IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH KOLKATA

BEFORE SHRI SONJOY SARMA, JUDICIAL MEMBER
AND SHRI RAKESH MISHRA, ACCOUNTANT MEMBER

ITA No. 1497/KOL/2024
Assessment Year: 2019-20

Rahul Anand 5th Floor, RoomNo.505, P-41, Princep Street, Kolkata- 700072, West Bengal	Vs	ADIT CPC Electronic City Post Office, Bangalore, Karnataka-560500
(Appellant)		**(Respondent)**
PAN: AFMPA3724Q		

Present for:
Assessee by : Shri Rajat Agarwal, AR
Revenue by : Shri Supriya Pal, DR

Date of Hearing : 24.09.2024
Date of Pronouncement : 06.12.2024

O R D E R

PER RAKESH MISHRA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of the Ld. Commissioner of Income-tax (Appeals), Kolkata-22 (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 2019-20 dated 16.05.2024, which has been passed against the intimation u/s 143(1) of the Act issued by the CPC, Bengaluru.

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

"(1) For that Commissioner of Income Tax Appeal-22, Kolkata (in short "CIT (A)") erred on only relying on procedural Notification No. 9 dated 19 September 2017 for not filing Form-67 before filing the return. Here as per section 295(1) of the Act, CBDT has been given the power to prescribe the procedure for granting foreign tax credit and board does not have power to prescribe for disallowance of foreign tax credit.

(2) For that CIT (A) erred in trite law that DTAA overrides the provisions of the Act and the Rules, as held by various Hon'ble High Courts, which has also been confirmed by Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT [2021] 125 taxmann.com 42/281 Taxman 19/432 ITR 471.

3) For that CIT(A) has ignored to follow judicial hierarchy as the recent jurisdictional ITAT Bench-B Kolkata order in case of Sukdev Sen Vs ACIT, Circle-61, Kolkata (1.T.A. No.78/Kol/2024) on 18.04.2024 was submitted during appeal proceedings and this order states 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.

(4) For that Assistant Director of Income Tax, CPC, (in short "AO") and CIT (A) erred in not following the provisions specified in under section 90 of Income Tax Act 1961 for avoidance of double taxation and granting of credit of taxes paid outside India on income which is taxed outside India even after claiming the details of foreign tax credit in Income Tax Return filed before the Income Tax Authority.

(5) For that AO and CIT (A) erred in not following the principle of natural justice. As AO rejected petition u/s 154 of the act without giving any opportunity of being heard, as petition was filed for allowing the foreign tax credit after filing relevant form 67 of the Income Tax Rules and CIT (A) erred in not considering the submissions dated 24.04.2024 and dated 03.05.2024 submitted by the appellant during the course of appeal proceedings.

6) For that AO and CIT (A) erred in not following the spirit of Law and CBDT circular No. 14(XL-35), dated 11-4-1955 which directs AO not to take advantage of assessee ignorance and/or mistake and ignoring the principle of natural justice. Under no circumstances Assessee can be asked to pay double tax on same income.

(7) For that under the facts and circumstances of the case the AO and CIT (A) had erred in re-computing Interest under 234C and Interest under 234B.

(8) For that your Appellant assessee craves leave to add or alter and modify the grounds of appeal before or at the time of appeal hearing."

3. Brief facts of the case are that the assessee filed his return of Income on 27.08.2019. After filing the return, assessee received intimation u/s 143(1) of the Act dated 23.03.2021 and found that relief under section 90 of the Act had not been allowed amounting to Rs 73,658/-. All the details of foreign income and taxes was provided by Appellant in the income tax return under Schedule FSI: Details of Income from outside India and tax relief. The reason for not granting Foreign Tax Credit (in short 'FTC') was not given in the intimation u/s 143(1) of the Act. After consulting with a Chartered Accountant assessee came to know that Rule 128

relates to claiming foreign tax credit. Moreover, Form No.67 was to be filed within the due date of filing return of income for claiming credit of taxes paid outside India. However, assessee filed belated Form No. 67 on 08.04.2021. Against the intimation u/s 143(1) of the Act in which the credit for FTC was not allowed, the assessee filed a rectification application which was rejected vide order dated 14.06.2021by the Ld. AO/ CPC. The assessee filed an appeal before the Ld. CIT(A) and cited several case laws in support of claim of FTC. However, the Ld. CIT(A) dismissed the appeal by giving the following findings: -

