

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'B' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

<b>ITA No. 29/Bang/2021</b>
<b>Assessment Year : 2017-18</b>

M/s. 42 Hertz Software India Pvt. Ltd., 2231, One Bangalore West, Dr. Rajkumar Road, Bangalore North, Bangalore – 560 010. PAN: AAACZ7113J	<b>Vs.</b>	The Assistant Commissioner of Income Tax, Circle – 3 (1)(1), Bangalore.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri PVSS Prasad, CA
Revenue by	:	Shri Priyadarshini Mishra, Addl. CIT (DR)

Date of Hearing	:	03-03-2022
Date of Pronouncement	:	07-03-2022

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal is filed by assessee against the order dated 18/03/2020 passed by the Ld.CIT(A)-3, Bangalore, for assessment year 2017-18 on following grounds of appeal:

<i>Grounds of Appeal</i>		<i>Tax effect relating to each ground of appeal (see note below)</i>
1.	<i>The Appellate Order of Ld Commissioner of Income tax Appeals is bad and erroneous both on facts and in law</i>	43,46,900/-
2.	<i>On the facts and in the circumstances of the case and in the law, the Ld</i>	43,46,900/-

	<i>Commissioner of Income Tax (Appeals) has erred in sustaining the assessment order and in denying the Foreign Tax Credit (FTC) for default in filling Form 67 under Rule 128. He Ought to have consider that the minor technical lapse cannot disentitle the assessee for FTC which is a substantial benefit and the tax credit cannot be denied.</i>	
3.	<i>On the facts and in the circumstances of the case and in the law, the Ld Commissioner of Income Tax (Appeals) has erred in denying FTC to the assessee ignoring the law that subordinate legislation cannot override the provisions of the statute. He ought to have considered that the provisions of Rule 128 are procedural in nature and cannot override the substantial right of the assessee granted under section 90</i>	43,46,900/-
4.	<i>On the facts and in the circumstances of the case and in the law, the Ld Commissioner of Income Tax (Appeals) has erred in denying FTC to the assessee by ignoring the law that provisions of DTAA and Article 23 of the DTAA with Japan cannot be overridden by Rule 128 and Form 67.</i>	43,46,900/-
5.	<i>Such other ground /grounds that may be urged during the hearing of the appeal.</i>	
<i>Total tax effect (see note below)</i>		43,46,900/-

## **2. Brief facts of the case are as under:**

**2.1** The assessee is a private limited company engaged in the business of software publishing consultancy and supply operating system software, business and other application software, computer games etc. It filed its return of income on 29/11/2017 declaring total income of Rs.1,36,89,850/-.

**2.2** The Ld.AO noted that Assessee claimed Foreign Tax Credit(FTC) of Rs.43,46,900/- u/s.90/91 in respect of tax withheld by Japan. As per India-Japan DTAA. The Ld.AO called on assessee to file requisite details in respect of the claim of FTC.

Assessee filed its reply on 22/07/2019 stating that TDS deducted in the AY 2016-17, however, the invoicing were done in the AY 2017-18. The Ld.AO noted that the Assessee did not file Form 67 before filing the return of income which is mandatory for claiming FTC. Subsequently, during assessment proceedings the assessee on 30/07/2019 filed Form 67 which was not accepted by the Ld.AO.

**2.3** The Ld.AO disallowed the claim on the ground that the Assessee failed to furnish Form 67 on or before the due date of furnishing the return of income as prescribed u/s 139(1) of the Act which is mandatory according to Rule 128(9) of the Rules.

Aggrieved by the assessment order assessee preferred appeal before the Ld.CIT(A).

**3.** The CIT(A) confirmed the Order of the Ld.AO. The CIT(A) held that the Assessee has not filed Form 67 before the time allowed under section 139(5) of the Act, and therefore Form 67 is non-est in law. The CIT(A) also held that provisions of Rule 128(8) &(9) are mandatory in nature. The CIT(A) rejected the contention of the assessee that filing of Form 67 is a procedural requirement and noncompliance thereof does not disentitle the Assessee of the FTC.

Aggrieved by the order of Ld.CIT(A), assessee preferred appeal before this *Tribunal*.

The assessee has filed an application for condonation of delay of 257 days in filing appeal before this *Tribunal*. It was submitted that the appeal was supposed to be filed on or before 17.05.2020. However, the same is filed on 29.01.2021. He submitted that

extension of limitation period due to COVID-19 second wave was withdrawn by *Hon'ble Supreme Court* vide order dated 23.09.2021, with effect from 03.10.2021. The Ld.AR submitted that limitation period starts from 03.10.2021 in filing the present appeal.

The Ld.DR could not controvert the above submissions.

We have perused the submissions advanced by both sides.

*Hon'ble Supreme Court* vide order dated 23.09.2021 has excluded limitation period expiring between 15.03.2021 till 02.10.2021.

Accordingly, the present appeal cannot be treated to have been filed belatedly.

Accordingly, the present appeal is considered to be filed within the period of limitation.

**4.** It was submitted that when there is no condition prescribed in DTAA that the FTC can be disallowed for non-compliance of any procedural provision. As the provisions of DTAA override the provisions of the Act, the Assessee has vested right to claim the FTC under the tax treaty, the same cannot be disallowed for mere delay in compliance of a procedural provision.

**5.** On the contrary, the Ld.DR submitted that fulfillment of requirement under rule 128(9) of the Rules, is mandatory and hence the revenue authorities were justified in refusing to FTC.

We have perused the submissions advanced by both sides in light of records placed before us.

**6.** There is no dispute that the Assessee is entitled to claim FTC. On perusal of provisions of Rule 128 (8) & (9), it is clear that, one of the requirements of Rule 128 for claiming FTC is that Form 67 is to be submitted by assessee before filing of the returns. In our

view, this requirement cannot be treated as mandatory, rather it is directory in nature. This is because, Rule 128(9) does not provide for disallowance of FTC in case of delay in filing Form No.67. This view is fortified by the decision of coordinate bench of this *Tribunal* in case of *Ms.Brinda Kumar Krishna vs.ITO in ITA no.454/Bang/2021 by order dated 17/11/2021*.

**7.** It's a trite law that DTAA overrides the provisions of the Act and the Rules, as held by various *High Courts*, which has also been approved by *Hon'ble Supreme Court* in case of *Engineering Analysis Centre of Excellence (P.) Ltd.* reported in (2021) 432 ITR 471.

**8.** We accordingly, hold that FTC cannot be denied to the assessee. Assessee is directed to file the relevant details/evidences in support of its claim. We thus remand this issue back to the Ld.AO to consider the claim of assessee in accordance with law, based on the verification carried out in respect of the supporting documents filed by assessee.

**Accordingly the grounds raised by assessee stands allowed for statistical purposes.**

**In the result appeal filed by assessee stands allowed for statistical purposes.**

Order pronounced in open court on 07<sup>th</sup> March, 2022.

Sd/-  
(CHANDRA POOJARI)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 07<sup>th</sup> March, 2022.  
/MS /

**Copy to:**

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

By order

Assistant Registrar,  
ITAT, Bangalore