

IS FILING FORM 67 DIRECTORY OR MANDATORY?

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INTRODUCTION

One of the key aspects of any Double Tax Anti-Avoidance Agreement (or “Treaty” for short) that one country enters into with another country is to avoid double taxation of the same income.

For example, an Indian resident (resident as per S.6 of the Indian Income Tax Act 1961) is subject to tax on his/her global income and so if said Indian resident has earned money by working abroad for a short time and paid taxes in the foreign country, he/she can take credit for the foreign taxes paid while computing the tax due in India. This is called a ‘credit’ system enshrined in the DTAA. (There are other forms of avoiding double taxation such as the ‘exemption’ system which this article does not deal with)

Now the Indian Government introduced the procedure to claim Foreign Tax Credit via Rule 128 of the Income Tax Rules, 1962 which prescribes Form 67 as a document an Indian resident has to furnish to gain foreign tax credit for the amount of tax he has paid in a foreign country while receiving income for which such foreign tax has been paid on or deducted. A Form 67 is essential for the taxpayer who earns income from a foreign country. In cases where such a taxpayer has paid taxes for income received by him in the foreign territory, he can claim credit while filing his income tax returns in India for the amount of tax he has paid in the foreign territory.

However, practically speaking, assessee’s may fail to file Form 67 while filing their Indian Income Tax Return and may submit Form 67 at a later point in time, say during the assessment. Recently, the Department has taken a hard line concerning disallowing claims for Foreign Tax Credit (‘FTC’) unless it is filed with the Indian Income Tax Return i.e., Form 67 filing is *mandatory* with the ITR is the view of the Department. This is not the taxpayer's view who views that Form 67 filing with ITR is only *directory*. This article thus examines the legal issue of whether the filing of Form 67 with the ITR is directory or mandatory?

RELEVANT PROVISIONS OF THE INCOME TAX ACT, 1961 AND INCOME TAX RULES, 1962

Subrule (8) of Rule 128 of the Income Tax Rules, 1962 discusses the documents that are to be furnished by the assessee to claim FTC. The provision is as follows.

(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.¹

Sub-rule (9) of Rule 128 amended w.e.f 1-4-2022 states that “*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 end of the assessment year relevant to the previous year in which the income referred to in sub-rule (1) has been offered to tax or assessed to tax in India and the return for such assessment year has been furnished within the time specified under sub-section (1) or sub-section (4) of section 139.*”

Prior to the 1-4-2022 amendment, Rule 128(9) read:

“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”

The recent amendment in the year 2022, allows Form 67 to be filed along with a belated return u/S.139(4) which can be filed three months before the end of the relevant assessment year or before completion of the assessment, whichever is earlier.

¹ (8), Rule 128, Income Tax Rules, 1962

The proviso to sub-rule 9 of Rule 128 of Income Tax Rules, 1962 also provides for filing Form 67 with the newly introduced Updated Returns u/S 139(8A).

Thus, according to a plain reading of Rule 128(9) of the Income Tax Rules, 1962 an assessee who has paid tax in a foreign territory, should file Form 67 while filing his return of income for claiming Foreign Tax Credit and to avoid double taxation. This is the basis of the stand of the Department in claiming Form 67 filing is mandatory with ROI.

LEGAL PRECEDENTS

Many Sections and Rules in the Act/Rules involve Form filing, audit reports and various other procedural documentation and the Courts have time and again been asked to decide whether such filings were mandatory or directory We consider a few such landmark rulings below:

In the landmark case of ***Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner***, in the context of S.8A of Karnataka Sales Act where the main exemption available to the Appellant was under a 1969 notification but a subsequent notification prescribed a procedural condition of obtaining prior permission to avail said exemption, which was not obtained by Appellant, the Court upholding Appellant's case observed that: *"The mere fact that it is statutory does not matter one way or the 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."*² The same ratio could be applied to the filing of Form 67 that it is a procedural, directory requirement and is not a mandatory requirement.

In another landmark case of ***Sambhaji and Others v. Gangabai and Others***, the SC held that *" procedure cannot be a tyrant but only a servant. It is not an obstruction in the implementation of the provisions of the Act, but an aid. The procedures are handmaid and not the mistress. It is a lubricant and not a resistance. A procedural law should not ordinarily be construed as mandatory; the procedural law is always subservient to and is in aid to justice"*.³

² Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner, (1992) Supp (1) SCC 21

³ Sambhaji and Others v. Gangabai and Others (2008) 17 SCC 117

The Apex Court in *CIT vs. Nagpur Hotel Owners Association*⁴ in a similar situation decided that, despite the prescription in Rule 17 about the time limit mentioned in Rule 17 and Form 10, laid down the law that particulars required to be filed Form No. 10 for charitable Trusts can be filed any-time before completion of assessment to satisfy the requirement of law. The law is settled that rendering substantial justice shall be the paramount consideration of the authorities rather than deciding on hyper-technicalities.

The Bombay High Court in *CIT v. Shivanand Electronics*, has held that the filing of the audit report along with the return of income mentioned in S.80J(6A) is not mandatory. It was held that the filing of the audit report is mandatory, but it need not necessarily be filed along with the return of income. It can be produced any time before the completion of the assessment, it was held.⁵

The *Madras High Court in CIT v. Jayant Patel* held that filing of audit report for claiming deduction u/s. 80J is directory and not mandatory. The Hon'ble High Court held the audit report produced before the appellate authority is sufficient compliance with section 80J. The Court held that non-following of procedure doesn't lead to obstruction of substantial rights granted in the provisions.⁶ Similarly, the Gujarat HC in *Zenith Processing Mills v. CIT* while considering a case where audit report for claiming of deduction u/s. 80J was not filed before the AO but at the time of revisionary proceedings before the CIT u/s. 263, the audit report was produced and the Hon'ble High Court held furnishing of audit report before the CIT was sufficient compliance and the assessee cannot be denied the benefit of S. 80J. The report was filed before the completion of the assessment and thus the deduction should be granted to the assessee.⁷

So it can be seen that generally speaking, the Courts have typically held substantial rights of the assessee cannot be denied by mere procedural requirements, unless specifically provided for in the provisions (Sections) of the Act.

Now, with respect to the specific issue of Form 67, the Hon'ble **Madras High Court** in a recent case in *Duraiswamy Kumaraswamy V PCIT*, held that “*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.*”⁸ The Court held that if Form

⁴ CIT vs. Nagpur Hotel Owners Association, (2001) 247 ITR 201 SC

⁵ Bombay High Court in *eft v. Shivanand Electronics* [1994] 209 ITR 63

⁶ Madras High Court in *CIT v. Jayant Patel* (2001) 248 T 199

⁷ *Zenith Processing Mills v. CIT* (219 ITR 721)

⁸ *Duraiswamy Kumaraswamy V PCIT* , W.P.No.5834 of 2022

67 is filed before the completion of the final assessment, the officials cannot disallow the claim for FTC. In doing so the Court took into consideration, the **CIT vs. GM Knitting case** of the Supreme Court where it was held that “*Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee was entitled to claim deduction under section 80-1B respect of the unit at Pondicherry even though the assessee had not complied with the mandatory provision for filing the audit report in Form 10CCB in support of the claim as stipulated in section 80-1B(13) read with section 80-1A(7) of the Act by observing that it was enough if the audit report was filed before the assessment was completed*”⁹. We believe that the Department is on Writ appeal against this Order.

In discussing this issue of mandatory vs directory, a key ruling to distinguish in this regard is the **PCIT vs Wipro**¹⁰ case where the SC decided in favour of the Department. The SC in this particular case held that “*for claiming the benefit under Section 10B (8) of the IT Act, the twin conditions of furnishing a declaration before the assessing officer and that too before the due date of filing the original return of income under section 139(1) are to be satisfied and both are mandatory to be complied with.*”. **Firstly**, It must be noted that in *Wipro’s case* (supra) there was an express provision in S.10B(8) itself which is not the case in S.139(1). **Secondly**, in the *Wipro (case)* itself the SC clearly distinguishes other judicial precedents which have held Form filing to be directory in para 11 of the Order where it states: “*Now so far as the reliance placed upon the decision of this Court in the case of G.M. Knitting Industries Pvt. Ltd. (supra), relied upon by the learned counsel appearing on behalf of the assessee is concerned, Section 10B (8) is an exemption provision which cannot be compared with claiming an additional depreciation under section 32(1) (ii-a) of the Act. As per the settled position of law, an assessee claiming exemption has to strictly comply with the exemption provisions. Therefore, the said decision shall not apply to the facts of the case on hand, while considering the exemption provisions. Even otherwise, Chapter III and Chapter VIA of the Act operate in different realms and the principles of Chapter III, which deals with “incomes which do not form a part of total income”, cannot be equated with the mechanism provided for deductions in Chapter VIA, which deals with “deductions to be made in computing total income”. Therefore, none of the decisions which are relied upon on behalf of the assessee on interpretation of Chapter VIA shall be applicable while considering the claim under Section 10B (8) of the IT Act*”. In other words, *Wipro’s* decision is pertinent to Chapter III (exemption chapter) and cannot be stretched to include other Chapters or Sections of the

⁹ C.I.T, Maharashtra vs M/S G.M.Knitting Industries, 376 ITR 456 SC

¹⁰ PCIT V Wipro Ltd., SC 831 SCC 2022

Act. Thus it is our view that SC's decision on multiple angles can be distinguished concerning the instant issue.

Furthermore, various **Tribunals** have had the occasion to deal with this Form 67 issue specifically and have held on similar lines that its filing is only directory and not mandatory along with the RoI. In doing so these decisions have brought out a few key interesting and unique points worth noting:

1. In the case of ***Ajay Kumar Mishra, Gurgaon vs DCIT¹¹, Rohan Hattangadi Vs CIT¹² and Brinda Ramakrishna, Bangalore vs Income Tax Officer, Ward-5(3)(1)¹³***, the Tribunals effectively held that that delay in filing Form No. 67 should not deny the claim of FTC enumerated in the DTAA and the intention of the legislation in the said case has to be construed in a manner which benefits the assessee. In other words, the Tribunal highlighted that Double Taxation Avoidance Agreements (DTAA's) entered between India and other countries give rise to this tax credit system and as per Section 90 of the ITA the DTAA Articles are binding, more specifically S.90(2) reads as follows: *"Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee"*. Thus when the DTAA between India and another country gives rise to the FTC system, it cannot merely be denied due to procedural lacunae.
2. In the case of ***Ritesh Kumar Garg, Jaipur vs ITO***, decided in the Hon'ble ITAT Jaipur, the Tribunal pointed out that *"The Rule 128(9) provides that Form 67 should be filed on or before the due date of filing the return of income as prescribed under section 139(1) of the Act. However, the Rule nowhere provides that if the said Form 67 is not filed within the above stated time frame, the relief as sought by the assessee under section 90 of the Act would be denied. In case the intention was to deny the FTC, either the Act or the Rules would have specifically provided that the FTC would be disallowed if the assessee does not file Form 67 within the due date prescribed under section 139(1) of the Act."*¹⁴ Further, the Tribunal held that *"There are many sections in the Act which specifically deny deduction or exemption or relief*

¹¹ Ajay Kumar Mishra, Gurgaon vs DCIT

¹² Rohan Hattangadi Vs CIT ,ITA No.1896/Mum/2022

¹³ Brinda Rama Krishna Vs ITO (2022) (Hon'ble ITAT Bangalore)

¹⁴ Ritesh Kumar Garg Vs ITO (Hon'ble ITAT Jaipur)

in case the return/audit report is not filed within prescribed time. Please refer to section 32AB (5), 80HHC (4), 80AC, 80-IA (7), 10A(5) and 10B(5). Such language is not used in Rule 128(9). Therefore, such condition cannot be read into Rule 128(9).”¹⁵

To summarize:

1. In case of a dispute between substantial rights as per the Act and non-following of procedural requirements, the provisions of the Act and the substantial rights are to be given priority unless expressly stated otherwise in the provisions of the Act.
2. Rules framed concerning Income Tax cannot override the provisions of the treaties such as DTAA entered into by various countries and the Treaties r.w.S.90 have binding precedence. Be that as it may, with respect to Rule 128, Rule nowhere provides that if the said Form 67 is not filed within the above stated time frame, the relief as sought by the assessee under section 90 of the Act would be denied
3. If Form 67 is filed before the completion of the assessment, the department shall not disallow an assessee’s claim for foreign tax credit.

CONCLUSION

Through interpretation of the Income Tax Act, Income Tax Rules and judicial precedents, we believe a view can be taken that the filing of Form 67 for Foreign Tax Credit is a procedure to claim tax credit which is only directory in nature and if the Form 67 has been filed within the completion of the assessment, the assessee cannot be denied the credit for foreign taxes paid.

¹⁵ Ibid.