

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.176/Ind/2024
(Assessment Year: 2019-20)

Asha Rani Pandya 389 1AD- Scheme no.74C Vijay Nagar, Indore (Appellant / Assessee)	Vs.	DCIT/ACIT-1(1) Indore (Respondent/ Revenue)
PAN: AQQPP7081A		
Assessee by	Ms. Shreya Jain & Shri Prakash Jain, ARs	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	27.06.2024	
Date of Pronouncement	28 .06.2024	

ORDER

Per Vijay Pal Rao, JM :

This appeal by assessee is directed against the order dated 24.01.2024 of the Commissioner of Income Tax (Appeal), National Faceless Appeal Centre, Chennai for A.Y.2019-20. The assessee has raised following grounds of appeal:

"1. That impugned order passed by the Ld. CIT(A) sustaining the order passed by the Ld. CPC u/s 143(1) is bad in law, without jurisdiction, it is based on incorrect interpretation of law

and without allowing proper and reasonable opportunity of being heard, moreover the facts have also been incorrectly construed.

2.1 That on the facts and in the circumstances of case and in law, the Ld. CIT(A) erred in sustaining the order passed by the Ld. CPC u/s 143(1) without appreciating the fact that the Ld. CPC disallowed the relief of Rs. 20,18,809/- claimed under section 90 on the Income of Rs. 84,53,976/- earned in USA and included in the total Income in the return of Income filed in India without assigning any reason.

2.2 That on the facts and in the circumstances of case and in law, the Ld. CIT(A) erred in sustaining the order passed by the Ld. CPC u/s 143(1) without appreciating the fact that the Ld. CPC failed to appreciate the fact that when overseas Income is included in the total income, the assessee is entitle for relief of overseas taxes paid under section 90 as per applicable double taxation avoidance agreement, if any, or for appropriate tax relief under section 91 of the Act in case there are no such agreements in existence with the respective country."

2. Ld. AR of the assessee has submitted that the assessee is a citizen of USA and presently residing in India. The assessee is about 85 years old and filed her return of income on 29.07.2020. The assessee claimed credit of tax paid in USA of Rs.20,18,809/- under section 90 of Income Tax Act. However, the CPC while processing return of income u/s 143(1) has denied the claim of credit of tax paid on the income earned in USA due to delay in filing the form 67. On appeal the CIT(A) has confirmed the disallowance made by the CPC on the reason that the assessee has failed to file form 67 within the due date for filing return of income u/s 139(1) of the Act. Ld. AR has submitted that the assessee initially filed the form 67 along with

return of income however, due to some mistakes the form 67 was revised and was again filed on 28th May 2021. Thus, Ld. AR has submitted that the delay in filing the form 67 cannot lead to disallowance of claim of credit of foreign tax as filing of form 67 is only directory and not mandatory. In support of her contention she has relied upon following decisions:

- (i) Deepak Shimoga Padmaraju vs. ADIT 162 taxmann.com 96
- (ii) Duraiswamy Kumaraswamy vs. PCIT of Hon'ble Madras High Court dated 06.10.2023 in writ petition no.5834 of 2022
- (iii) Ms. Brinda Ramakrishna vs. ITO 193 ITD 840

2.1 Thus, the Ld. AR has submitted that when the assessee filed form 67 and was available before the CIT(A) then the claim of credit of foreign tax paid on the income earned in USA ought to have been allowed by the CIT(A) having co-terminus power of the AO.

3. On the other hand, Ld. DR has submitted that the credit of foreign tax is not available as form 67 was not filed within the period of limitation specified u/s 139(1) of the Act. He has referred Rule 128 of the Income Tax Rules wherein the word "shall" is used for filing the form 67 before time limit for filing the return of income u/s 139(1) of the Act. He has relied upon the impugned order of the CIT(A).

4. We have considered the rival submissions as well as relevant material on record. The CIT(A) has confirmed the disallowance of FTC in para 4.1 to 4.3 of the impugned order as under:

“4.1 The Appellant is aggrieved by the denial of foreign tax credit of Rs.20,18,309/-, which according to CPC is not available when form 67 has not been filed before the time limit specified u/s.139(1). A notice was issued to the Appellant to establish the fact on filing of form no.67 to claim relief of taxes u/s.90. In response to the same, the Appellant, vide letter dated 25/10/2023 submitted that the relief u/s.90 cannot be denied for non filing of form 67 since income earned in USA of Rs.84,53,976/- has been offered to tax in the total income declared of Rs.20,04,65,150/-.

4.2 The facts of the case and the compliance to the rules laid down u/r. 128 of the Income tax Rules, 1962 are carefully considered. It is an admitted fact that Form no.67 has not been filed by the Appellant before the time limit specified u/s.139(1) for AY 2019-20 and such omission is attempted to be justified by the Appellant on the pretext that filing of Form No.67 is not mandatory relying on certain judgements. With due respect to the judicial authorities who had rendered in favour of the tax payers like that of the Appellant, it is brought on record that filing of Form no.67 is mandatory to claim the benefit of Foreign Tax Credit.

4.3 Taxes are paid in an alien nation, the particulars of which can never be verified by the Income tax Authorities. It is for such reason that Form no.67 which consists of 4 parts has a verification column, affirming that the claim of the FTC to the best of the knowledge and belief of the Appellant is true and correct. Providing credit of FTC in the absence of such verification is not logical while the authorities erred in failing to comprehend that the claims are otherwise not verifiable. Further, Rule 128 incorporates the word "Shall", which imply that filing of Form no.67 before the time limit u/s.139(1) [now extended to 139(4)] is directory/mandatory. Having failed to file

the same, the CPC was correct in denying the credit of FTC paid abroad. The corresponding ground of appeal is therefore dismissed.”

4.1. Thus, the payment of tax of Rs.20,18,809/- on USA income has not been disputed by the CIT(A) however, the claim of the assessee on foreign tax credit was denied on the ground that the assessee has not filed form No.67 within the limitation specified u/s 139(1) of the Act.

4.2 At the outset, we note that the Hon'ble Madras High Court in case of Duraiswamy Kumaraswamy vs. PCIT (supra) has held in para 11 to 13 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.

12. Further, in the present case, the intimation under Section 143(1) was issued on 26.03.2021, but the FTC was filed on 02.2021. 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.”

4.3 Thus, it is clear that the Hon'ble High Court has held that the filing of form no. 67 for claim of FTC in terms of Rule 128 is only directory in nature. Once the assessee has filed this form no.67 then the claim of foreign tax credit of the assessee ought to have been allowed by the CIT(A). The Bangalore Benches of the Tribunal in case of Deepak Shimoga Padmaraju (supra) has considered this issue in para 5 to 6 as under:

“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, nonfurnishing 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 ITA No.680/Bang/2022 Vinodkumar Lakshmipathi, Bangalore Page 9 of 10 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.

5. Respectfully following the above judgment, we direct the AO to give credit for foreign tax credit as per Form No.67 filed on 22/10/2022 after due verification.

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

4.4 Thus, it is clear that Bangalore benches of the tribunal has taken a consistent view on this issue as in the earlier decision in case of Ms. Brinda Ramkrishna vs. ITO (supra) has also considered this issue and held that Rule 128(9) of the Income tax Rules does not provide for disallowance of foreign tax credit in case of delay in filing in form 67 as it is directory requirement not mandatory. Further the DTAA overrides the provisions of the Act and Rule cannot be contrary to the Act. Following said order the Bangalore Benches of the Tribunal in case of Deepak Shimoga Padmaraju vs. ADIT (supra) has taken a same view. Accordingly in view of decisions cited above we find that this issue is covered by the decision relied upon by the assessee and consequently the AO is directed to allowed the claim of foreign tax credit after verification of the quantum.

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

Order pronounced in the open court on 28.06.2024.

Sd/-
(B.M. BIYANI)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Indore, 28 .06.2024

Patel/Sr. PS

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore