

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "A", MUMBAI  
BEFORE SHRI BASKARAN B.R, ACCOUNTANT MEMBER &  
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA NO.1844/MUM/2022 (A.Y.2018-19)

&

ITA NO.1845/MUM/2022 (A.Y.2019-20)

Anuj Bhagwati Nishant House, 6, Carmichael Road, Cumballa Hill S.O, Mumbai-400086 PAN: AEHPB1858C	Deputy Commissioner of Income Tax- Circle – 1(1)(1), Mumbai, Room No.533, 5 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road Mumbai-400020
<b>Appellant</b>	<b>Respondent</b>

Appellant by : None  
Respondent by : Shri. Manoj Sinha.DR  
Date of hearing : 13/09/2022  
Date of pronouncement : 20/09/2022

ORDER

**PER PAVAN KUMAR GADALE, JM:**

These are the two appeals filed by the assessee against the separate orders of Commissioner of Income Tax Appeals(CIT(A))-National Faceless Appeals Centre Delhi, passed under Section 143(3) and 250 of the Income tax Act 1961.

Since the issues in these appeals are common and identical, for the sake of convenience these appeals are clubbed, heard and consolidated order is passed.

We shall take up ITA No. 1844/M/22 for assessment year 2018-19 as the lead case and the facts narrated. The assessee has raised the following grounds of appeal.

- i) *On the facts and in the circumstances of the case and in law, initially under Section 143(1) the CPC has failed to provide the Appellant the relief of tax under Section 90 (erroneously mentioned as relief under Section. 91 of the Act in the Return of*

*Income instead of relief under Section. 90 of the Act) of the Act of ₹ 14,22,129/-. The relief was denied on account of an inadvertent mistake in complying with the procedural requirement of filing of Form No. 67 with the Return of Income.*

- ii) *On the facts and in the circumstances of the case and in law, subsequent to the above even the Assessing Officer of the NEAC (Faceless Scheme) has confirm the wrong non-allowance of relief under Section 90 of the Act vide order under Section. 143(3) dated 21<sup>st</sup> October, 2020 to the tune of ₹14,22,129/-.*
- iii) *On the facts and in the circumstances of the case and in law, the Commissioner of Income Tax Appeal, NFAC has also erred in confirming the wrong non allowance of relief to the tune of ₹ 14,22,129/- related to Foreign Tax credit under Section 90 of the Act.*

*(B) Relief Prayed:*

*The appellant therefore prays, to allow the relief of ₹ 14,22,129/- on account of Foreign Tax Credit paid in the USA as per the provision of Section 90 and Article 25(2)(a) DTAA entered into by the Government of India and Government of the USA.*

*(C) General:*

*The appellant craves leave to add, to alter, to vary, to delete or to amend all or any of the grounds above mentioned on or before the date of hearing of the appeal mentioned above.*

2. The briefs facts of the case are that, the assessee is an individual and resident in India and also in USA and derives income from salary and income from other sources. The assessee has filed the return of income for the assessment year 2018-19 on 23/07/2018 disclosing a total income of ₹ 2,07,95,303/-. Whereas, the assessee has included the foreign income of ₹41,26,063/- in the total income disclosed and also tax of ₹ 14,22,129/- paid in USA was claimed as Foreign Tax Credit(FTC). The assessee is eligible to claim Tax Relief U/sec 90 of the Act as per Double Taxation Avoidance and Agreement (DTAA) with the government of USA and the return of income was processed under section 143(1) of the Act on

21.03.2020. Subsequently, the case was selected for scrutiny and notice under section 143(2) of the Act was issued. Whereas, the Assessing Officer (A.O.) based on the submissions and information has accepted the income as per the return of income filed by the assessee but the no relief was granted under Section 90 of the Act in respect of the Foreign Tax Credit(FTC) and assessed the total income of ₹. 2,07,95,030/- and passed the order under section 143(3) r.w.s 143(3A) and 143(3B) of the Act dated 21.10.2020.

3. Aggrieved by the order of the A.O. the assessee has filed an appeal with the CIT(A), whereas the CIT(A) considered the grounds of appeal, submissions of the assessee and the findings of the scrutiny assessment in respect of granting of FTC tax relief. The CIT(A) was not satisfied with the explanations on the claim of FTC and has confirmed the action of the A.O. and dismissed the appeal. Aggrieved by the CIT(A) order, the assessee has filed an appeal with the Hon'ble Tribunal.

4. At the time of hearing none appeared on behalf of the assessee and we considered the material on record and the submissions of the Ld.DR supporting the order of CIT(A).

5. We heard Ld.DR submissions and perused the material on record. The assessee has raised the grounds of appeal challenging the action of the assessee officer which was confirmed by the CIT(A) in respect of the denial of foreign tax credit (FTC) as the assessee has filed the Form No. 67 beyond the due date and after completion of the Assessement. Whereas, the assessee has filed Form No 67 online on the portal of the Income Tax Department on 19.01.2021 in order to comply with Rule 128 of Income Tax Rules. The CIT(A) has considered the fact of filing Form No.67 and is of the opinion that it is a mandatory requirement as per the I T Rules and the revenue has fallowed and further the DTAA should take a precedence over domestic laws for determining the eligibility of FTC claim and also there is no power to condone the delay in filling the Form No. 67 and the CIT(A) has confirmed the action of A.O and dismissed the appeal. We find in respect of foreign tax credit (FTC), the assessee is required to file Form.no. 67 with details of the statement of income from a country or specified territory outside India and foreign tax credit and further rule 128 of the income tax rules prescribes the procedure for claiming the tax foreign tax credit.

6. We find under Section 90 of the income tax Act allows double taxation relief in respect of agreements with foreign countries or specified territories and also

Section 91 of the IT Act deals with the taxability of income where the countries which don't have agreements. Further there is no amendment in the Section 90 of the Act with regard to claim of FTC and in such cases Rule procedures are directory and not mandatory. We rely on the decision of the Hon'ble Tribunal ITA No.29/Bang/2021 in M/s 42 Hertz Software India Pvt. Ltd., Vs. ACIT-3(1)(1), Bangalore dated 07.03.2022 wherein the Hon'ble Tribunal has considered the facts & law on the filing of Form. No. 67 and observed at page 4 Para 4 to 8 read as under:

*"4. 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.*

*5. On the contrary, the Ld. DR submitted that fulfillment of requirement under rule 128(9) of the Rules, is mandatory and hence the Revenue authorities were justified in refusing to FTC. We have perused the submissions advanced by both sides in light of records placed before us.*

*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 IT A 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/evidence 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.*

*Accordingly the grounds raised by assessee stands allowed for statistical purposes.*

*In the result appeal filed by assessee stands allowed for statistical purposes.*

7. Similarly, in the case of Ms. Brindra Rama Krishna, Vs. Income Tax Officer in ITA No 454/Bang/2021 for assessment year 2018-19 order dated 17.11.2021 the Hon'ble Tribunal has observed that the filling of FormNo.67 is not mandatory but directory in Para 13 to 17 of the order which is read as under:

*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 Vs. Azadi Bachao Andolan (2003) 263 ITR 706 (Supreme Court)*
- *CIT Vs. Eli Lily & Co (India) P. Ltd (2009) 178 Taxman 505 (Supreme Court)*
- *GE India Technology centre P Ltd. Vs. CIT (2010) 193 Taxman 234 (Supreme Court)*
- *Engineering Analysis Centre of Excellence P Ltd Vs CIT (2021) 125 taxmann.com 42 (Supreme Court) (Pg 106-109 of Paper Book 2- Para 25 & 26)*
- *CBDT Circular No. 333 dated 02.04.82 137 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 Departmental Representative reiterated the stand of the Revenue that rule 128(9) of the Rues, 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 Assessing Officer when the intimation under Section 143(1) of the Act dated 28.05.2020 was passed. He pointed out that the Assessing Officer or the CIT(A) did not dismiss the Assessee application for rectification under Section 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 under Section 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 under Section 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 under Section 154 of the Act can be resorted to. Even otherwise the ground on which the Revenue authorities rejected the Assessee's application under Section 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 Departmental Representative in this regard.*

*17. In the result, the appeal is allowed.*

8. We considering the facts, circumstances provisions of the Act and judicial decisions are of the opinion that there is no amendment on these aspects in the Section 90 of the Act and the Rules cannot override the Act and therefore the filing of Form.No 67 is not mandatory but it is directory. Accordingly, We restore the disputed issue to the file of the CIT(A) to adjudicate afresh on merits considering the observations in above paragraphs and the ratio of judicial decisions. Further the assessee should be provided adequate opportunity of hearing and shall cooperate in submitting the information for

early disposal of appeal and allow the grounds of appeal of the assessee for statistical purposes.

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9. As the facts and circumstances in this appeal is identical to ITA No. 1844/M/2022 for (A.Y.2018-19) except the variance in figures. Therefore, the decision rendered in the above paragraphs apply *mutatis mutandis* for this appeal also. Accordingly, the disputed issues are restored to the CIT(A) on similar directions and grounds of appeal of the assessee are allowed for statistical purposes.

10. In the result, the two appeals filed by the assessee are allowed for statistical purposes.

Order pronounced in the open court on the 20<sup>th</sup> day of September, 2022.

Sd/-

**(BASKARAN B.R)**

**ACCOUNTANT MEMBER**

Sd/-

**(PAVAN KUMAR GADALE)**

**JUDICIAL MEMBER**

Mumbai, Dated 20/09/2022

M. Sonavane

**Copy of the Order forwarded to :**

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt.Registrar)ITAT, Mumbai