

# TAX FLASH NEWS

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## The claim of Foreign Tax Credit allowed even in case of delay in filing of Form No. 67 as such filing is not mandatory but a directory requirement

### Executive summary

Taxpayers would be required to file Form 67 along with supporting documents for the claim of any foreign tax credit<sup>1</sup> (FTC) while filing the India tax return for a relevant tax year. Such Form 67 is to be prepared and submitted online and submission of Form 67 should precede the filing of return of income.

In this context, the Bangalore Bench of the Income Tax Appellate Tribunal (ITAT), in the case of Brinda RamaKrishna<sup>2</sup> held that furnishing of Form 67 is a directory but not a mandatory requirement and consequently allowed the claim of FTC where Form 67 was filed after the filing of the India tax return for the relevant tax year.

### Facts of the case

The taxpayer, a resident individual, worked in Australia with an Australian entity for the period November 2017 to May 2019. Since the taxpayer's global income was taxable in India by virtue of his residential status, the salary income earned for services rendered in Australia for the period from December 2017 to March 2018 pertaining to the tax year (TY) 2017-18 was offered to tax in India while filing the India tax return (on 31 August 2018) post claiming FTC<sup>3</sup> for the taxes paid in Australia.

The taxpayer had not filed Form 67 before filing the return of income and such Form 67 in support of the claim of FTC was filed only on 18 April 2020.

The return of income was processed by Centralized Processing Centre (CPC) electronically and intimation<sup>4</sup> was passed disallowing the claim of FTC.

The taxpayer had filed a rectification for allowing the FTC as claimed in the return; however, the Assessing officer upheld the action of disallowing the FTC on the ground that the taxpayer has failed to furnish Form 67<sup>5</sup> on or before the due date of furnishing the return of income<sup>6</sup>.

On appeal by the taxpayer, the Commissioner of Income Tax Appeals [CIT(A)] also held that provisions of Rule 128 are mandatory in nature and rejected the claim of FTC by the taxpayer.

The taxpayer filed an appeal before the ITAT against the order passed by CIT(A).

### Taxpayer's contention

The taxpayer was of the view that the filing of Form 67 is a procedural/directory requirement and is not a mandatory requirement.

Based on judicial precedents<sup>7</sup>, the taxpayer contended that a procedural law should not ordinarily be construed as mandatory and that the procedural laws act only as an aid to justice.

The taxpayer also placed reliance on few judicial precedents<sup>8</sup>, wherein High Courts have taken a view that filing of a relevant report is directory and not mandatory in nature even where there is a specific provision<sup>9</sup> for disallowance of deduction/exemption for non-filing of the relevant report.

<sup>5</sup> Under Section 139(1) of the Act

<sup>6</sup> Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner, (1992 Supp (1) Supreme Court Cases 21); Sambhaji and Others v. Gangabai and Others, reported in (2008) 17 SCC 117

<sup>7</sup> Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner, (1992 Supp (1) Supreme Court Cases 21); Sambhaji and Others v. Gangabai and Others, reported in (2008) 17 SCC 117

<sup>8</sup> CIT v. Axis Computers (India) (P.) Ltd [2009] 178 Taxman 143 (Delhi); PCIT, Kanpur v. Surya Merchants Ltd [2016] 72 taxmann.com 16 (Allahabad), etc

<sup>9</sup> Section 80IA(7), 10A(5) of the Act

<sup>1</sup> Under Section 90 of the Income-tax Act, 1961 (the Act)

<sup>2</sup> Brinda RamaKrishna v. The Income Tax Officer (ITA. No. 454/Bang/2021)

<sup>3</sup> Under Article 24 of India-Australia Double Taxation Avoidance Agreement

<sup>4</sup> Rule 128(9) of the Income-tax Rules, 1962 (the Rules)

Further, as per the provisions<sup>10</sup> of the Act, where the Central Government of India has entered into a Double Taxation Avoidance Agreement (DTAA) with another country, then the provisions of the Act would apply to the extent they are more beneficial to a taxpayer. Since the DTAA's do not prescribe a condition for disallowance of FTC for non-compliance of any procedural provision, the claim of FTC cannot be disallowed for the mere delay in compliance of the same.

### ITAT's decision

The ITAT, basis the following, opined that the DTAA overrides the provisions of the Act; accordingly, the relevant Rules cannot be contrary to provisions of the Act and consequently allowed the claim of FTC by the taxpayer:

- (i) The Central Board of Direct Taxes (CBDT) under Rule 128 does not have the power to prescribe a condition for disallowance of FTC, thus, the provisions of Rule 128 are procedural in nature
- (ii) Rule 128 nowhere stipulates that if Form 67 is not filed within the prescribed time, relief under Section 90 of the Act would be denied; and
- (iii) Violation of procedural norm (of filing Form 67 within the due date) did not extinguish the right of claiming FTC

### Our comments

This decision provides clarity on the timelines and the related filing of Form 67 pertaining to claim of FTC. Though the procedural aspect of filing a Form 67 requires filing of the same before the due date of filing the India tax return, a claim of FTC cannot be denied for mere non-adherence to the above timeline. However, it is imperative to follow the timelines in order to mitigate any litigation around the same.

Further, considering this is a fact-specific case and a ruling of the Tribunal, adoption of the same in other jurisdictions/ set of facts could be evaluated on a case-to-case basis.



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<sup>10</sup> section 90(2) of the Act

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