

AO to pass draft assessment order before passing a final one in pursuance of Sec. 144C: ITAT

Summary – The Delhi ITAT in a recent case of Tevapharm India (P.) Ltd., (the Assessee) held that Assessing Officer has to adhere to mandatory requirement of section 144C(1) and first pass a draft assessment order before passing final assessment order even in remand proceedings

Facts

- The assessee filed its regular return of income under section 139 for relevant year on 20-11-2012. The said return of income was selected for scrutiny and matter was also referred to the TPO for determination of arm's length price for the international transaction entered into by the assessee with its AE.
- The TPO in the transfer pricing assessment suggested certain adjustments which were incorporated by the Assessing Officer and draft assessment order was passed, thereby making an upward adjustment of Rs. 56.07 crores on account of international transactions.
- On appeal, the DRP issued directions to the Assessing Officer giving certain directions to the Assessing Officer on account of adjustments to be made and in pursuance of such direction, final assessment order was passed under section 143(3) read with section 144C(13) at an income of Rs. 89.98 crores.
- On second appeal, the Tribunal remanded back the entire transfer pricing adjustments back to the file of the Assessing Officer/TPO for all the three transactions. In pursuance of such setting aside of the entire transfer pricing issue, the Assessing Officer referred the matter to the TPO for the determination of ALP.
- The TPO in the said assessment proceeding, further enhanced the transfer pricing adjustment by Rs. 11.85 crores. The Assessing Officer based on the TPO's recommendation of the proposed adjustment, added the said amount and instead of passing draft assessment order passed final assessment order and also issued demand notice for payment of demand of Rs. 11.68 crores and also initiated penalty proceedings.
- On appeal before the Tribunal:

Held

- In the instant 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 Assessing Officer 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 the Commissioner (Appeals) 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 the Tribunal has decided the appeal and thereafter has remanded the matter back to the file of the Assessing Officer/TPO. Once an appeal has been disposed of by the Tribunal by remanding back the matter before the Assessing Officer to 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 Assessing Officer. Even if the matter is remanded with specific direction or purpose of verification or re-computation etc., then also the Assessing Officer 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 sections 246 and 246A.

- Here in this case, the Assessing Officer instead of passing draft assessment order under section 144C, which he was though mandatorily required under the law, has passed a final assessment order. Whether such an order may survive or not 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 lies before the Commissioner (Appeals); or secondly, assessee has other constitutional remedy before the High Court under extraordinary jurisdiction, with the discretion of the 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. It has been held that when the matter in the appeal before the Tribunal has been set aside or remanded back to the file of the Assessing Officer, the Assessing Officer 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 is that, the remanding back to the Assessing Officer is not reckoned as extension of *lis* pending before the Tribunal, *albeit*, the set

aside or remand back to the file of the Assessing Officer is disposal of the appeal by the Tribunal and all the consequence of passing of fresh assessment order will follow.

- Accordingly, the appeal filed by the assessee is not maintainable before the Tribunal and hence treated as infructuous having not been filed before the appropriate authority under the law.
- However, under the given facts and circumstances of the case and in the interest of justice, only the assessee can be directed to seek shelter of statutory remedy of filing of first appeal before the Commissioner (Appeals) and if such an appeal is filed, then Commissioner (Appeals) 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 High Court if so advised, with discretion and the permission of the Court as it deems fit whether to entertain such a remedy or not. Accordingly, it is held that assessee is at liberty to file an appeal before the Commissioner (Appeals) and contest this appeal in accordance with law. Consequently, appeal of the assessee is dismissed *in limine* being non-maintainable.