> *"Discussions and Findings:-*
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> *I have carefully examined the material at hand including the impugned orders, the submissions of the appellant, the citations and orders relied upon by him as well as the citations that are more broadly applicable to the facts of this case. The brief facts of the case are that the assessee is a resident individual and had filed his return of income on 31.08.2019 for the A.Y. 2019-20. The assessee was working in India till January 2019 and he left India in the month of February 2019 for an assignment in Thailand. During the assessment year under consideration, the assessee had earned gross salary of Rs.28,19,740/- in India and salary of Rs.5.29.210/- for rendering services outside of India from Deloitte Touche Tohmatsu Jaiyos Advisory CO Ltd. Thailand. In the Intimation u/s 143(1) and in the rectification order u/s 154, the claim of the tax relief of Rs.73.658/- u/s 90/90A of the IT Act. Therefore, the appeal is being disposed ground wise as below.*
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> *Ground No 1,2 & 3*
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> *On perusal of the rectification order dated 13.06.2021, it is observed that the claim of tax relief of Rs.73,658/- Under Section 90/90A of the IT Act was disallowed due to non-filing of the form 67 on or before the due date of furnishing the return of income as prescribed u/s 139(1) of the Act.*
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> *It is pertinent to mention here that the CBDT also through its Notification No. 9 dated 19 September 2017 categorically mandates that for claiming credit of any taxes in a country or territory specified outside India, the assessee shall file Form No. 67 under sub-rule (9) of rule 128 of the Income-tax rules, 1962 before the due date for filing the return of income under section 139(1) the Income-tax Act, 1961 and also mandates that filing of Form No. 67 shall precede the filing of the return..*
>
> *In the instant case, the Form No 67 was not filed along with the return of income. Although a claim foreign tax credit was made in the return of income and the same was not accompanied by the Form No 67 which is mandated by the law. Accordingly, the CPC processed the return of income without allowing the credit for foreign tax deduction. Afterwards, the appellant filed the Form No. 67 on 08.04.2021 which is belated and hence, non-est as per law. Therefore, the CPC, Bengaluru has rightly denied to rectify the order u/s 143(1) as there was no legally valid Form 67.*

In view of the above, the grounds of appeal are dismissed."

Aggrieved with the order of the Ld. CIT(A), the assessee has filed the appeal before the Tribunal.

4. Rival contentions have been heard and the Paper Book filed by the assessee was examined. During the course of appeal it was contended that the assessee is a salaried employee and had shifted to Thailand and the return of income was filed on 27.08.2019, which was processed u/s 143(1) of the Act on 23.03.2021 and since the credit for FTC was not allowed, a rectification application was filed which has been disposed off vide order dated 13.06.2021 mentioning that in the order u/s 154 of the Act there is no change in the computation of interest u/s 234B and 234C of the Act as the same has been correctly computed while processing, thereby, *inter-alia* implying that the credit for FTC was denied. The assessee relied upon the decision of in ITA No. 78/KOL/2024 and brought our attention to page 150 of the Paper Book at para 17 and also brought our attention to page 43 of the Paper Book containing the Doble Taxation Avoidance Agreement between India and Thailand dt. 27.06.1986. The form no.67 was filed on 08.04.2021, which was subsequent to the intimation u/s 143(1) of the Act on 23.03.2021.

5. Further, similar issue arose in the case of Sukhdev Sen Vs. ACIT, Circle -1, Kolkata (ITA No. 78/Kol/2014, dated 26.03.2024). The relevant extract of the aforesaid order is as under:

"7. 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 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 lax 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"

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 25 of DTAA between India and USA provides for credit for foreign taxes. Article 25(2)(a) is relevant in the present context. Same is extracted below:

"Where a resident of India derives income which, in accordance with the provisions of this Convention, may be taxed in the United States, India shall allow as a deduction from the tax on the income of that resident an amount equal to the income tax paid in the United States, whether directly or by deduction. Such deduction shall not, however, exceed that part of the income-tax (as computed before the deduction is given) which is attributable to the income which may be taxed in the United States"

Thus, Section 90 of the Act read with Article 25(2)(a) of the DTAA provides that tax paid in USA 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 assesser's vested right as per Article 25[2](a) of the DNA road wat Section 90 and same cannot be disallowed for non-compliance with procedural requirement that is prescribed in the rules.

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. In support of the claim, the assessee has relied upon several decisions including the following decision:

i. CIT vs. G.M. Knitting Industries (P) Ltd. 71 Tuxmann.com 35(SC)

ii. Brinda Ramakrishna us. IPO 193 ITD 840 (Bang)

iii. 42 Hertz Software India Pvt. Ltd vs Asst. CIT. Ita No. 29. Hang/2001

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

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 of that 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, 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 DIAA shall override the provisions of the Income-tax Act unless they are more beneficial to the assessee:

The conclusions in the afore stated paragraph have no direct relevance to the facts at hand as the effect of section 902) of the Income Tax Act wat explanation 4 thereof, is to treat the DTAA provisions as the low 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.

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:

There is no dispute that the Assessee is entitled to claim FTU 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. Brindu Kumar Krishna us. 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 im (2021) 432 ITR 471.

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.

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:

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 het 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.

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:

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 m 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.

We find from Article 25(2)(a) of the DTAA that where a resident of India derives income which, in accordance with the provision 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 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.

In the case of Purushothama Reddy Vankıreddy (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.

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

We have also gone through the decision of the Hon'ble Madras High Court in the case of Duraiswamy Kumaraswamy us. PCIT (supra) and found 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 row. 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 ITK 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 FIC, 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.

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 PTC 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.

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 wade only to the extent of disallowing of FTC clam made by the petitioner und hence, the first respondent is directed to consider only on the aspect of rejection of FTC clam within a period of 8 weeks from the date of receipt of copy of this order"

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 the 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 USA. Accordingly, grounds no. 2,3,4 of the appeal are allowed."

6. The relevant extract of Article 23 of India Thailand Double Taxation Avoidance Agreement (DTAA) is as under:

"ARTICLE 23
ELIMINATION OF DOUBLE TAXATION
1. The laws in force in either of the Contracting States shall continue to govern the taxation of income in the respective Contracting States except where provisions to the contrary are made in this Agreement.
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 Thailand, India shall allow as a deduction from the tax on the income of that resident, an amount equal to the tax paid in Thailand.

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 Thailand.

(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 Thailand,

(a) Where a resident of Thailand derives income which, in accordance with the provisions of this Agreement, may be taxed in India, Thailand 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 Thailand is exempt from tax in Thailand, Thailand may nevertheless, in calculating the amount of tax on the remaining income of such resident, take into account the exempted income.

7. Since the provision of DTAA override the provision of Section 90 of the Act as they are more beneficial to the assessee, in view of judicial pronouncements in this regard and since Rule 128(a) does not preclude the assessee from claiming credit for FTC in case of delay in filing the required form no 67 as the credit for FTC is a vested right of the assessee and since form 67 was filed as contended by the assessee, therefore, there was no justification for not allowing the credit for FTC. Hence, respectfully following the decision cited in preceding paragraphs, the claim for FTC is directed to be allowed as the assessee had filed the required form no.67 as evidence of foreign taxes paid and the Ld. AO is directed to allow the FTC in accordance with DTAA between India & Thailand and as per law.

8. Ground No. 3 is general in nature and does not require separate adjudication.

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

Order pronounced in the Court on 6th December, 2024 at Kolkata.

Sd/-	**Sd/-**
(SONJOY SARMA)	**(RAKESH MISHRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Kolkata, Dated 06. 12.2024
SS, Sr.Ps

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण , कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ **BY ORDER,**

TRUE COPY

Sr. PS/ Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata