IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT, AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

IT(TP)A no.3199/Mum./2017
(Assessment Year : 2011–12)

Cable and Wireless (India) Ltd.
C/o BMR& Associates LLP
BMR House, 36B, Dr.R.K. Shriodkar ……………. Appellant
Marg, Parel, Mumbai 400 012
PAN – AAACC6133F

v/s

Dy. Commissioner of Income Tax
Circle–2(1)(1), Mumbai ……………. Respondent

Assessee by : Shri Vishal Karla
Revenue by : Shri V. Sreekar

Date of Hearing – 17.09.2019	Date of Order – 16.12.2019

O R D E R

PER SAKTIJIT DEY, J.M.

The captioned appeal has been filed by the assessee challenging the order dated 3rd August 2017, passed by the Assessing Officer in pursuance to the directions of the Income Tax Appellate Tribunal (ITAT) while disposing off assessee's appeal against the final assessment order passed of the assessment year 2011–12.

2. Brief facts are, the assessee is the Indian Branch of a non–resident company and is basically a tax resident of United Kingdom

(UK). For the assessment year under consideration, the assessee filed its return of income on 28th November 2011, declaring nil income. The Assessing Officer framed the draft assessment order on 21st December 2015, proposing certain additions which resulted in determination of total income at ₹ 7,20,20,659. The assessee raised objections before the Dispute Resolution Panel (DRP) against the draft assessment order. In pursuance to the directions of the DRP, the Assessing Officer passed the final assessment order under section 144C(13) r/w 143(3) of the Act on 21st December 2015. The assessee challenged the aforesaid final assessment order by filing an appeal before the Tribunal. Vide order dated 8th June 2016, in ITA no.1166/Mum./2016, the Tribunal restored the disputed issues for fresh adjudication by the Assessing Officer. Of course, subsequently, vide order dated 4th January 2017, in M.A. no.274/Mum./2016, the Tribunal rectified certain mistakes which crept into the appeal order. Be that as it may, in pursuance to the directions of the Tribunal, the Assessing Officer passed order dated 8th March 2017, termed as *"order giving effect to ITAT's order"* making certain disallowances of ₹ 68,24,622, under the normal provisions and computed the total income of ₹ 1,04,30,850. Since, the tax computed on the book profit was more than tax computed on the income assessed under the normal provisions, the Assessing Officer assessed the tax under section 115JB of the Act.

Against the aforesaid order passed by the Assessing Officer, the assessee has preferred the present appeal before us. In addition to the grounds raised in the memorandum of appeal, the assessee has raised additional ground challenging the validity of the order passed by the Assessing Officer in pursuance to the directions of the Tribunal.

3. The learned Counsel for the assessee submitted, in pursuance to the directions of the Tribunal, the Assessing Officer has passed the final assessment order instead of forwarding a draft assessment order as required under section 144C(1) of the Act. The learned Counsel submitted, though, the Assessing Officer has termed the order passed by him as order giving effect to the order of the Tribunal, however, in effect, it is nothing but an assessment order passed under section 143(3) r/w section 254 of the Act. The learned Counsel submitted, since the Assessing Officer has passed a final assessment order straight away without forwarding a draft assessment order, the assessment order passed is invalid, hence, deserves to be quashed. In support of such contention he relied upon a number of decisions including the following:–

i) PCIT v/s Andrew Telecommunications Pvt. Ltd., [2018] 96 taxmann.com 613 (Bom.); and

ii) Dimension Data Asia Pacific PTE Ltd. v/s DCIT, [2018] 96 taxmann.com 182 (Bom.);

4. The learned Departmental Representative, as a preliminary issue, submitted, assessee's appeal is not maintainable as against the assessment order passed, the assessee has straight away come in appeal before the Tribunal. Drawing our attention to the provisions of section 253 of the Act, the learned Departmental Representative submitted, the assessment order passed by the Assessing Officer is not an order against which an appeal can directly lie to the Tribunal. He submitted, only recourse available to the assessee against the order passed by the Assessing Officer is to prefer appeal before the Commissioner (Appeals). Thus, he submitted, the appeal filed by the assessee being not maintainable has to be dismissed at the threshold. Without prejudice, the learned Departmental Representative submitted, passing the final assessment order without forwarding a draft assessment order is a procedural lapse which can be rectified by the Assessing Officer through the procedure laid down in the Act. He submitted, in case, it is held that before passing the final assessment order the Assessing Officer is required to forward a draft assessment order, the final assessment order may be set aside with a direction to the Assessing Officer to forward the draft assessment order to the assessee. In support of such contention, he relied upon the following decisions:–

i) Tevapharm India Pvt. Ltd. v/s ACIT, [2018] 91 taxmann.com 103 (Del.);

ii) Home Finders Housing Ltd. v/s ITO, [2018] 93 taxmann.com 371 (Mad.); and

iii) Home Finders Housing Ltd. v/s ITO, [2018] 94 taxmann.com 84 (SC).

5. In rejoinder, the learned Counsel for the assessee submitted, since the Assessing Officer has passed an order termed as *"order giving effect to ITAT's order"* the only remedy available with the assessee is to file an appeal before the Tribunal. Drawing our attention to the provisions of section 246A(b) of the Act, he submitted, it only contemplates filing of appeal against the assessment order passed under section 143(3) of the Act. Thus, he submitted, the assessee has accordingly filed the appeal before the Tribunal, hence, it is maintainable. In support of his contentions, the learned Counsel relied upon the following decisions:–

i) Empire Industries Ltd. v/s CIT, [1991] 59 Taxman 443 (Bom.);

ii) Paras Rice Mills v/s CIT, ITA no.524/2006, dated 16.09.2008; and

iii) Tally Solutions Pvt. Ltd. v/s DCIT, [2014] 49 taxmann.com 51 (Bang. Trib.).

iii) We have considered rival submissions and perused the material on record. Before we consider the admissibility of the additional ground and adjudicate on it, it is necessary to deal with the preliminary objection raised by the Revenue regarding maintainability of the present appeal before us. It is the specific contention of the learned Departmental Representative that even assuming that the order giving effect to passed by the Assessing Officer is the final assessment order it has to be treated as an order passed under section 143(3) r/w section 254 of the Act. Hence, the assessee has to file the appeal before the Commissioner (Appeals). On a careful reading of the provisions of section 253 of the Act, it is noticed that the assessee can file an appeal against the assessment order only as prescribed under section 253(1)(d) and (e) of the Act. Admittedly, the order against which the assessee has preferred the present appeal does not come within the purview of section 253(1)(d) and (e) of the Act. Though, the learned Counsel for the assessee drawing our attention to the provisions of section 246A(b) of the Act has submitted that it does not provide for filing appeal before the Commissioner (Appeals) against the order giving effect to passed by the Assessing Officer, however, in our considered opinion, the impugned order passed by the Assessing Officer is nothing less than an order passed under section 143(3) of the Act. In fact, the assessee itself in Col.2 of the memorandum of appeal filed in Form no.36B, has stated that the order appealed against has been passed under section 143(3) r/w section 254 of the Act. Moreover, the Hon'ble Jurisdictional High Court in Empire Industries Ltd. v/s CIT, [1992] 193 ITR 293 (Bom.), has held that an order passed by the Income Tax Officer to give effect to the appeal order results in assessment under section 143(3) or 144 of the Act. Further, the Hon'ble High Court has held that even in appropriate case, such an order passed by the Assessing Officer can also be treated as order passed under section 154 of the Act. In the light of the ratio laid down by the Hon'ble Bombay High Court in the aforesaid decision, it has to be held that the impugned order passed by the Assessing Officer has to be treated as an assessment order passed under section 143(3) of the Act as the assessee was given opportunity of being heard during the assessment proceedings. Now, the issue before us is, whether against such an assessment order the assessee can directly file an appeal before the Tribunal. As contemplated under section 253(1) of the Act, the assessee can file an appeal before the Tribunal against a final assessment order passed by the Assessing Officer only in case the assessee goes through the DRP route. In the facts of the present case, admittedly, the impugned order passed by the Assessing Officer is not in pursuance to the directions of the DRP. Therefore, it does not come within the purview of section 253(1)(d) of the Act. It is worth mentioning, the Tribunal, Delhi Bench, while dealing with identical issue in Tevapharm India Pvt. Ltd. v/s ACIT, [2018] 91 taxmann.com 103 (Del.), held that in respect of assessment order passed in pursuance to restoration of the issues by the Tribunal, the appeal will lie to the first appellate authority and not before the Tribunal. The observations of the Co–ordinate Bench in this regard is reproduced below:–

> *"8. We have gone through the aforesaid facts and background of the case as well as the objection raised by the Ld. CIT-DR with regard to the very maintainability of the appeal before the Tribunal. As stated above, in present case the appeal has not been filed against the final assessment order which has been passed in pursuance of the directions given by the DRP in terms of sub section (13) of section 144C. Section 253(1) (d) provides that the order passed by the A.O. in pursuance of directions of DRP can be filed before the Tribunal. Similarly in section 246A (1) (a), exception has been carved out for the filing of the appeal before CIT (A) against an order passed in pursuance of the direction of the DRP. From the conjoint reading of both the sections, it is quite ostensive that the appeal before the Tribunal against the assessment order would lie if it has been passed in pursuance of direction given by the DRP in terms of section 144C and no appeal can be filed before the first appellate authority in such a case. In the original round of proceedings, the appeal before the Tribunal has come through DRP route and that is the reason how this Tribunal has decided the appeal and thereafter has remanded the matter back to the file of the AO/TPO. Once an appeal has been disposed of by the Tribunal by remanding back the matter before the A.O. to be pass fresh assessment order in accordance with the law, then it relegates back to the stage of assessment proceedings as if it is a fresh assessment which has to be done by the A.O. Even if the matter is remanded with specific direction or purpose of verification or re-computation etc., then also the A.O. has to give effect to such direction and pass a fresh assessment order thereby determining the income of the assessee and work out the tax demand accordingly. If the assessee is aggrieved by such an assessment order giving effect to the appellate order, then in that case, the only remedy open for appeal is before the first appellate authority in terms of section 246 and 246A.*
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> *9. Now here in this case, the AO instead of passing draft assessment order u/s 144C, which he was though mandatorily required under the law, has passed a final assessment order. Whether such an order may survive or not in view of the aforesaid principle laid down by the Hon'ble Jurisdictional High*

Court is an altogether a secondary issue, because, at the threshold what is required to be seen is that, the statutory remedy of appeal has to be before the appropriate authority. If an appeal mechanism has been provided under the statute for different kind of orders before different authorities then such an authority alone has the jurisdiction to decide the appeal. Even if the final assessment order has been passed in contravention of any statutory provision or any judicial precedent, the only course open for the assessee to seek for remedy is, firstly, either to file appeal before the appropriate forum/authority in terms of the provisions of law, which in our opinion lies before the CIT (A); or secondly, assessee has other constitutional remedy before the Hon'ble High Court under extra ordinary jurisdiction, of course with the discretion of Hon'ble Court. If an assessment order has been passed post remanding back by the Tribunal, then appeal will lie to the appropriate authority/ forum and the Tribunal does not have any jurisdiction to entertain an appeal which is not provided under the statute. In other words, right or wrong, if an assessment order has been passed, the remedy to rectify such a wrong has to be by filing of appeal before the appropriate authority empowered under the Act. The statute clearly envisages that the appeal before the Tribunal can be filed against those assessment orders which has been passed in pursuance of DRP's direction and not otherwise. That is, not against the final assessment order even though it could not have been passed under the law. One very important aspect which can be deduced from the aforesaid judgments of the Hon'ble High Court is that, the Court have held that when the matter in the appeal before the Tribunal has been set-aside or remanded back to the file of AO, the AO has to resort to the same procedure of section 144C and pass draft assessment order and if such a draft assessment order is passed then the appeal will lie before the Tribunal. This inter alia means that the entire assessment procedure is thrown open and remedy against the order will follow according to the statute. One another inference can be drawn though not directly flowing from the judgments, is that, the remanding back to the AO is not reckoned as extension of lis pending before the Tribunal, albeit, the set-aside or remand back to the file of AO is disposal of the appeal by the Tribunal and all the consequence of passing of fresh assessment order will follow. Most of these judgments have been rendered under writ jurisdiction of the Hon'ble High Court where non adherence to procedure laid down in section 144C has been struck down or has been held as nullity.

10. Accordingly, we agree with the objection raised by the Ld. CIT (DR) that the appeal filed by the assessee is not maintainable

> *before the Tribunal and hence treated as infructuous being not been filed before the appropriate authority under the law.*
>
> *11. However, under the given facts and circumstances of the case and in the interest of justice, we can only direct the assessee to seek shelter of statutory remedy of filing of first appeal before the CIT (Appeals) and if such an appeal is filed, then Ld. CIT (A) should entertain the appeal and decide the matter at the earliest and in accordance with the law. Otherwise the constitutional remedy is always available to the assessee before the Hon'ble High Court if so advised, of course with discretion and the permission of the Hon'ble Court as it deems fit whether to entertain such a remedy or not. Accordingly, we hold that assessee is at liberty to file an appeal before the Ld. CIT (Appeals) and contest this appeal in accordance with law. Consequently, appeal of the assessee is dismissed in-limine being non maintainable."*

iv) The aforesaid decision of the Co–ordinate Bench is squarely applicable to the facts of the present case. Therefore, we hold that the present appeal filed by the assessee being not against an appealable order as provided under section 253 of the Act, is not maintainable. We must observe, the assessee may be having a strong case in its favour on the issue of not forwarding the draft assessment order before passing the final assessment order. However, that issue relating to the validity of the impugned assessment order has to be decided by the appropriate authority as provided under the statute. In view of the aforesaid, since the appeal of the assessee is not maintainable, we do not find any justifiable reason to entertain the grounds raised by the assessee including the additional grounds. Therefore, the present appeal filed by the assessee deserves to be dismissed in limine without going into the merits of the various issues raised by the assessee.

Accordingly, we do so. However, as observed by the co–ordinate Bench in case of Tevapharm India (P) Ltd. V/s ACIT (supra), it is open to the assessee to file an appeal before the first appellate authority and contest all the issues including the validity of the order passed by the Assessing Officer.

v) In the result, appeal stands dismissed.

Order pronounced in the open Court on 16.12.2019

Sd/-	**Sd/-**
PRAMOD KUMAR	**SAKTIJIT DEY**
VICE PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 16.12.2019

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai