आयकर अपीलीय अधिकरण
कोलकाता 'डी' पीठ, कोलकाता में
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'D' BENCH, KOLKATA

श्री संजय शर्मा, न्यायिक सदस्य
एवं
श्री राकेश मिश्रा, लेखा सदस्य
के समक्ष
Before

SHRI SONJOY SARMA, JUDICIAL MEMBER
&
SHRI RAKESH MISHRA, ACCOUNTANT MEMBER

I.T.A. No.: 163/KOL/2025
Assessment Year: 2020-21

Vivek Tiwari	Vs.	ACIT, Circle 3, Suri
(Appellant)		***(Respondent)***
PAN: ATHPT9952A		

Appearances:

Assessee represented by : Vikas Agrawal, AR.

Department represented by : Prabhakar Prakash Ranjan, Sr. DR.

Date of concluding the hearing : 30-Apr-2025
Date of pronouncing the order : 16-June-2025

ORDER

PER RAKESH MISHRA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of the ADDL/JCIT(A)-Aurangabad [hereinafter referred to as Ld. 'Addl/JCIT(A)'] passed u/s 250 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for AY 2020-21 dated 31.12.2024, which has been passed against the intimation order u/s 143(1) of the Act, dated 24.12.2021.

2. The assessee is in appeal before the Bench raising the following grounds of appeal:

> *"1. The learned Addl. / Jt. CIT(A), Aurangabad erred in law and on facts in sustaining the action of the learned DDIT, CPC, Bengaluru in not granting Foreign Tax Credit of Rs. 16,49,094/-. The learned I-T Authorities ought to have appreciated that Foreign Tax Credit cannot be denied merely due to delay in filing Form-67, as held by various courts.*
>
> *2. The learned Addl. / Jt. CIT(A), Aurangabad erred in law and on facts in not appreciating that filing of Form-67 as per Rule 128 of the ITR, 1962 is only directory in nature and therefore non grant of foreign tax credit for delay in filing Form-67 is uncalled for, as held by various courts.*
>
> *3. The learned Addl. / Jt. CIT(A), Aurangabad erred in law and on facts in not appreciating that non grant of foreign tax credit, due to delay in filing Form-67, is against the provisions of section 90 of the ITA, 1961 and the DTAA between India and USA.*
>
> *4. The learned Addl. / Jt. CIT(A), Aurangabad erred in law and on facts, in not following the binding decisions of the Honorable Madras High Court and the Jurisdictional Honorable ITAT, Kolkata Bench.*
>
> *5. Appellant craves leave to add / alter / modify / amend / delete all / any of the Grounds of Appeal."*

3. Brief facts of the case are that the assessee is an individual and was employed with M/s. Microsoft India (R&D) Pvt. Ltd. during AY 2020-21. He was working in India and USA during AY 2020-21 and had received salary in India and USA. Since the assessee was a 'Resident' for the purpose of the Income Tax Act, 1961, his global income was taxable in India. He filed his return of income for AY 2020-21 on 28/12/2020 disclosing total income of Rs. 72,20,820/-. The total income of the assessee also included salary income received in the USA at Rs. 58,04,035/- and he also claimed foreign tax credit of Rs. 16,49,094/- u/s 90 of the Act for which he also filed Form-67 on 18/01/2021. Since Form No. 67 was filed on 18/01/2021, i.e. after the due date of filing the return of income u/s 139(1) of the ITA, 1961 i.e.

10/01/2021, the Ld. AO, CPC processed the return of income u/s 143(1) of the ITA, 1961 on 24/12/2021, without granting foreign tax credit of Rs. 16,49,094/- and raised tax demand of Rs. 20,80,790/-. The assessee filed a rectification return of income before the CPC; however, the CPC did not grant credit of foreign tax of Rs. 20,80,790. It was submitted before the Ld. CIT(A) that since the issue was not getting rectified, the assessee consulted a tax consultant, and it was advised that a rectification application should be filed before the learned jurisdictional AO. As a result, the assessee filed a rectification application dated 23/10/2024 before the Ld. ACIT, Circle-3, Suri(sic). It was also advised by the tax consultant that on conservative basis, an appeal should also be filed before the learned CIT(A), against the intimation, which was filed. Before the Ld. Addl/JCIT(A) in the course of the appeal, the assessee submitted as under:

> *"Since single issue is involved in the appeal i.e. non-grant of Foreign Tax Credit due to delay in filing Form-67, by the learned AO, CPC all the Grounds of Appeal are dealt together.*
>
> *a) Provision of Rule 128:*
>
> *The relevant provision of Rule 128(1) of the ITR, 1962 as applicable for AY 2020-21 is reproduced below for sake of easy referencing:*
>
> *"Rule 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 "*
>
> *As per the provisions of Rule 128(1) of the ITR, 1962 credit of taxes paid outside India to be granted in the year in which the corresponding income is offered to tax in India.*

b) Provision of section 90:

The relevant provision of section 90(1) of the ITA, 1961 as applicable for AY 2020-21 is reproduced below for sake of easy referencing:

"Section 90 (1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,—

(a) for the granting of relief in respect of—

(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

As per the provisions of section 90(1) of the ITA, 1961 credit of taxes paid outside India to be granted if the agreement has been entered by the Indian Government with the Government of other country.

c) Provision of Article 25 of the DTAA between India and USA:

The relevant provision of Article 25(2)(a) of the DTAA between India and USA as applicable for AY 2020-21 is reproduced below for sake of easy referencing:

"Article 25(2)(a) Where a resident of India derives income which, in accordance with the provisions of this Convention, moy be taxed in the United States. India shall allow as a deduction from the tax on the income of that resident on 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 (os computed before the deduction is given) which Is attributable to the income which may be taxed in the United States.'

As per the provisions of Article 25(2)(a) of the DTAA between India and USA, credit of taxes paid in USA to be granted for a person resident of India, if income is offered to tax in India.

d) Treaty provision to override:

On combine reading of Rule 128 of the ITR, 1962; section 90 of the ITA, 1961 and Article 25 of the DTAA between India and USA, taxes paid in USA shall be allowed as a credit against the tax payable in India. Neither section 90 of the ITA, 1961 nor the DTAA provides that Foreign Tax Credit shall be disallowed for non-compliance with any procedural requirement. It Is submitted that Foreign Tax Credit Is appellants vested right as per Article 25(2)(a) of the DTAA between India and USA read with section 90 of the ITA,

1961 and same cannot be disallowed for noncompliance with procedural requirement that is prescribed in the rules. As such, in case even if Form-67 is not filed, considering the provision of Article 25 of the DTAA between India and USA, which has an over-riding effect on the provisions of the Income Tax Act, 1961; credit of taxes paid outside India to be granted.

In appellants case, appellant has filed Form-67 with a slight delay of 8 days. As such, appellant is eligible for Foreign Tax Credit of Rs. 16,49,094/-, which is duly reported and supported with documentary evidence in Form-67, considering Article 25 of the DTAA between India and USA.

e) Provision of Rule 128(9) is only directory in nature:

As per provision of Rule 128(9) of the ITR, 1962 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 ITA, 1961. However, the rule nowhere provides that if the said Form-67 is not filed within the required time frame, the relief as sought u/s 90 of the ITA, 1961 would be denied. It is therefore evident that if the intention of the legislature were to deny the Foreign Tax Credit, either the Income Tax Act or the Income Tax Rules would have specifically provided that the Foreign Tax Credit would be disallowed if Form-67 is not filed within the due date prescribed under section 139(1) of the ITA, 1961. As such, it can be safely concluded that filing of Form-67 is merely a procedural / directory requirement and is not a mandatory requirement and violation of procedural norm does not extinguish the substantive right of claiming the credit of Foreign Tax.

Further, Rule 128(9) of the ITR, 1962 has been amended w.r.e.f. 01/04/2022 and provides that Form-67 can be filed within the due date prescribed u/s 139(1) / 139(4) of the ITA, 1961. Though, the said amended rule is applicable from 01/04/2022, since the said rule is beneficially, it can be applied to the period prior to 01/04/2022 also

In appellant's case, in any case, appellant has submitted Form-67 with a slight delay of 8 days only and is filed well within provision of section 139(4) of the ITA, 1961. As such, appellant is eligible for Foreign Tax Credit of Rs. 16,49,094/-, which is duly reported and supported with documentary evidence in Form-67, considering the fact that filing of Form-67 is only directory in nature."

3.1 The Ld. Addl/JCIT(A) considered the submission of the assessee and noted as under:

"7.5. In this case, the extended due date of filing the return of income was 10.01.2021 whereas Form No. 67 was filed on 18.01.2021. Thus, Form No.

67 was not filed by the appellant in time. So the form -67 was filed after due date. Thus, the conditions prescribed for filing the return of income and Form No. 67 as prescribed and discussed above have not been fulfilled by the appellant.

3.2 Thereafter, the Ld. Addl/JCIT(A) has reproduced the contents of CBDT Notification No. 9 dated 19.09.2017. Further, relying upon the decisions in the cases of **State of Uttar Pradesh vs. Singhara Singh AIR 1964 SC 358**, **Chandra Kishore Jha vs. Mahavir Prasad [1999] 8 SCC 266** and **Commissioner of Income-tax v. Shivanand Electronics 209 ITR 63 (Bombay HC),** the Ld. Addl/JCIT(A) dismissed the appeal of the assessee.

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

5. We have considered the rival submissions made and have also considered the facts of the case. In the paper book filed before us, the assessee has relied upon the following decisions in support of the claim that filing of Form No. 67 is directory and not mandatory and therefore, the relief of foreign tax credit is allowable as Form No. 67 was available at the time of processing of the return:

"i) Duraiswamy Kumaraswamy Vs. PCIT-460 ITR 615 (Madras)

ii) Kuthoore Venkatasubramanian Vs. PCIT-168 taxmann.com 622 (Madras)

iii) Venkatesh Krishnamoorti Vs. PCIT-169 taxmann.com 339 (Madras)

iv) Rahul Anand Vs. ADIT, CPC-169 taxmann.com 281 (Kolkata ITAT)

v) Surendra Goenka Vs. ADIT-169 taxmann.com 306 (Kolkata ITAT)

vi) BGA Electrical (P.) Ltd. Vs. DCIT-169 taxmann.com 272 (Kolkata ITAT)

vii) Soumitra Ganguly Vs. ITO-167 taxmann.com 168 (Kolkata ITAT)

viii) Jaspal Singh Bindra Vs. DCIT-1826/KOL/2024 (Kolkata ITAT)

ix) Neetu Agarwal Vs. ITO-1898/KOL/2024 (Kolkata ITAT)

x) Ratanlal Bhura Vs. DCIT-1719/KOL/2024 (Kolkata ITAT)"

6. The Ld. DR relied upon the order of the Ld. CIT(A) and requested that the same may be upheld.

7. We have considered the submission made. The facts are similar to that in the case of **Swapan Bhttacharya vs. ACIT, Circle-61, Kolkata** in **ITA No. 242/KOL/2025** order dated 05.05.2025 (in which the Accountant Member was part of the Bench) in which the Coordinate Bench has held as under:

> *"5. Rival submissions were heard and the record and the submissions made have been examined. During the course of the appeal, the Ld. DR submitted that the Form No. 67 was filed on 30.03.2019, which was late and was filed beyond the due date of filing the return of income. The Ld. AR submitted that during the year the income was earned in USA and section 90 of the Act read with the DTAA was applicable. Though Form No. 67 was filed late but the same was filed on 30.03.2019 and was available at the time of processing of the return of income carried out u/s 143(1) of the Act on 25.12.2019 as well as at the time of completion of assessment under section 143(3) of the Act on 27.12.2019 and, therefore, the credit for Foreign Taxes paid in the USA should have been allowed. Reliance was placed by the Ld. AR on the case of Rahul Anand vs. ADIT (CPC, Bengaluru) in ITA No. 1497/KOL/2024 order dated 06.12.2024, a copy of which was filed along with the case law paper book in which reliance has also been placed upon several other judicial pronouncements. The Ld. DR submitted that the assessee had filed multiple returns which was countered by the Ld. DR by stating that the return was revised but in the computation sheet, different figure has been adopted by the Ld. AO. Our attention was drawn to the computation sheet in which the figure of Rs. 2,49,43,470/- was adopted while in the assessment order u/s 143(3) of the Act, the total income is assessed at Rs. 2,23,86,630/- which is the same as the income as per the return of income. Our attention was further drawn to column 14 of the computation sheet in which total income after deduction is shown at Rs. 2,49,43,470/- while in column 16 the aggregate income is shown at Rs. 2,23,86,630/-. The assessee had claimed the refund but on the contrary demand was raised. The Ld. CIT(A) did not consider the ground relating to the enhanced income. An application filed u/s 154 of the Act filed was rejected. After analysis of the computation sheet, it was noted that the income from capital gains shown at Rs. 68,28,041/- was not correct which as per the final revised return at pages 22 to 27 of the paper book was shown at Rs. 'NIL' on account of short term capital gains earned outside*

India and set off of brought forward losses for A.Y. 2016-17. It was submitted that the Ld. CIT(A) did not adjudicate this issue in the appeal. The Ld. DR vehemently supported the order of the Ld. CIT(A).

6. We have gone through the submissions made and also considered the facts of the case. Similar issue arose in the case of Jaspal Singh Bindra vs. DCIT in ITA No. 1826/KOL/2024 order dated 19.11.2024 in which the Coordinate Bench (in which the Accountant Member was a member) on similar issue of FTC allowed the appeal. The following cases have been referred in the said order as well as in the order of Rahul Anand (supra) relied upon by the assessee:

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

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

iii. 42 Hertz Software India Pvt. Ltd vs Asst. CIT. ITA No. 29/Bang/2001

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

7. Before proceeding further, we would like to reproduce rule 128 of the Income-tax Rules, 1962 (the Rules) which relates to foreign tax credit and is as under:

"Foreign Tax Credit.

128 (1) An assessee, being a resident shall be allowed credit for the amount of any foreign tax paid by him in a country or specified territory outside India, by way of deduction or otherwise, in the year in which the income corresponding to such lax has been offered to tax or assessed to tax in India, in the manner and to the extent as specified in this rule:

Provided that in a case where income on which foreign tax has been paid or deducted, is offered to tax in more than one year, credit of foreign tax shall be allowed across those years in the same proportion in which the income is offered to tax or assessed to tax in India."

8. We further note that section 90 of the Act provides that Government of India can enter into Agreement with other countries for granting relief in respect of income on which taxes are paid in country outside India and such income is also taxable in India. Article 25 of DTAA between India and USA provides for credit for foreign taxes. Article 25(2)(a) is relevant in the present context and the same is extracted below:

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

9. Thus, Section 90 of the Act read with Article 25(2)(a) of the DTAA provides that tax paid in USA shall be allowed as a credit against the tax payable in India but limited to the proportion of Indian tax. Neither section 90 nor the DTAA provides that FTC shall be disallowed for non-compliance with any procedural requirement. Foreign Tax Credit is an assessee's vested right as per Article 25[2](a) of the DTAA read with Section 90 and same cannot be disallowed for non-compliance with procedural requirement as prescribed in the rules.

10. Further, we would like to mention that rule 128(9) provides that Form No. 67 should be filed on or before the due date of filing the return of income as prescribed u/s 139(1) of the Act. However, the rule nowhere provides that if the said Form No. 67 is not filed within the required time frame, the relief as sought by the assessee u/s 90 of the Act would be denied. It is therefore evident that if the intention of the legislature were to deny the foreign tax credit, either the Act or the rules would have specifically provided that the foreign tax credit would be disallowed if the assessee does not file Form No. 67 within the due date prescribed under section 139(1) of the Act. We further note that as is judicially held, filing of Form No. 67 is a procedural/directory requirement and is not a mandatory requirement and violation of procedural norm does not extinguish the substantive right of claiming the credit of FTC and such is the finding in the cases of the coordinate Benches referred to in the order of Jaspal Singh Bindra (supra).

11. Hon'ble Supreme Court, in the case of Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner, [1992 Supp (1) Supreme Court Cases 21] in respect of compliance with the procedural requirements have observed that:

> *"The mere fact that it is statutory does not matter one way of that other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve."*

12. Further, in the case of Engineering Analysis Centre of Excellence (P.) Ltd. vs. Commissioner of Income-tax [2021] 125 taxmann.com 42 (SC)/[2021] 281 Taxman 19 (SC)/[2021] 432 ITR 471 (SC), Hon'ble Supreme Court have held as under that the provisions of DTAA shall override the provisions of the Income-tax Act unless they are more beneficial to the assessee:

> *165. The conclusions in the aforestated paragraph have no direct relevance to the facts at hand as the effect of section 90(2) of the Income-tax Act, read with explanation 4 thereof, is to treat the DTAA provisions as the law that must be followed by Indian courts, notwithstanding what may be contained in the Income-tax Act to the contrary, unless more beneficial to the assessee.*

13. We have gone through the decisions of the coordinate Benches and concur with their findings in this regard that filing of Form No. 67 is directory and not mandatory and the credit for foreign taxes paid cannot be denied merely on the delay in filing the Form No. 67.

14. We have also gone through the decision of the Hon'ble Madras High Court in the case of Duraiswamy Kumaraswamy us. PCIT (supra) and find that the facts are identical to the facts of the case of the assessee and the decision is squarely applicable to the facts of the case of the assessee. In that case, the petitioner was resident of India and had filed Indian ITR and claimed benefit of FTC u/s 90/91 of the Act r.w. Article 24 of the India-Kenya DTAA. During the year, he had income of both Kenya and India but while filing the Indian ITR for the impugned assessment year 2019-20, the Form No. 67 prescribed in rule 128 of the rules for claiming FTC was inadvertently not uploaded along with the ITR which was uploaded on 02.02.2021 The return was processed on 26.03.2021, however, the credit of FTC was not given effect to and the request made to the CPC to give effect to the FTC was not accepted and intimation along with notices of demand was received. The assessee also could not succeed with the rectification application filed and approached the CIT u/s 264 of the Act and at the same time filed a writ petition before the Hon'ble Madras High Court. It was stated by the respondent-department that rule 128 is mandatory and cannot be considered as directory in nature. The petitioner referred to the judgment of the Hon'ble Supreme Court in the case of CIT vs. G.M. Knitting Industries (P) Ltd. Civil Appeal Nos. 10782 of 2013 and 4048 of 2014 dated 24.06.2015. The Hon'ble High Court allowed the Writ Petition in favour of the assessee by holding as under:-

> *"11. The law laid down by the Hon'ble Apex Court in Commissioner of Income Tax, Maharashtra v. G.M. Knitting Industries (P) Limited in Civil Appeal Nos. 10782 of 2013 and 4048 of 2014 dated 24.06.2015, which was referred above, would be squarely applicable*

to the present case. In the present case, the returns were filed without FTC, however the same was filed before passing of the final assessment order. The filing of FTC in terms of the Rule 128 is only directory in nature. The rule is only for the implementation of the provisions of the Act and it will always be directory in nature. This is what the Hon'ble Supreme Court had held in the above cases when the returns were filed without furnishing Form 3AA and the same can be filed the subsequent to the passing of assessment order. W P. No 5834 of 2022.

12. Further, in the present case, the intimation under Section 143(1) was issued on 26.03.2021, but the FTC was filed on 02.02.2021. Thus, the respondent is supposed to have provided the due credit to the FTC of the petitioner. However, the FTC was rejected by the respondent, which is not proper and the same is not in accordance with law. Therefore, the impugned order is liable to be set aside.

13. Accordingly, the impugned order dated 25.01.2022 is set aside. While setting aside the impugned order, this Court remits the matter back to the respondent to make reassessment by taking into consideration of the FTC filed by the petitioner on 02.02.2021. The respondent is directed to give due credit to the Kenya income of the petitioner and pass the final assessment order. Further, it is made clear that the impugned order is set wade only to the extent of disallowing of FTC clam made by the petitioner und hence, the first respondent is directed to consider only on the aspect of rejection of FTC clam within a period of 8 weeks from the date of receipt of copy of this order"

15. Respectfully following the order of the Hon'ble Madras High Court in the case of Duraiswamy Kumaraswamy vs. PCIT (supra) and concurring with the views held by the coordinate Benches of the Tribunal in the cases relied upon in the cases of Rahul Anand and Jaspal Singh Bindra (supra), we hold that merely because the assessee could not file Form No. 67 within the prescribed time limit as per the provisions of rule 128(9) of the Income-tax rules, 1962, as it stood during the year under consideration, will not preclude the assessee from claiming the benefit of the Foreign Tax Credit in respect of taxes paid outside India. Therefore, the claim of the assessee is allowed and the Assessing Officer is directed to give benefit of Foreign Tax Credit in respect of taxes paid outside India by the assessee in accordance with law and the DTAA between India and the USA. Accordingly, Ground no. 2 of the appeal is allowed.

16. As regards Ground no. 3, the Ld. AO is directed to verify the return of income with the computation made and allow the requisite relief as pre law as the tax computation apparently has been made on a higher income and

the figure of capital gains has been incorrectly adopted. This ground of appeal is allowed for statistical purposes."

8. Hence, relying upon the decision of the coordinate Bench in the case of **Swapan Bhttacharya** (supra) which has referred to the decision of Duraiswamy Kumaraswamy (supra) and Rahul Anand (supra), the filing of Form No. 67 is directory and not mandatory, and the provisions of DTAA override the provision of the Income tax Act, the credit for foreign tax is allowable to the assessee. Hence, ground nos. 1, 2, 3 and 4 are allowed and the Ld. AO is directed to allow the credit for foreign taxes in accordance with law.

9. Ground no. 5 being general in nature does not require any separate adjudication.

10. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 16th June, 2025.

Sd/-	*Sd/-*
[**Sonjoy Sarma**]	[**Rakesh Mishra**]
Judicial Member	Accountant Member

Dated: 16.06.2025

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***Vivek Tiwari, Flat No. 203, Orange Blooms, Whitefields,, Hyderabad, West Bengal, 500084.***
2. ***ACIT, Circle 3, Suri.***
3. ADDL/JCIT(A)-Aurangabad.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata