

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES “SMC-B” BENCH: BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE-PRESIDENT

ITA. No. 454/Bang/2021
Assessment Year: 2018-19

Ms. Brinda RamaKrishna, 106, Eshwari Emerald, 6 th E Main, Gauravnagar, JP Nagar 7 th Phase, Bangalore. PAN: AFNPR6614P	vs.	The Income Tax Officer, Ward 5(3)(1), Bangalore.
(Appellant)		(Respondent)

Assessee by	:	Shri Narendra Kumar Jain, Advocate
Revenue by	:	Shri Ganesh R Ghale, Standing Counsel

Date of Hearing :	10.11.2021
Date of Pronouncement :	17.11.2021

ORDER

PER N.V. VASUDEVAN, VICE-PRESIDENT

This is an appeal by the assessee against the order dated 03.09.2021 of the National Faceless Appeal Centre (NFAC), Delhi relating to Assessment Year 2018-19.

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 sub-section (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 non-est in law. The CIT(A) also held that provisions of Rule 128 are mandatory in nature. The CIT(A) rejected the contention of the Appellant that filing of Form 67 is a procedural requirement and non-compliance 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.

Order pronounced in the open court on 17th November, 2021.

Sd/-
(N.V. VASUDEVAN)
VICE-PRESIDENT

Dated: 17th November, 2021.
/MS/

Copy to

1. The Appellant
2. The Respondent
3. CIT(A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore