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IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"SMC" JAIPUR

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BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

vk;dj vihy l-a@ITA No. 71/JP/2023 fu/kZkj.k o"kZ@Assessment Year : 2018-19.

Shri Sanjeev Agarwal, R-21, Raj Aangan, NRI Colony, Haddi Ghati Marg, Pratap Nagar, Sanganer, Jaipur.	cuke Vs.	DCIT Central Circle-4, Jaipur.
LFkk;h y[kk l-a@thvkbZvkj l-a@PAN/GIR No. AATPA 4920 C		
vihykFkhZ@Appellant		izR;FkhZ@Respondent

fu/kZkfjrh dh vksj l@s Assessee by : Shri Rohan Sogani (CA)

jktLo dh vkjs ls@ Revenue by : Smt. Monisha Choudhary, (Addl.CIT)

lquokbZ dh rkjh[k@ Date of Hearing : 25/04/2023

mn?kk"sk.kk dh rkjh[k@Date of Pronouncement: 10/05/2023

vkn'sk@ ORDER

PER: SANDEEP GOSAIN, J.M.

This appeal by the assessee is directed against the order dated 20.12.2022 of ld. CIT (A), Udaipur-2 passed under section 250 of the IT Act for the assessment year 2018-19. The assessee has raised the following grounds :-

1. In the facts and circumstance of the case and law, ld. CIT (A) has erred in confirming the action of ld. AO (CPC), in not allowing the credit of the taxes paid outside India by the assessee, while processing the Return of Income under section 143(1) of the Income Tax Act, 1961. The action of the ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by allowing the credit of taxes paid by the assessee outside India, for which the assessee was entitled to in accordance with the provisions of the Income Tax Act, 1961 and also

in accordance with the Double Taxation Avoidance Agreement entered between India and United Kingdome.

2. In the facts and circumstance of the case and law, ld. CIT (A) has erred in confirming the action of ld. AO (CPC), in rejecting the rectification application filed by the assessee against the order passed under section 143(1), for not allowing credit of taxes paid outside India by the assessee. The action of the ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by allowing the credit of taxes paid by the assessee outside India by directing the ld. AO (CPC) to allow the rectification application filed by the assessee.

3. In the facts and circumstance of the case and law, ld. CIT (A) has erred in confirming the action of ld. AO (CPC), in rejecting the rectification filed by the assessee for sole reason that not allowing such credit was not a mistake apparent on record, even though the assessee was entitled for claiming the credit of the taxes paid outside India, in accordance with Section 90/90A of the Income Tax Act, 1961 and also the double Taxation Avoidance Agreement entered between India and United Kingdom. The action of the ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by allowing the rectification application, as not allowing the taxes paid outside India is a mistake apparent on record.

4. In the facts and circumstance of the case and law, ld. CIT (A) has erred in confirming the action of ld. AO (CPC), in rejecting the rectification filed by the assessee for not allowing the credit of the taxes paid outside India while processing the return of income under section 143(1), even though such rejection of the claim of foreign tax credit did not fall within the purview of Section 143(1) of the Income Tax Act, 1961. The action of the ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by allowing the rectification application, as such rejection was outside the purview of section 143(1).

5. The assessee craves his right to add, amend or alter any of the grounds on or before the hearing.

2. The brief facts of the case are that the assessee for the relevant previous year earned income from salary, rental income and also income from business or profession. Part of the income was received by the assessee from outside India, i.e. from M/s. Strata Stones Ltd., entity based in United Kingdom (UK) and salary income in India from M/s.

Stone Age Private Ltd. He also earned rental income from his house properties situated in India and Income from business. For the relevant previous year, assessee was a resident in India, in accordance with section 6 of the IT Act, 1961. Thus, in accordance with section 5 read with section 4 and 6, assessee offered entire income earned by him, whether in India or outside India i.e. his Global Income to tax in India, while filing his return of income on 13.03.2019 for the relevant previous year. While filing the return of income, assessee considered income of Rs. 21,56,330/- earned in UK as part of his total income offered for tax in India. Against the income earned in UK, assessee paid tax of Rs. 2,32,870/- un UK. Resultantly, while filing the return of income, assessee took credit of the tax paid in UK of Rs. 2,32,870/-, in accordance with section 90/91 of the IT Act. For claiming the aforementioned Foreign Tax Credit (FTC), amounting to Rs. 2,32,870/-, as per Rule 128 of the Income Tax Rules, 1962, Form 67 was filed on 02.11.2019. The AO, while processing return of income under section 143(1) of IT Act, 1961, rejected the Foreign Tax Credit claimed of Rs. 2,32,870/- on the ground that assessee filed the Form 67 for claiming FTC after the due date prescribed under section 139(1) relevant for the year under consideration, and raised demand against the assessee of such amount including interest. Against the order passed under section 143(1), assessee filed rectification application under section 154 contending that as the assessee has not been allowed credit of the taxes paid outside India, which is nothing but a mistake apparent on record and deserves to be rectified under section 154 of the IT Act. The said rectification application filed by the assessee was disposed off by the AO (CPC) confirming the rejection of FTC. Against the

rectification order, appeal was filed by the assessee before the ld. CIT (A), who vide order dated 20.12.2022 rejected the appeal of the assessee.

3. Aggrieved by the order of ld. CIT (A), now the assessee is in appeal before this Tribunal.

4. Before us, the ld. A/R of the assessee has filed his written submission as under :-

" **FILING OF FORM 67, NOT MANDATORY FOR CLAIMING FOREIGN TAX CREDIT**

2.1 There is no dispute as regards the amount of FTC claimed by the assessee. Sole reason for rejecting the FTC was that **Form 67 for claiming FTC was filed by the assessee after the due date prescribed under Section 139(1) relevant for the year under consideration. However, it is undisputed that Form 67 was filed by the assessee 02.11.2019.**

2.2 The entitlement for claiming FTC, of the taxes having paid outside India emerges from **Double Taxation Avoidance Agreement ("DTAA")** entered by India with different countries.

2.3 In the present case, assessee had offered his income earned in UK, while filing return of income in India and accordingly had claimed the credit of taxes paid in UK. The same was in accordance with **Article 24** of the **DTAA between India and UK**. Relevant extract of the same are reproduced hereunder for the sake of our ready reference.

"2. Subject to the provisions of the law of India regarding the allowance as a credit against Indian tax of tax paid in a territory outside India (which shall not affect the general principle hereof), the amount of the United Kingdom tax paid, under the laws of the United Kingdom and in accordance with the provisions of this Convention, whether directly or by deduction, by a resident of India, in respect of income from sources within the United Kingdom which has been subjected to tax both in India and the United Kingdom 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".

2.4 As per Article 24, assessee having paid taxes in UK was entitled to claim credit of such taxes, without even fulfilling any procedural requirement, such

as filing of any form or otherwise. Thus, as long as the assessee paid taxes in UK and offered the income earned in UK to tax in India the assessee was entitled to claim credit of such taxes paid in UK.

2.5 The requirement for filing Form 67, for availing FTC, is prescribed under Rule 128 of Income Tax Rules, 1962. As per **Rule 128(8)**, credit of any Foreign Tax shall be allowed on furnishing, amongst other documents as specified therein, Form 67.

2.6 As per Sub-Rule (9) of Rule 128, Form 67, as specified in Sub-Rule (8), has to be furnished on or before the due date of furnishing return of income u/s 139(1), in the manner specified for furnishing such return on income. The relevant Sub-Rule (8) and Sub-Rule (9) of Rule 128 are set out hereunder for the sake of ready reference.

"…(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…"

2.7 Attention is drawn towards Sub-Section (2) of Section 90, which states that for granting relief in accordance with the provisions of the DTAA, the provisions of the ITA shall apply only to the extent they are more beneficial to the assessee. Going by the plain words of the statute, the provisions of the ITA, in a situation covered by the tax treaty, cannot put the assessee to any greater burden than the burden placed by the provisions of applicable tax treaty. The only limitation placed is by insertion of Sub-Section (2A) to Section 90 which states that *"notwithstanding anything contained in subsection (2), the provisions of Chapter X-A (dealing with the General Anti Avoidance Rules) of the Act shall apply to the assessee even if such provisions are not beneficial to him".* Thus, Section 90(2A) is the only statutory provision in the ITA, which starts with a *non-obstante clause* vis-àvis the provisions of Section 90(2), and it is the only rider to the treaty override provision set out in Section 90(2).

2.8 **Accordingly, when the provisions of DTAA are *juxtaposed* alongside the provisions of the ITA, then the provisions of DTAA shall always override the provisions of ITA.**

2.9 However, in a scenario, wherein, if the provisions of the ITA are more beneficial in comparison to the DTAA then only to that extent the beneficial provisions as contained in the ITA shall have to be made applicable on the assessee. **In other words, only to the extent of the beneficial provisions, will the provisions of the ITA supersede the provisions of DTAA, otherwise, DTAA shall always have an overriding effect on the provisions of the ITA.**

2.10 Rule 128 was inserted by Income Tax (18th Amendment) Rules, 2016, w.e.f 1.04.2017. The requirement for filing Form 67 is prescribed under Rule 128 only and the same does not emerge out of any of the provisions contained in the ITA.

2.11 It is reiterated that there is no requirement of filing any form, be it Form 67 or otherwise, for claiming FTC as per **Article 24** of the DTAA between India and UK.

2.12 Thus, rejecting the FTC for delay in filing of Form 67 would tantamount to pitting the Income Tax Rules, 1962 on a higher pedestal, in comparison to the provisions of the DTAA. It is well understood that the rules are a form of delegated legislation and are not approved by parliament as against the provisions of the ITA which are amended/modified or introduced by the parliament.

2.13 As regards the legal position that the provisions of the DTAA shall always supersede the provisions of the ITA, attention is drawn towards the below mentioned judicial precedents: -

Supreme Court

- **P.V.A.L. Kulandagan Chettiar [2004] 267 ITR 654 (SC)**
  It was also held that in case of any conflict between the provisions of the DTAA and the ITA, the provision of the DTAA would prevail over the provisions of the ITA as is clear from the provisions of Section 90(2).

- **Azadi Bachao Andolan [2003] 263 ITR 70 (SC),**

  It was held that the provisions of DTAA, with respect to cases to which they apply, would operate even if inconsistent with the provisions of the Income Tax Act.

High Courts

- **Sanofi Pasteur Holding SA [2013] 354 ITR 316 (AP)**

  It was held that the Double Taxation Avoidance Agreement is a treaty and the provisions contained therein are expressions of sovereign policy of more than one sovereign state. Accordingly, provisions of DTAA shall override the provision of ITA.

- **New Skies Satellite BV [2016] 382 ITR 114 (Delhi)**,

  It was held that where the Central Government has entered into a Double Tax Avoidance Agreement, then in relation to the taxpayer who is contemplated by such agreement, the provisions of the Act shall apply to the extent that they are more beneficial to the assessee.

2.14 Attention is also drawn towards Article 51(c), of Constitution of India, which provides that the State shall endeavour to foster respect for International law and treaty obligations. Also, as per Article 253, parliament has power to make any law for whole or any part of India for implementing any treaty, agreement and convention with any other country or countries.

2.15 Attention is drawn towards the decision of **Nagarjuna Fertilizers and Chemical Ltd. [2017] 55 ITR (TRIB) 1 [Hyd.]**, rendered by the **Special Bench of Hon'ble ITAT**.

- In the said case, the issue was that the assessee had made payment outside India. For the purpose of deduction of Tax at Source, the

assessee applied the tax rate as prescribed under the relevant Article of DTAA, entered between India and the country of residence of the payee. The payees to whom the payment were made by the assessee were not having any Permanent Account Number ("PAN"), in India.

- Department was of the view that since the payees were not having PAN in India, then assessee should have deducted tax at source, not as per the rate prescribed under DTAA, but as per the higher rate prescribed under Section 206AA.

- The precise question for adjudication before the Special Bench was that whether the provisions of DTAA would be applied or whether the provisions of Section 206AA would supersede the provisions of DTAA.

- Deciding the case in favour of assessee, it was held by the Hon'ble ITAT, after considering the decision of **Hon'ble Supreme Court**, in case of **P.V.A.L. Kulandagan Chettiar *(supra),* Azadi Bachao Andolan *(supra),* Sanofi Pasteur Holding SA (*supra*)**, that the provisions of DTAA shall *supersede* the provisions of Domestic Tax Laws, including Section 206AA. Accordingly, it was held as under: -

  "…In view of the above discussion, we are of the view that the provisions of Section 206AA of the Act will not have an overriding effect for all other provisions of the Act and the provisions of the Treaty to the extent they are beneficial to the assessee will override Section 206AA by virtue of Section 90(2). In our opinion, the assessee therefore cannot be held liable to deduct tax at higher of the rates prescribed in Section 206AA in case of payments made to non-resident persons having taxable income in India in spite of their failure to furnish the permanent account numbers. We, accordingly, answer the question referred to this Special Bench in the negative and in favour of the assessee and allow both the appeals of the assessee for the assessment year 2011-12 and 2012-13…"

2.16 Similarly, in the below mentioned decisions the controversy was that assessee were not having **Tax Residency Certificate**, accordingly as per Sub-Section (4) of Section 90, the beneficial provisions of DTAA were denied to the assessee. However, it was held that the benefit under the DTAA cannot be denied to the assessee and that the provisions of SubSection (4) of Section 90 cannot override Sub-Section (2) of Section 90 which provides that DTAA shall always override the ITA provisions:-

- **Skaps Industries India (P.) Ltd. [2018] 171 ITD 723 (AhmedabadITAT)**

- **Ranjit Kumar Vuppu [2021] 127 taxmann.com 105 (Hyd – ITAT)**

In both the decision reliance was placed on the decision of Hon'ble Punjab and Haryana High Court in the case of **Serco BPO (P.) Ltd vs Authority of Advance Rulings [2015] 379 ITR 256 (P&H – HC)** wherein it was held that "…*whatever may have been the intention of the lawmakers and whatever the words employed in Section 90(4) may prima facie suggest, the ground reality is that as the things stand now, this provision cannot be construed as a limitation to the superiority of treaty over the domestic law. It can only be pressed into service as a provision beneficial to the assessee…"*

2.17 Without prejudice to above, i.e. under the DTAA there is no requirement of filing Form 67 for availing FTC, It is submitted that Filing of Form 67, for the purpose of claiming FTC is a procedural requirement provided in the Income Tax Rules, 1962. It is a trite law that non fulfilment of any procedural requirement, cannot in any way, debar the assessee from any claim or benefit under the law to which he is otherwise entitled to.

2.18 Even Rule 128 nowhere prescribes that if Form 67 is not filed within the stated time frame, the relief as sought by the assessee under Section 90 of the ITA would be denied. In case the intention of the statute was to deny the FTC, either the ITA or the relevant Rule 128 would have specifically provided that the FTC would be disallowed if the assessee does not file Form 67 within the due dates prescribed under Section 139(1) of the ITA. It is submitted that there are many sections in the ITA which specifically denied deduction or exemption or relief in case the return is not filed within the prescribed time frame. Attention is drawn toward Section 80AC, Section 80IA, Section 10A, Section 10B etc. Such language is not used in Rule 128(9). Therefore, such condition cannot be read into Rule 128.

2.19 There have been many instances in the past, wherein, assessees in order to claim tax benefit under various provisions of ITA, were required to file various forms before filing Return of Income, under Section 139(1). Attention is drawn towards the provisions of **Section 80-IB**, wherein, for claiming benefit under such section, the assessee is required to furnish Form 10CCB from a Chartered Accountant, before the due date of furnishing the return of income u/s 139(1). However, there were instances, wherein, such form could not be filed by the assessee within the stipulated time period and hence the assessees claim, under such section was rejected.

2.20 In the below mentioned decisions, specifically as regards Section 80-IB, the claim was allowed by different appellate authorities as the assessee had furnished the requisite form before completion of the assessment:-

- **Fortuna Foundation Engineers & Consultants (P.) Ltd. [2017] 81 taxmann.com 189 (Allahabad)**

"Headnote II: Section 80-IB of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings other than infrastructure development undertakings (Housing Project) - Assessment year 200506 - Whether where assessee, claiming deduction under section 80IB(10), did not file audit report in Form 10CCB along with return of income but filed same before assessment was complete, assessee could not be made to suffer for it - Held, yes [Para 44] [In favour of assessee]"

- **AKS Alloys (P.) Ltd. [2012] 18 taxmann.com 25 (Mad.)**

"….5. In so far as it relates to the substantial question of law (1) is concerned, namely, whether the filing of audit report in Form 10CCB is mandatory, it is well settled by a number of judicial precedents that before the assessment is completed, the declaration could be filed. In fact, the said issue came to be decided by the Karnataka High Court in the case in CIT v. ACE Multitaxes Systems (P.) LTD. [2009] 317 ITR 207 (Kar.), wherein it was held that when a relief is sought for under Section 80IB of the Act, there is no obligation on the part of the assessee to file return accompanied by the audit report, thereby, holding that the same is not mandatory. Therefore, it is clear that before the assessment is completed if such report is filed, no fault could be found against the assessee. That was also the view of the Delhi High Court in the case in CIT v. Contimeters Electricals (P.) Ltd. [2009] 317 ITR 249/ 178 Taxman 422 (Delhi), wherein the Delhi High Court, by following the judgements of the Madras High Court in CIT v. A.N. Arunachalam [1994] 208 ITR 481 / 75 Taxman 529 and in CIT v. Jayant Patel [2001] 248 ITR 199/ 117 Taxman 707 (Mad.) held that the filing of audit report along with the return was not mandatory but directory and that if the audit report was filed at any time before the framing of the assessment, the requirement of the provisions of the Act should be held to have been met.

6. That is also the consistent view of the other High Courts, including the High Court of Bombay in CIT v. Shivanand Electronics [1994] 209 ITR 63 / 75 Taxman 93 (Bom.), apart from Gujarat High Court in Zenith Processing Mills v. CIT [1996] 219 ITR 721 (Guj.) and Punjab and Haryana High Court in CIT v. Mahalaxmi Rice Factory [2007] 294 ITR 631/ 163 Taxman 565 (Punj. & Har).

7. The Calcutta High Court in the case in the CIT v. Berger Paints (India) Ltd. [2002] 254 ITR 503/[2003] 126 Taxman 435 (Cal.) has also concurred with the said view which was followed by the Tribunal in this case.

8. Mr. T. Ravikumar, the learned counsel for the appellant is not able to produce any other judgement contrary to the above said views consistently taken.

9. In the light of the above, by virtue of hierarchy of judgements which are against the Revenue, the substantial question of law (1) would not arise at all for consideration…."

2.21 Similar is the legal position, as regards Section 80J. Relevant decisions in this regard are set out hereunder:-

- **Zenith Processing Mills vs CIT [1996] 219 ITR 721 (Gujarat)**

"Headnote: Section 80J of the Income-tax Act, 1961 - Deductions - Profits and gains from new industrial undertakings, ships or hotels - Assessment year 1976-77 - Whether provision of section 80J(6A) to extent it requires furnishing of auditor's report in prescribed form along with return, is directory in nature and not mandatory - Held, yes - Whether assessee can be permitted to produce such report at later stage when question of disallowance arises during course of assessment proceedings - Held, yes"

- **Shivanand Electronics [1994] 75 TAXMAN 93 (BOM.)**

"Headnote: Section 80J of the Income-tax Act, 1961 - Deductions - Profits and gains from new industrial undertakings - Assessment years 1976-77 and 1977-78 - Whether for purpose of claiming relief under section 80J(6A), filing of audit report before ITO is mandatory - Held, yes - Whether filing of audit report along with return is mandatory - Held, no - Whether, if an assessee fails to file audit report along with return and files it subsequently but before completion of assessment, ITO will have power to accept same if he is satisfied that delay was for good and sufficient cause - Held, yes - Whether any duty is cast on ITO to ask an assessee, who has failed to file report of audit, to do so before rejecting his claim for relief under section 80J - Held, no"

2.22 As can be seen from the above judicial pronouncements, for sections such as 80-IB, 80J, certain compliances mandatorily required to be made for claiming the benefit of such sections, such as filing of the Audit Report, along with the return of income, before the due date were held to be procedural in nature. The claim under such sections were allowed even though such mandatory procedural requirements were not fulfilled. As against that, in the present case, there is no express requirement of filing Form 67, either in the DTAA or in the ITA, as a mandatory requirement for claiming FTC. Under such circumstances, even if Form

67 has been filed by the assessee with delay, the claim of FTC cannot be rejected.

2.23 **Moreover, nowhere in Rule 128 of the ITR, it has been specified that if Form 67 is not filed at all or if filed after the due date of filing of return u/s 139(1) then the assessee would be denied the claim of FTC.**

2.24 In view of the above settled legal position that non-compliance of procedural requirements, even if mandated under the law cannot be fatal and debar the assessee from claiming various benefits/credits, if the assessee, on substantive basis, is otherwise eligible for those benefits/credits. Thus, the action of ld. AO(CPC) is not only contrary to settled legal position, but is also outside the purview of automatic processing under 143(1)

2.25 In the present case, assessee filed Form 67, although with a delay. Thus, it is not the case that the assessee has not filed the Form 67 at all but has filed it with a delay.

2.26 Attention is drawn towards the recent decision passed by the **Hon'ble ITAT, Bangalore Bench,** in the case of **Brinda Rama Krishna [2022] 135 taxmann.com 358 (Bangalore - Trib.) [Case Law Page 12]** which laid down the ratio that Rule 128(9) of Income Tax Rules, 1962, does not provide for disallowance of Foreign Tax Credit in case of delay in filing Form 67, and filing of Form 67 is not mandatory but a directory requirement. In the said case, assessee had not filed Form 67 before filing the return of income. Even such Form 67 was not filed before the time-limit prescribed under Section 139(4). When the FTC claimed by the assessee was rejected while processing the return of income under Section 143(1), assessee filed a rectification application. Such rectification application was rejected by the concerned Assessing Officer, similar to the case at hand, by stating that since Form 67 was not filed by the assessee FTC was not to be allowed. On appeal preferred by the assessee before Hon'ble ITAT, Bangalore Bench, such appeal was allowed. Relevant extracts of the decision of Hon'ble ITAT is as under:-

"…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…"

2.27 The aforementioned decision of Hon'ble ITAT, Bangalore Bench, has been subsequently followed by different benches of ITAT, including Hon'ble ITAT, Jaipur Bench, in the below mentioned cases-

S.No.	Case law	ITA No.	Bench	Case Law Page
1	Ritesh Kumar Garg	261/JP/2022	Jaipur	Page 7
2	Bhaskar Dutta	1869/DEL/2022	New Delhi	Page 16
3	Sumedha Arora	1399/DEL/2022	New Delhi	Page 20

2.28 **Hon'ble ITAT, Jaipur Bench,** in the case **Ritesh Kumar Garg, ITA 261/JP/2022,** under identical set of facts, held that filing of Form 67, in accordance with Rule 128 was only a procedural/directory requirement and **not a mandatory requirement**. Hon'ble ITAT, also relied upon the decision of **ITAT Bangalore Bench,** in the case of **Brinda Rama Krishna *(supra).***

2.29 Ld. CIT(A) /NFAC rejected the claim of the assessee on two grounds: -

2.29.i Filing of Form 67 is mandatory requirement; and

2.29.ii Rejection of FTC for delayed filing of Form 67 is a debatable issue not falling under the purview of Section 154, which only deals with the mistake apparent on record.

NFAC, in this regard, also relied upon the decision of **Hon'ble ITAT, Vishakhapatnam Bench,** in the case of **Murlikrishna Vaddi, ITA No. 269/VIZ/202**1.

2.30 It is submitted that filing of Form 67, for claiming FTC is not a mandatory requirement. In this regard, the aforementioned legal position and judicial pronouncement directly on the issue may please be considered.

2.31 Further in the below mentioned decisions, as also cited above, not allowing FTC for the sole reason of delayed filing of Form 67 was held to be **a mistake apparent on the record** for which rectification application of the assessee, for not allowing claim of FTC was allowed:-

S.No.	Case law	ITA No.	Bench	Case Law Page
1	Brinda Ramakrishna	454/Bang/2021	Bangalore	Page 12
2	Bhaskar Dutta	1869/DEL/2022	New Delhi	Page 15-18
3	Sumedha Arora	1399/DEL/2022	New Delhi	Page 20-21
4	Baburao Atluri	108 and 118/Hyd/2022	Hyderabad	Page 24-25

2.32 Order of **Hon'ble ITAT, Vishakhapatnam Bench,** in case of **Murikrishnam Vaddi *(supra)*,** as relied upon by the NFAC have not been followed in the below mentioned judicial pronouncement, including that rendered by the ITAT, Jaipur Bench:-

S.No.	Case law	ITA No.	Bench	Case Law Page
1	Ritesh Kumar Garg	261/JP/2022	Jaipur	Page 7
2	Bhaskar Dutta	1869/DEL/2022	New Delhi	Page 18
3	Baburao Atluri	108 and 118/Hyd/2022	Hyderabad	Page 25

2.33 In the below mentioned decisions, also cited above, Form 67 was filed by the respective assessees, even after the end of the relevant assessment year. However, inspite of such delay, the claim of FTC was allowed by different benches of Hon'ble ITAT.

S.No.	Case law	ITA No.	Bench	AY	Date of filing Form 67	Case Law Page
1	Ritesh Kumar Garg	261 /JP/ 202 2	Jaipur	**AY 2020-21**	**24.04.2021**	Page 5
2	Brinda Ramakrishna	454/Bang/2021	Bangalore	**AY 2018-19**	**18.04.2020**	Page 9
3	Bhaskar Dutta	1869/DEL/2022	New Delhi	**AY 2020-21**	**31.05.2021**	Page 15
4	Sumedha Arora	1399/DEL/2022	New Delhi	**AY 2019-20**	**15.07.2021**	Page 19

In view of the above, Foreign Tax Credit, deserves to be allowed in *to-to,* even if the Form 67 was filed after the due date prescribed u/s 139(1). Not allowing FTC by the ld. AO(CPC) was nothing but a mistake apparent on record."

5. On the contrary, the ld. D/R relied on the orders of the revenue authorities and also relied upon the decision of Coordinate Bench of ITAT Visakhapatnam in ITA

No. 269/Viz/2021 in the case of Muralikrishna Vaddi vs. ACIT/DCIT.

6. We have heard rival contentions, perused the material on record and gone through the orders of the revenue authorities. The main controversy in the present case relates to the fact that for the relevant previous year assessee earned income from salary, rental income and also income from Business or Profession. Since part of the income was received by the assessee from outside India i.e. United Kingdom (UK) and remaining portion was earned by the assessee in India, therefore, while filing his return of income, assessee considered income of Rs. 21,56,330/- earned in UK as part of his total income offered for taxation in India. Against the income earned in UK, assessee paid tax of Rs. 2,32,870/- in UK. Resultantly, while filing the return of income, assessee took credit of tax paid in UK of Rs. 2,32,870/- in accordance with section 90/91 of the IT Act, 1961. However, while processing the return of income under section 143(1) of the Act, the AO rejected the Foreign Tax Credit (FTC) claimed by the assessee. Against the said order, the assessee filed rectification application under section 154 of the IT Act for rectifying the mistake and for giving credit of FTC. However, said application was dismissed and on further appeal, the ld. CIT (A) vide his order dated 20.12.2022 rejected the appeal of the assessee, mainly on two grounds by holding that filing of Form 67 was mandatory requirement and since the assessee has filed Form 67 delayed, therefore, the claim of the assessee was rejected. However,

in this regard before we proceed to discuss the merits of the arguments raised by the assessee, it is necessary and imperative to mention the relevant point containing various important dates relevant to the case in hand, which are reproduced below :-

Particulars	Date
Due date [Extended] of filing of return of income u/s 139(1)	31.10.2018
Date of filing of Form 67 by the assessee for claiming Foreign Tax Credit [Copy of Form 67 is enclosed]	02.11.2019

6.1. After having gone through the facts of the present case, we find that the sole reason for rejecting the Foreign Tax Credit (FTC) to the assessee was that Form 67 for claiming FTC was filed by the assessee after the due date prescribed under section 139(1) relevant for the year under consideration. It is undisputed fact that Form 67 had already been filed by the assessee although he had filed it delayed. The entitlement of claiming FTC of taxes having paid outside India emerges from Double Taxation Avoidance Agreement (DTAA) entered by India with different countries. In the present case assessee had offered his income earned in UK by filing return of income in India. The assessee claimed the credit of taxes paid in UK which was in accordance with Article 24 of the DTAA between India and UK. The relevant extract of the same are reproduced below for the sake of brevity :-

> ***"2. Subject to the provisions of the law of India regarding the allowance as a credit against Indian tax of tax paid in a territory outside India (which shall not affect the general principle hereof), the amount of the United Kingdom tax paid, under the laws of the United Kingdom and in accordance with the provisions of this Convention, whether directly or by deduction, by a resident of India, in respect of income from sources within the United Kingdom which has been subjected to tax both in***

India and the United Kingdom 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".

As per Article 24, assessee having paid taxes in UK was entitled to claim credit of such taxes, without even fulfilling any procedural requirement, such as filing of any form or otherwise. Thus, as long as the assessee paid taxes in UK and offered the income earned in UK to tax in India, the assessee was entitled to claim credit of such taxes paid in UK. The requirement for filing Form 67, for availing FTC, is prescribed under Rule 128 of Income Tax Rules, 1962. As per **Rule 128(8)**, credit of any Foreign Tax shall be allowed on furnishing, amongst other documents specified therein, Form 67. As per Sub-Rule (9) of Rule 128, Form 67, as specified in SubRule (8), has to be furnished on or before the due date of furnishing return of income u/s 139(1), in the manner specified for furnishing such return on income. The relevant Sub-Rule (8) and Sub-Rule (9) of Rule 128 are set out hereunder for the sake of ready reference.

"…(8) Credit of any foreign tax shall be allowed on furnishing the following documents by the assessee, namely:—

(iii) 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;

(iv) 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…"

Our attention was drawn towards Sub-Section (2) of Section 90, which states that for granting relief in accordance with the provisions of the DTAA, the provisions of the I.T. Act shall apply only to the extent they are more beneficial to the assessee. Going by the plain words of the statute, the provisions of the ITA, in a situation covered by the tax treaty, cannot put the assessee to any greater burden than the burden placed by the provisions of applicable tax treaty. The only limitation placed is by insertion of Sub-Section (2A) to Section 90 which states that *"notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A (dealing with the General Anti Avoidance Rules) of the Act shall apply to the assessee even if such provisions are not beneficial to him".* Thus, Section 90(2A) is the only statutory provision in the ITA, which starts with a *non-obstante clause* vis-à-vis the provisions of Section 90(2), and it is the only rider to the treaty override provision set out in Section 90(2). **Accordingly, when the provisions of DTAA are *juxtaposed* alongside the provisions of the I T Act, then the provisions of DTAA shall always override the provisions of ITA.** However, in a scenario, wherein, if the provisions of the ITA are more beneficial in comparison to the DTAA then only to that extent the beneficial provisions as contained in the ITA shall have to be made applicable on the assessee. **In other words, only to**

the extent of the beneficial provisions, will the provisions of the ITA supersede the provisions of DTAA, otherwise, DTAA shall always have an overriding effect on the provisions of the ITA.

6.2. The ld. A/R further submitted that Rule 128 was inserted by Income Tax (18th Amendment) Rules, 2016, w.e.f 1.04.2017. The requirement for filing Form 67 is prescribed under Rule 128 only and the same does not emerge out of any of the provisions contained in the I T Act, 1961. It is reiterated that there is no requirement of filing any form, be it Form 67 or otherwise, for claiming FTC as per **Article 24** of the DTAA between India and UK. Thus, rejecting the FTC for delay in filing of Form 67 would tantamount to pitting the Income Tax Rules, 1962 on a higher pedestal, in comparison to the provisions of the DTAA. It is well understood that the rules are a form of delegated legislation and are not approved by parliament as against the provisions of the ITA which are amended/modified or introduced by the parliament. Even otherwise, filing of Form 67 for the purpose of claiming FTC is a procedural requirement provided in the Income Tax Rule, 1962 and it is a trite law that nonfulfillment of any procedural requirement cannot in any way debar the assessee from any claim or benefit under the law to which he is otherwise entitled to. Even Rule 128 nowhere prescribes that if Form 67 is not filed within the specified time frame, the relief as sought by the assessee under section 90 of the IT Act would be denied. In case the intention of the statute was to deny the FTC, either the I.T. Act or the relevant Rule 128 would have specifically provided that the FTC would be disallowed if the assessee does not file Form 67 within the due dates prescribed under section 139(1) of the IT Act. The ld. A/R further submitted that there are many sections in the IT Act which specifically denied deduction or exemption or relief in case the return is not filed within the prescribed time frame. Our attention was drawn toward section 80AC, sec.

80IA, sec. 10A, sec. 10B etc. However, such language is not used in Rule 128(9). Therefore, such condition cannot be read into Rule 128. In this regard our attention was drawn to the recent decision passed by the Coordinate Bench of the Tribunal, Bangalore Bench in the case of **Brinda Rama Krishna [2022] 135 taxmann.com 358 (Bangalore - Trib.) [Case Law Page 12]** which laid down the ratio that Rule 128(9) of Income Tax Rules, 1962, does not provide for disallowance of Foreign Tax Credit in case of delay in filing Form 67, and filing of Form 67 is not mandatory but a directory requirement. In the said case, assessee had not filed Form 67 before filing the return of income. Even such Form 67 was not filed before the time-limit prescribed under Section 139(4). When the FTC claimed by the assessee was rejected while processing the return of income under Section 143(1), assessee filed a rectification application. Such rectification application was rejected by the concerned Assessing Officer, similar to the case in hand, by stating that since Form 67 was not filed by the assessee, FTC was not to be allowed. On appeal preferred by the assessee before Hon'ble ITAT, Bangalore Bench, such appeal was allowed. Relevant extracts of the decision of Hon'ble ITAT is as under:-

> *"…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…"*

The aforementioned decision of Hon'ble ITAT, Bangalore Bench, has been subsequently followed by different benches of ITAT, including ITAT, Jaipur Bench, in the below mentioned cases -

S.No.	Case law	ITA No.	Bench	Case Law Page
1	Ritesh Kumar Garg	261/JP/2022	Jaipur	Page 7
2	Bhaskar Dutta	1869/DEL/2022	New Delhi	Page 16
3	Sumedha Arora	1399/DEL/2022	New Delhi	Page 20

The Coordinate Bench of the Tribunal, Jaipur Bench, in the case Ritesh Kumar Garg, ITA 261/JP/2022, under identical set of facts, held that filing of Form 67, in accordance with Rule 128 was only a procedural/directory requirement and **not a mandatory requirement**. The Coordinate Bench also relied upon the decision of ITAT Bangalore Bench in the case of Brinda Rama Krishna *(supra).*

6.3. While rejecting the claim of assessee, the ld. CIT (A) has relied upon the decision of ITAT Vishakhapatnam Bench in the case of Murlikrishna Vaddi in ITA No. 269/Viz/2021. However, the said decision has already been distinguished by the

Coordinate Benches of the Tribunal, in the cases of Ritesh Kumar Garg in ITA No. 261/JP/2022, Bhaskar Dutta in ITA No. 1869/Del/2022, Baburao Atluri in ITA Nos. 108 & 118/Hyd/2022 and even in the case of Brinda Ramakrishna in ITA No. 454/Bang/2021, it has been held that not allowing FTC for the sole reason of delayed filing of Form 67 was held to be a mistake apparent on the record. Therefore, it was held by the Coordinate Benches of the Tribunal in the cases supra, that rectification application of the assessee for not allowing claim of FTC was maintainable and the Coordinate Bench of the Tribunal, in the cases of Brinda Ramakrishna in ITA No. 454/Bang/2021, Bhaskar Dutta in ITA No. 1869/Del/2022, Sumedha Arora in ITA No.

1399/Del/2022 has held that Form 67 filed by the respective assessees, even after the end of the relevant assessment year makes the assessee entitled to claim FTC. Therefore, considering the facts of the present case, the FTC deserves to be allowed to the assessee even if Form 67 was filed by the assessee after the due date of filing the return under section 139(1) of the IT Act, 1961, and in our view not allowing foreign tax credit by AO (CPC) was nothing, but a mistake apparent on record.

Therefore, we direct the revenue to allow the claim of the assessee.

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

Order pronounced in the open court on 10/05/2023.

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(RATHOD KAMLESH JAYANTBHAI) (SANDEEP GOSAIN)
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Tk;iqj@Jaipur

fnukda@Dated:- 10/05/2023. Das/

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1. vihykFkhZ@The Appellant- Shri Sanjeev Agrawal, Jaipur.
2. izR;FkhZ@ The Respondent- The DCIT, Central Circle-4, Jaipur.
3. vk;dj vk;qDr@ CIT
4. vk;dj vk;qDr@ CIT(A)
5. foHkkxh; izfrfuf/k] vk;dj vihyh; vf/kdj.k] t;iqj@DR, ITAT, Jaipur. 6. xkMZ QkbZy@ Guard File {ITA No. 71/JP/2023}

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