॥आयकर अपीलीय न्यायाधिकरण, पुणे 'एस.एम.सी.' न्यायपीठ, पुणे में ॥

IN THE INCOME TAX APPELLATE TRIBUNAL, PUNE 'SMC' BENCH, PUNE

BEFORE HON'BLE SHRI S. S. VISWANETHRA RAVI, JUDICIAL MEMBER

AND

SHRI G. D. PADMAHSHALI, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 1428/PUN/2023

निर्धारण वर्ष / Assessment Year : 2019-19

Akshay Rangroji Umale
A-402, Pride Panorama,
Shivaji Hsg. Society,
SB Road, Pune-411016
PAN: AAMPU7528K ..... *अपीलार्थी / Appellant*

बनाम / V/s

Dy. Commissioner of Income Tax,
Circle-12, Pune ..... *प्रत्यर्थी / Respondent*

द्वारा / Appearances

Assessee by : Mr Kishor Phadke ['Ld. AR']

Revenue by : Ms Sonal Sonkavde ['Ld. DR']

सुनवाई की तारीख / Date of conclusive Hearing : 23/01/2024

घोषणा की तारीख / Date of Pronouncement : 01/02/2024

आदेश / ORDER

PER G. D. PADMAHSHALI, AM;

This appeal of the assessee for assessment year 2019-20 [for brevity 'AY'] is assailed against DIN & Order No. ITBA/APL/S/250/2023-24/1057622362(1) dt. 01/11/2023 passed u/s 250 of the Income-tax Act, 1961 [for brevity 'the Act'] by Addl./Joint Commissioner of Income Tax Appeals-11, Delhi [for brevity 'CIT(A)'], which in turn ascended out of order of intimation dt. 25/02/2021 passed u/s 143(1) of the Act by Centralised Processing Centre, Bengaluru, [for brevity 'CPC'].

2. The long and short of the case is that; the appellant is an individual assessee who for the year under consideration was resident in India in terms of section 6(1) of the Act, consequently his global income by virtue of section 5 of the Act was subjected to tax in India. The assessee filed his return of income [for brevity 'ITR'] belatedly u/s 139(4) of the Act on 28/02/2020 by offering to tax his global income of ₹58,48,036/- of which ₹45,58,748/- was from United State of America Company [for brevity 'USA'] which suffered tax in USA @24.37%. Since such USA salary is again offered to tax in India, the resident assessee filed Form No 67 on even date claiming Foreign Tax Credit ₹11,11,174/- [for brevity 'FTC'] in terms of section 90/90A of the Act r.w. INDO-USA Double Tax Avoidance Agreement entered with USA [for brevity 'DTAA']. The Ld. CPC by its order of intimation dt. 25/02/2021, however denied the aforestated claim of FTC to the assessee for a solitary reason of not filing FTC claim Form No 67 accompanying certificates, statements etc., within the time limit of filing ITR prescribed u/s 139(1) of the Act as specified u/r 128(9) of Income Tax Rules, 1962 [for brevity 'IT-Rules'] which was expired on 31/08/2019.

3. Being aggrieved by the order of intimation processed u/s 143(1) of the Act, the assessee instituted an appeal before Ld. first appellate authority [for brevity 'FAA'], who by impugned order confirmed the action of the Ld. CPC, and thus denied the claim of FTC to the assessee, as the mandatory requirement of filing of Form No. 67 to be filed in terms of rule 129(9) of IT Rules, 1962 was admittedly filed belatedly on 28/02/2020 i.e. beyond prescribed due date for filing return of income u/s 139(1) of the Act. Aggrieved assessee is in appeal before us in the present appeal.

4. During the course of hearing, the Ld. AR Mr Phadke contented that; (1) the provisions of treaty prescribed no such filing requirement for claiming FTC in the contracting state, therefore additional arduous filing compliance fastened u/r 128(9) of IT Rules, 1962 can neither override the provisions of DTAA nor legally disentitle the assessee for FTC. (2) Filing of Form No 67 is procedural and at the most directive but not mandatory requirement of section 90 r.w. provisions of DTAA. (3) The rule prescribes no explicit denial for delayed compliance or non-compliance (4) Form No 67 alongwith certificates of payment of foreign taxes since filed well within time allowed u/s 139(4) of the Act and well before ITR actually processed, hence no prejudice was caused to the Revenue.

5. *Per contra,* the Ld. DR Ms Sonkavde vehemently supported the orders of both the tax authorities and submitted that for claiming FTC, filing of Form No 67 on or before the due date of filing of return of income as provided u/r 128(9) of IT Rules, 1962 is must & mandatory in nature. It is further stated that merely because the obligation is created under rules in place of provisions of the Act does not sanction the appellant to claim such obligation is directive and not mandatory. Since the appellant by choice failed to file said claim and accompanying requisite certificates as specified in s/r (8) within statutory due date as prescribed u/r 128(9) r.w.s. 139(1) of the Act and no reasonable cause beyond such belated filing is established at any-time including the present proceedings before this Tribunal, hence non-compliance of prescribed mandate *per-se* stands established. By pressing into service, the decision of Co-ordinate bench rendered in ITA No.269/Viz/2021 dt 14/06/2022 the Ld. DR solicited dismissal of the present appeal & claim for FTC canvassing that delayed compliance serves no purpose.

6. We have heard the rival contentions of both parties; subject to provisions of rule 18 of ITAT Rules, 1963 perused material placed on records, case laws relied upon by rival parties and duly considered facts of the case in light of settled legal position, which are forewarned to parties present.

7. We note that, neither party to the present litigation have dispute over the entitlement of FTC to the appellant or correctness of amount of FTC claimed. The solitary dispute in the instant case revolves around denial of FTC credit on the ground of delayed filing of Form No. 67 & accompanying certificates/statement in violation s/r (9) of rule 128 of IT Rules, 1962. To put it straight, the only question in the extant case arisen as to *'whether belated compliance for FTC made after the expiry of time limit prescribed for filing ITR u/s 139(1) of the Act is allowable?'*

8. Upon visiting enabling provisions of the statute, we note that;

8.1 *Sub-section(1) of section 90 of the Act, inter alia, empowers the Central Government of India [for brevity 'GOI'] to enter into a DTAA with other countries for avoidance of double taxation and for granting relief in respect of income on which tax has been paid or income tax is chargeable both in India and the foreign country. Accordingly invoking the power conferred u/s 295(2)(ha) of the Act Central Board of Direct taxes [for brevity 'CBDT] vide Notification No. 54/2016 dated 27 June 2016, CBDT notified rule 128 of IT Rules on FTC, which inter alia, provided that FTC shall be lower of the tax payable on a foreign income in India and in the foreign country.*

8.2 *Sub rule (1) of rule 128 provides that, any 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. Whereas s/r (8) mandates allowance of FTC on furnishing certificate of statement in form no 67 and certificate of statement of foreign tax paid / deducted from such income. The s/r (9) prescribes time limit within which compliance with respect to s/r (8) of rule 128 is to be made.

8.3 *This s/r (8) prescribed time clock for furnishing certificate or the statement referred to therein by the due date specified for furnishing the return of income u/s 139(1) of the Act. It shall be worthy to note here that, CBDT vide Notification No. 100/2022/F. No. 370142/35/2022-TPL GSR 636(E) dt. 18/08/2022 substituted this s/r (9) w.r.e.f. 01/04/2022 thus entitling thereby FTC credit to the resident assessee where compliance with respect to s/r (8) is made any time before the expiry of time limit prescribed for filing of return of income u/s 139(4) of the Act. It shall be apt to note further that, the explanatory memorandum appended to former notification clarifies that this amendment is effective from the 1st day of April, 2022 so that it applies to all the claims of foreign tax credit furnished during the financial year 2022-2023.*

9. Now let us consider standing position of INDO-USA Treaty/DTAA;

9.1 The article 25(2)(a) of INDO-USA DTAA provides relief for FTC credit clearly stating that, '*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.'

9.2 *Insofar as superseding of provisions of DTAA over the provisions of the Act and IT Rules, 1963 are concerned, the article 26 comes into play which provides for non-discrimination by stating that, nationals of a Contracting State who are residents of one or both of the Contracting States, shall not be subjected to any taxation or any requirement connected therewith in the other Contracting State which is other or more burdensome than the taxation and connected requirements to which nationals that other State in the same circumstances are or may be subjected. Thus, this provision nowhere undermines right of GOI in prescribing other or addition burdensome requirements either under the Act or rules but washouts the possibilities of discriminating treatment if any.*

10. A careful reading & conjunct consideration of provisions of section 90/90A of the Act and provisions of DTAA, *prima-facie* it appears us that, the provisions of DTAA in general does not prevail over the provisions of Act and rules made thereunder. Section 90/90A of the Act does also not provide so. However, wherever the DTAA has provided the taxation of a particular category of income at certain rates, then charging of that income at different rates as per the Act, may come in conflict with the DTAA and hence, the taxes over that category of income will be levied at that the rates, so provided in the DTAA. But where no such rates on an income or a category of income on the status of an assessee has been prescribed in the DTAA, then there cannot be any conflict with the Act. Where there is no specific provision in the agreement, it is basic law, i.e., the Income-tax

Act/Rules, that will govern the taxation of income. Therefore, in absence of any specific compliance provided in INDO-USA DTAA, in view of the ratio laid down in *'CIT Vs Hindusthan Paper Corpn. Ltd.'* 77 Taxman 450 (Cal.) the general provisions of the Act or the IT Rules will govern matter of taxation/assessment.

11. The article 25 of DTAA entitles the resident assessee a credit against USA taxes paid/deducted from the income, prescribing no filing compliance therefore. And insofar filing compliance required u/r 128(9) of the IT Rules is concerned, it is neither nullified by article 25 nor article 26 of the DTAA. On the contrary, article 26 of DTAA simply prescribes non-discrimination while dealing with such additional or other requirements prescribed under domestic laws of the contracting state. Therefore, the appellant's first contention that the DTAA since prescribed no filing requirement for FTC will prevail over the provisions of rule 128 of IT Rules, 1962 *prima-facie* fails to inspire any confidence. Ergo this contention stand rejected. The reliance placed on the decision of Co-ordinate Benches in *Sanjiv Gopal Vs Addl CIT' reported in 66 CCH 0078 and 'Brinda Ramakrishna Vs ITO' reported in 135 taxmann.com 358,* by the Ld. AR is answered accordingly.

12. It is the case of the Revenue that, s/r (9) r.w.s/r (8) prescribed twin conditions (i) with respect to furnishing and secondly (ii) time limit within which it is to be furnished. In view of the Revenue mere filing does not entitle the assessee to FTC but filing within the time limit prescribed by s/s (1) of section 139 of the Act. To drive home this contention the Ld. DR heavily relied on the decision of Hon'ble Supreme Court in *'PCIT Vs WIPRO Ltd'* reported in 115 CCH 162 & 446 ITR 1 (SC) which was rendered in context of *non-obstante* section 10B of the Act.

13. The s/r (1) of rule 128 of IT Rules, 1962 assumes a statutory obligation to allow FTC to a resident assessee for the amount of any foreign tax paid/deducted in a country or specified territory outside India, for which s/r (9) prescribed a time limit for furnishing a requisite form alongwith certificates & statements etc., as specified under s/r (8) thereof. We note that, both these s/r (1) as well s/r (9) created a mandate using the word *'shall',* therefore here arises a question of its effective operation, thus interpretation. Whether a particular provision in a statute is mandatory or directory has to be construed from the scheme and object of the provisions. It is well settled law that the rules are sub-ordinate piece of legislation, enacted to facilitate to carry out objective of main legislation i.e. provisions of Act. The very purpose and object of insertion of rule 128 to statute is to allow FTC and it is so subscribed by s/r (1) therefore, mandate of s/r (9) is sub-servient to s/r (1). As the river cannot rise higher to its source hence s/r (9) it is to be read harmoniously so as not to defeat the purpose of s/r (1) enabling FTC to resident assessee to in terms of article 25 of DTAA. It is apt to mention here that the very insertion of rule 128 is stemmed out of provision of section 295(1)(ha) of the Act which empowered the board to prescribe procedure for granting of relief or deduction of any income-tax paid in any foreign country outside India u/s 90/90A or 91, against the income-tax payable under the Act; This *ispo-fact* clarifies amply that, the compliance envisaged under s/r (9) is procedural in nature. Therefore, we are afraid as this could not rescue the Revenue's concern as their Hon'ble Lordships in 'PCIT Vs WIPRO Ltd' (supra) have dealt with mandate of provisions of the Act which circumscribed with non-obstante clause, dissimilar with the present case relating to procedural rule brought in by CBDT to give effect to the provision DTAA.

14. We are mindful to state that, the prime object of prescribing filing of requisite form, certificate & statement on record is to verify and vouch genuineness & correctness of the FTC claimed by resident assessee. It would not only be difficult but impossible for the Revenue to honour each and any FTC claim without first verifying the eligibility of the claimant, genuineness & correctness of claim. Undisputedly, a belated compliance would be indifferent to eligibility, genuineness & correctness, hence cannot be subjected to rejection or denial. In our considered view filing of claim form alongwith certificates/statement etc., is mandatory as it relates to essence of FTC claim to be allowed as matter of substance, however directory with respective to time limit within which it is to be made as it is merely matter of convenience rather than substance, as the matter of fact rule 128 of IT Rules prescribed no consequences for delayed compliance or non-compliance.

15. This view we find fortified by the Hon'ble Madras High Court in 'Hyundai Motors India Ltd. Vs UOI' reported in 2015 (1) TMI 23, wherein their Honb'le lordships have also dealt with nature of time limit prescribed whether mandatory or directory co-relating with prescription of consequences for non-compliance. It is held that, the rule setting a time clock prescribing no consequences for non-compliance within such time limit, then such rule for the limited purpose of time clock has to be seen as directory in nature. Placing reliance thereon, we agree with the decision of Co-ordinate Bench of ITAT, in 'Brinda Rama Krishna [ITA No. 454/Bang/2021] wherein it is adjudicated that, the s/r (9) does not provide for disallowance of FTC in case of delay in filing as same is not mandatory but a directory requirement, therefore non-furnishing the same before the due date u/s 139(1) of the Act is not fatal.

16. The hon'ble Apex Court in 'CIT Vs G. M Knitting Ltd' reported 379 ITR 456 (SC) & 93 CCH 475 which in turn appreciating the ratio laid by Hon'ble Bombay High Court in 'CIT Vs Shivanand Electronics [1994] 209 ITR 63 (Bom.) held that it shall be sufficient compliance with the law if requisite forms are filed during the assessment proceedings and before the final order of the assessment was made. The Co-ordinate bench in *'Sonakshi Sinha Vs CIT'* reported in 66 CCH 0050, dealing with identical issue of belated filing of return and form no 67 adjudicated that, under amended rule w.e.f. 01/04/2022, the assessee can file requisite form on or before the end of the assessment year therefore, assessee is eligible for FTC, though not in accordance with rule 128(9) of IT Rules. We therefore, respectfully following the aforestated judicial precedents, hold that belated filing of form no 67, certificate & statement as envisaged under s/r (8) any-time before it is actually processed or before the final assessment is actually made is sufficient compliance of s/r (9) of IT Rules, thus entitled to FTC. Thus, all other contentions and grounds of appeal are adjudicated accordingly.

17. In result, the appeal of the assessee is **ALLOWED** in above terms.

In terms of rule 34 of ITAT Rules, order pronounced in open court on Thursday 01st day of February, 2024.

-S/d-
S. S. VISWANETHRA RAVI
JUDICIAL MEMBER

-S/d-
G. D. PADMAHSHALI
ACCOUNTANT MEMBER

पुणे / PUNE ; दिनांक / Dated : 01st day of February, 2024.

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

1.अपीलार्थी / The Appellant. 2. प्रत्यर्थी / The Respondent. 3. The Pr. CIT, Concerned
4. The AddCIT(A)/JCIT(A)Concerned 5. DR, ITAT, Pune Bench 'SMC', Pune 6. गार्डफ़ाइल / Guard File.

आदेशानुसार / By Order
वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय न्यायाधिकरण, पुणे / ITAT, Pune.