of Form No. 67 in due course of time.

7. As regards ground of condonation of delay, it is mentioned in column 15 that "*since I had the first available remedy to make a Rectification application u/s. 154 against the order u/s. 143(1) and thereon the rectification order has been received on 23.02.2023.*" since the assessee had filed the rectification application which was disallowed it had the option to file an appeal u/s. 143(1) of the Act before the Commissioner. However, without deciding the appeal on merit, the appeal was dismissed as the Ld. CIT(A) was of the view that the appeal ought to have been filed against the rectification order u/s. 154 of the Act dated 22.02.2023.

8. The right to file an appeal is a statutory right and the order u/s. 143(1) is appealable to the first appellate authority i.e. the Ld. CIT(A). therefore, merely because the rectification application was rejected and the assessee requested for credit of foreign tax paid, the claim cannot be said to have been obliterated by rejection of the rectification application, if it is otherwise admissible. The assessee had income under the head *"salary"* in Bhutan for which Form No. 67 was filed on 25.03.2021 while the return was also filed on 25.03.2021 which was filed under sub-section (4) of section 139 of the Act. The rectification order was passed on 03.08.2022. Since Form No. 67 was filed before the return was processed u/s. 143(1) on 15.12.2021, the claim of relief u/s. 90 to the tune of Rs.4,63,266/- should have been allowed for the reasons mentioned subsequently.

9. The only issue in this case is non-allowance of the credit for the foreign tax paid in Bhutan. Before proceeding further, we would like to

reproduce rule 128 of the Income-tax Rules, 1962 (the Rules) which relates with foreign tax credit as under:

"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"

10. We further note 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 22 of DTAA between India and Bhutan provides for credit for foreign taxes. Article 22(2) is relevant in the present context same is extracted below:

"ARTICLE 22

METHODS FOR ELIMINATION OF DOUBLE TAXATION

1.....

2. *Double taxation shall be eliminated as follows:*

(i) In India:

(a) Where a resident of India derives income which, in accordance with the provisions of this Agreement, may be taxed in Bhutan, India shall allow as a deduction from the tax on the income of that resident, an amount equal to the tax paid in Bhutan.

Such deduction shall not, however, exceed that portion of the tax as computed before the deduction is given, which is attributable, as the case may be, to the income which may be taxed in Bhutan.

(b) Where in accordance with any provision of the Agreement income derived by a resident of India is exempt from tax in India, India may nevertheless, in calculating the amount of tax on the remaining income of such resident, take into account the exempted income.

(ii) In Bhutan:

(a) Where a resident of Bhutan derives income which, in accordance with the provisions of this Agreement, may be taxed in India, Bhutan shall allow as a deduction from the tax on the income of that resident, an amount equal to the tax paid in India.

Such deduction shall not, however, exceed that portion of the tax as computed before the deduction is given, which is attributable, as the case may be, to the income which may be taxed in India.

(b) Where in accordance with any provision of the Agreement, income derived by a resident of Bhutan is exempt from tax in Bhutan, Bhutan may nevertheless, in calculating the amount of tax on the remaining income of such resident, take into account the exempted income."

11. Thus, Section 90 of the Act read with Article 22(2) of the DTAA provides that tax paid in Bhutan shall be allowed as a credit against the tax payable in India but limited to the proportion of Indian tax. Neither section 90 nor the DTAA provides that FTC shall be disallowed for non-compliance with any procedural requirement. Foreign Tax Credit is an assessee's vested right as per Article 22(2) of the DTAA read with Section 90 and the same cannot be disallowed for non-compliance with procedural requirement that is prescribed in the rules.

12. Further, we would like to mention 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 u/s 139(1) of the Act. However, the rule nowhere provides that if the said Form No. 67 is not filed within the required time frame, the relief as sought by the assessee u/s 90 of the Act would be denied. It is therefore evident that if the intention of the legislature were to deny the foreign tax credit, either the Act or the rules would have specifically provided that the foreign tax credit would be disallowed if the assessee does not file Form No. 67 within the due date prescribed under section 139(1) of the Act. We further note 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 FTC. The following decisions support the claim of the assessee:

i. *CIT vs. G.M. Knitting Industries (P) Ltd. 71 Taxmann.com 35(SC)*
ii. *Brinda Ramakrishna vs. ITO 193 ITD 840 (Bang.)*
iii. *42 Hertz Software India Pvt. Ltd. vs. Asst. CIT, Ita No.29/Bang/2021*

iv. Duraiswamy Kumaraswamy vs. PCIT, W.P No.5834 of 2022

13. Hon'ble Supreme Court, in the case of Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner, (1992 Supp (1) Supreme Court Cases 21) in respect of compliance with the procedural requirements have 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 may merely 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."*

14. Further, in the case of Engineering Analysis Centre of Excellence Private Limited vs the Commissioner of Income-tax & Anr. Civil Appeal Nos. 8733-8734 of 2018 & Ors., Hon'ble Supreme Court have held as under that the provisions of DTAA shall override the provisions of the Income-tax Act unless they are more beneficial to the assessee:

> *165.The conclusions in the aforestated paragraph have no direct relevance to the facts at hand as the effect of section 90(2) of the Income Tax Act, read with explanation 4 thereof, is to treat the DTAA provisions as the law that must be followed by Indian courts, notwithstanding what may be contained in the Income Tax Act to the contrary, unless more beneficial to the assessee.*

15. We have gone through the decisions of the coordinate Benches and concur with their findings in this regard that filing of Form No. 67 is directory and not mandatory and the credit for foreign taxes paid cannot be denied merely on the delay in filing the Form No. 67. In the case of M/s. 42 Hertz Software India Pvt. Ltd. Vs the Assistant Commissioner of Income Tax, Circle – 3 (1)(1), Bangalore, ITA No. 29/Bang/2021 ITAT, BANGALORE it is held that:

> *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 ITA 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/evidences 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.

16. In Vikash Daga Vs ACIT Circle – 3 (1) Gurgaon ITA No.2536/Del/2022 , the ITAT DELHI BENCH 'H', NEW DELHI vide order dated 14/06/2023 have held that:

8. We have given a thoughtful consideration to the orders of the authorities below. The undisputed fact is that the assessee holds a foreign tax credit certificate for Rs.1887114/-. In our considered opinion filing of form 67 is a procedural / directory requirement and is not a mandatory requirement. Therefore, violation of procedural norms does not extinguish the substantive right of claiming the credit of FTC. We accordingly direct the AO to allow the credit of FTC and hold that rule 128(9) of the Rules 3 does not provide for disallowance FTC in case of delay filing of form 67 is not mandatory but a directory requirement and DTAA overrides the provisions of the Act and the Rules cannot be contrary to the Act. 9. In the result, the appeal filed by the assessee is allowed.

17. Similarly, in the case of Ashish Agrawal Vs. Income Tax Officer, Ward-12(1), Hyderabad ITA No. 337/Hyd/2023 ITAT HYDERABAD BENCHES "B", have held vide order dated 26/09/2023 that:

11. As far as the issue of FTC is concerned, learned AR placed reliance on the decision in the case of Ms. Brinda Rama Krishna (supra). In the case of Ms. Brinda Rama Krishna (supra), the Bench considered the issue in the light of the provisions of DTAA, section 295(1) of the Act, the decisions of the Hon'ble Apex Court in the case of Mangalore Chemicals & Fertilizers Ltd. Vs. Deputy Commissioner (1992 Supp (1) SCC 21), Sambhaji Vs. Gangabai (2008) 17 SCC 117 and a lot many decisions of the Hon'ble Apex Court including the case in Union of India Vs. Azadi Bachao Andolan (2003) 263 ITR 706 (SC) etc. and reached a conclusion that since Rule 128(9) of the Rules does not provide for disallowance of FTC in the case of

delay in filing Form 67 and such filing within the time allowed for filing the return of income under section 139(1) of the Act is only directory, since DTAA over rides the Act, and the Rules cannot be contrary to the Act.

12. We find from Article 25(2)(a) of the DTAA that where a resident of India derives income which, in accordance with the provisions of the convention, may be taxed in the United States, India shall allow as a deduction from the tax on the income of the resident an amount equal to the income tax paid, paid in the United States, whether directly or by deduction. In view of this provision over riding the provisions of the Act, according to us, Rule 128(9) of the Rules has to be read down in conformity thereof. Rule 128(9) of the Rules cannot be read in isolation. Rules must be read in the context of the Act and the DTAA impacting the rights, liabilities and disabilities of the parties.

13. In the case of Purushothama Reddy Vankireddy (supra) also the Co-ordinate Bench of the Tribunal, in the similar circumstances, allowed the appeal of assessee for FTC claim. Respectfully following the same, we are of the considered Page 6 of 8 ITA No. 337/Hyd/2023 opinion that the decisions relied upon by the assessee are applicable to the facts of the case and the grounds raised by the assessee are accordingly allowed.

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

18. We have also gone through the decision of the Hon'ble Madras High Court in the case of *Duraiswamy Kumaraswamy vs. PCIT (supra)* and find that the facts are identical to the facts of the case of the assessee and the decision is squarely applicable to the facts of the case of the assessee. In that case, the petitioner was resident of India and had filed Indian ITR and claimed benefit of FTC u/s 90/91 of the Act r.w. Article 24 of the India-Kenya DTAA. During the year, he had income of both Kenya and India but while filing the Indian ITR for the impugned assessment year 2019-20, the Form No. 67 prescribed in rule 128 of the rules for claiming FTC was inadvertently not uploaded along with the ITR which was uploaded on 02.02.2021. The return was processed on 26.03.2021, however, the credit of FTC was not given effect to and the request made to the CPC to give effect to the FTC was not accepted and intimation along with notices of demand was received. The assessee also could not succeed with the rectification application filed and approached the CIT u/s 264 of the Act and at the same time filed a writ

petition before the Hon'ble Madras High Court. It was stated by the respondent-department that rule 128 is mandatory and cannot be considered as directory in nature. The petitioner referred to the judgment of the Hon'ble Supreme Court in the case of CIT vs. G.M. Knitting Industries (P) Ltd. Civil Appeal Nos.10782 of 2013 and 4048 of 2014 dated 24.06.2015. The Hon'ble High Court allowed the Writ Petition in favour of the assessee by holding as under:

"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. W.P.No.5834 of 2022

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."

19. Respectfully following the order of the Hon'ble Madras High Court in the case of *Duraiswamy Kumaraswamy vs. PCIT (supra)* and concurring with the views held by the coordinate Benches of the Tribunal (supra), we hold that merely because the assessee could not file Form No. 67 within the prescribed time limit as per the provisions of rule 128(9) of the Income-tax rules, 1962, as it stood during the year under consideration, will not preclude the assessee from claiming the

benefit of foreign tax credit in respect of taxes paid outside India. Therefore, the claim of the assessee is allowed and the Assessing Officer is directed to give benefit of foreign tax credit in respect of tax paid outside India by the assessee in accordance with law and the DTAA between India and the Bhutan. Since in the instant case the assessee had filed Form No. 67 along with the return of income filed u/s. 139(4) of the Act, the foreign tax credit was allowable. The AO is directed to allow the credit in accordance with the provisions of section 90 read with DTAA. Accordingly, grounds no. 1, 2 and 3 of the appeal are allowed.

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

Order pronounced in the open court on 12th June, 2024.

Sd/-	Sd/-
(Sanjay Garg)	(Rakesh Mishra)
Judicial Member	Accountant Member

Dated: 12th June, 2024

JD, Sr. P.S.
Copy to:

1. The Appellant:
2. The Respondent.
3. Addl./JCIT(A)-9, Mumbai
4. The CIT,
5. DR, ITAT, Kolkata Bench, Kolkata

//True Copy// By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata