IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SHRI KESHAV DUBEY, JUDICIAL MEMBER

ITA No.247/Bang/2024
Assessment Year: 2018-19

Krishnakumar Balasankara Subramanian 296, Ferns City, Dodanakundi, ORR Marathahalli Bengaluru 560 037 Karnataka **PAN NO : AGGPB1386G**	**Vs.**	DCIT Circle-3(3)(1) Bangalore
APPELLANT		**RESPONDENT**

Appellant by	:	Smt. Preeti Goel, A.R.
Respondent by	:	Sri V. Parithivel, D.R.

Date of Hearing	:	13.05.2024
Date of Pronouncement	:	31.07.2024

O R D E R

PER KESHAV DUBEY, JUDICIAL MEMBER:

This appeal by assessee is directed against order of NFAC for the assessment year 2018-19 dated 6.12.2023. The assessee raised following grounds of appeal:

1. *"Learned AO has erred in the facts and circumstances of the case and in law in issuing the impugned rectification order dated 1 9 March 2020 under Section 143(1) of the Act disallowing the claim for Foreign Tax Credit (FTC) of INR preferred by the Appellant under Article 23(2) of the India-Japan Double Taxation Avoidance Agreement (DTAA) read with Section 90 of Act and thereby raising a demand of INR 6,81,430 incorrectly.*

2. *Learned AO has erred in the facts and circumstances of the case and in law by imposing interest of INR 1 under Section 234B and 234C of the Act.*

3. *The Learned AO has erred in the facts and circumstances of the case and in law in issuing the intimation order dated 6 March 2021 under*

Section 245 of the Act, 21 January 2022 under Section 143(1) of the Act and 3 August 2022 under Section 143(1) of the Act adjusting the Mura of INR 59.190, INR 7,480 and INR 28,400 for the AY 2020-21. AY 2021-22 and AY 2022-23 respectively against the demand of AY 2018-19.

4. *Learned AO has in the facts and circumstances of the case and in law erred in imposing interest of INR 1,97,971 for delay in payment on impugned demand under section 220(2) of the Act thereby incorrectly raising a demand of INR 7,84,331.*

5. *Learned AO in the facts and circumstances of the case and in law erred in disregarding documentary evidence filed in support of the relief claimed under Article 23(2) of the India-Japan DTAA read with Section 90 of the Act i.e. Form 67 duly filed by the Appellant at the time of filing the revised return of income (ROI) including proof of taxes deducted/ paid in Japan alongn with computation of FTC / judicial precedents cited.*

6. *Learned AO has in the facts and circumstances of the case in law erred in not considering re filed by the Appellant."*

2. Facts of the case for regarding not allowing credit for Foreign Tax Relief claimed u/s.90 are that in the order u/s 143(1) of the Act dated 19.03.2020, the AO(CPC) accepted total income of Rs 88,49,370 as returned by the assessee for the AY. 2018-19. The tax payable was determined at Rs 32,02,555/-. However, the tax relief amounting to Rs 5,13,047/- which was claimed he assessee has been denied. The assessee is a Resident received salary from Nokia Japan during the relevant previous salary received has been shown—under Income from Salaries in the Revised Return filed for AY 2018-19. The assessee filed Form No 67 on 29.32019. As per Rule 128, the assessee was under obligation to declaration in form no.67 within the due date of filing of the return of income. Tax relief u/s 90 was disallowed as Form No 67 was filed late. The assessee filed form no.67 on 29.3.2019, as required under rule 128 of the IT Rules to claim the foreign tax credit of Rs.1,31,592/-. As per rule 128, the assessee was under obligation to file declaration no.67 within the due date of filing of the return of income. The of filing of return of the income in the case of assessee was 31.082018. The assessee has filed

form no.67 after due date of filing of the return of income. The assessee has submitted that the requirement of filing of form no.67 is procedural and non-compliance of such procedural requirement should not result into denial of foreign tax credit. On the facts of the case, the issue which required adjudication is that the assessee is entitled to claim foreign tax credit where form no.67, as required under rule 128 of the I T Rule, 1962 was not filed within the due date of filing of the return of income for the relevant assessment year.

2.1 As per Rule 128 of the Income-tax Act, 1962, credit of foreign tax paid by the assessee in the country or specified territory outside India is allowed In the year in which the income corresponding to such tax has been offered to tax or assessed to tax in India. Further, as per sub-rule 8 of Rule 128, statement of income from foreign country and tax paid in foreign country on such income, shall be furnished in Form- No. 67 for availing foreign tax credit. Further sub-rule 9 of Rule 128 states that statement in Form No. 67 shall be furnished on or before the due date for filing of return of income u/s 139(1) of the Act. Sub-rule 1 of Rule 128 states that a resident assessee shall be allowed a credit of foreign tax paid by him in a country or specified territory outside India, in the year in which the income corresponding to such tax has been offered to tax or assessed to tax in India. This foreign tax credit is subject to the manner and to the extent as specified in this rule. Subrule 1 of Rule 128 make mandatory for the Åssessing Officer to allow foreign tax credit to the resident assessee in the manner and to the extent as specified in this rule. Thus, the language used in sub-rule 1 is mandatory provision for the Assessing officer. In sub-rule 2 to 10 of Rule 128, everywhere the word 'shall' has been used. Once it is mandatory for the Assessing officer to allow foreign tax credit to the resident assessee, the manner and extent of providing such foreign tax credit becomes mandatory. The question is whether use of word "shall" as indicated in Rule 128(8) which requires the assessee to file form no. 67 before

the due date of filing of return of income u/s 139(1) of the IT Act, is to be construed as mandatory or directory. On appeal, the ld. CIT(A) dismissed the appeal of the assessee on this ground. Against this assessee is in appeal before us.

3. We have heard the rival submissions and perused the material available on record. We find that similar issue came for consideration before this Tribunal in the case of Vinod Kumar Lakshmipathi in ITA No.680/Bang/2022 for the assessment year 2018-19, the Tribunal vide order dated 6.9.2022 held as under:

"4. We have heard the rival submissions and perused the materials available on record. The claim of the assessee has been denied while processing return of the assessee u/s 143(1) of the Income-tax Act,1961 ['the Act' for short] dated 11.6.2020 on the reason that assessee has not filed the Form No.67 along with return of income so as to claim the foreign tax credit. However, the same has been filed before the Ld. CIT(A) on 22.9.2018. The assessee has made the contention before Ld. CIT(A) that assessee has offered the foreign income of Rs.2,01,024/- and also paid tax on it at Rs.63,342/- and levying of additional tax of Rs.28,431/- is amounting to double taxation. In our opinion, the plea of the assessee is justified. The assessee has filed the copy of Form No.67 before Ld. CIT(A). He ought to have given direction to give credit for foreign tax which has been paid as per Form 67.

5. Further, we note that on identical issue, This Tribunal in the case of Brinda Rama Krishna (in ITA No. 454/Bang/2021 for AY.2018-19), order dated 17.11.2021 held 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. Therefore, non-furnishing of Form No.67 before the due date u/s 139(1) of the Act is not fatal to the claim for FTC. The findings of this Tribunal are reproduced below:

> *"2. The Assessee is an individual and during the previous year relevant to AY 2018-19 an ordinary resident in India. The Assessee worked with Ernst & Young Australia from 20.11.2017 till 16.05.2019. Since her global income was taxable in India, the Assessee offered to tax salary income earned for services rendered in Australia for the period from December 2017 to March 2018 to tax in India. The Assessee claimed foreign tax credit ("FTC") for taxes paid in Australia.*
>
> *3. There is no dispute that the Assessee is entitled to claim FTC. Rule 128 of the Income Tax Rules, 1962 (Rules) provides for giving FTC and reads thus:*
>
> *"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."

One of the requirements of Rule 128 for claiming FTC is provided by Rule 128 (8) & (9) of the Rules and the same reads thus:

"(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 due date specified for furnishing the return of income under subsection (1) of section 139, in the manner specified for furnishing such return of income."

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 nonest in law. The CIT(A) also held that provisions of Rule 128 are mandatory in nature. The CIT(A)rejected the contention of the Assessee that filing of Form 67 is a procedural requirement and noncompliance 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 Article 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 relief 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-IA(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 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."

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 cases:

- *CIT vs Axis Computers (India) (P.) Ltd [2009] 178 Taxman 143 (Delhi)*
- *PCIT, Kanpur vs Surya Merchants Ltd [2016] 72 taxmann.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)
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. In view of the above order of the Tribunal, we direct the AO to give credit for foreign tax as per Form 67 filed on 22.9.2018 before Ld. CIT(A) after due verification.

7. In the result, the appeal filed by the assessee is partly allowed for statistical purposes."

3.1 In view of the above order of the Tribunal, we remit this issue to the file of ld. AO to give credit for foreign tax as per Form 67 filed by the assessee before the Department on 29.3.2019, which is placed in the record in paper book page 41 to 49 and decide the issue as directed in that order. Ordered accordingly.

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

Order pronounced in the open court on 31st July, 2024

Sd/-	**Sd/-**
(Chandra Poojari)	**(Keshav Dubey)**
Accountant Member	**Judicial Member**

Bangalore,
Dated 31st July, 2024.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5 Guard file

By order

Asst. Registrar,
ITAT, Bangalore.