

**आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI**

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री एन. के. प्रधान लेखा सदस्य के समक्ष।

**BEFORE SRI MAHAVIR SINGH, JM AND SRI N.K. PRADHAN, AM**

आयकर अपील सं./ ITA No. 2624/Mum/2017

(निर्धारण वर्ष / Assessment Year 2008-09)

Prakash Securities Pvt. Ltd.

2, Vivek, Tilak Road, Ghatkopar East, ..... (अपीलार्थी / Appellant)  
Mumbai-400 077

Vs.

ACIT, Circle 2(2)(2),  
Mumbai

..... (प्रत्यर्थी / Respondent)

स्थायी लेखा सं./PAN No. AAACP2401K

अपीलार्थी की ओर से / Appellant by : Shri Devendra Jain, ARs'

प्रत्यर्थी की ओर से / Respondent by : Shri Somnath M. Wagale, DR

सुनवाई की तारीख / Date of hearing:	14-08-2018
घोषणा की तारीख / Date of pronouncement :	29-08-2018

**आदेश / ORDER**

**PER MAHAVIR SINGH, JM:**

This appeal of assessee is arising out of the order of Commissioner of Income Tax (Appeals)-5, Mumbai [in short CIT(A)], in appeal No. CIT(A)-IT-44/15-16 dated 06.01.2017. The assessment was framed by the



Asst. Commissioner of Income Tax, Circle 2(2), Mumbai (in short 'ACIT'/ 'AO') for the A.Y. 2008-09 vide order dated 8.03.2015 under section 154 of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The only issue in this appeal of assessee is against the order of CIT(A) confirming the action of the AO in restricting the rebate claim under section 88E of the Act at ₹ 22,70,512/- as against claimed by assessee and allowed by AO under section 143(3) of the Act at ₹ 30,93,497/-. The assessee has raised the issue that this is highly debatable issue and hence, the rectification order passed by the AO is without jurisdiction. For this assessee has raised the following two grounds: -

*"1. In the facts and circumstances of the case and in law, the Learned CIT(A) erred in upholding the rectification order passed by Assessing Officer u/s 154, disregarding the legal position that when the issue is debatable or two views are possible or the issue involves a long drawn process of reasoning, it cannot be subject matter of rectification under section 154.*

*2. Without prejudice to the above, in the facts and in circumstances of the case and in law, the Learned CIT(A) has erred in confirming the action of Assessing Officer in restricting the rebate u/s 88E at Rs. 22,70,512/- as against Rs. 30,93,497/- claimed by the appellant and allowed in assessment."*

3. Briefly stated facts are that the assessee company is engaged in the business of share trading and also investment and assessment was completed by the AO in the case of the assessee under section 143(3) of



the Act determining the total income of ₹ 1,71,76,300/- on 25.11.2010, which includes income from share trading at ₹ 93,51,369/- for which the assessee has paid STT. During the course of assessment proceedings, the assessee claimed rebate under section 88E of the Act on account of STT paid at ₹ 30,93,497/- and which was eventually allowed by the AO while completing the assessment under section 143(3) of the Act. Subsequently, the AO issued notice under section 154 of the Act dated 17.10.2014 and according to AO, the assessment framed suffers from mistake apparent from record as the rebate under section 88E of the Act has been allowed excessive. For this AO issued show cause notice which states as under: -

*“Particulars of mistake proposed to be rectified for*

*As per section 88E of the Income Tax Act 1961, where the total income of an assessee in a previous year includes any income chargeable under the head “Profits and gains of business or profession”, arising from taxable securities transactions, he shall be entitled to a deduction, from the amount of income tax of such income arising from such transaction of an amount equal to the securities transaction tax paid by him in respect of taxable securities transaction entered into in course of his business. Further, as per sec. 2(10) of IT Act average rate of income tax means rate arrived at by dividing the amount of income tax calculated on the total income, by such total income.*

*Your company is broker in NSE and is also engaged in trading of securities. The assessment for AY 2008-09 was completed after scrutiny, assessing*



total taxable income at ₹ 7.75 lakhs, wherein the department had allowed rebated under section 88E of ₹ 30,93,497/- as claimed. It is observed from the record that your income during the financial year 2007-08 consisted of following:

Income from share trading 93,51,369

Interest income 2,44,256

Interest income 26,68,539

Short term capital gain 49,2,136

Total assessed income 1,71,76,300

Thus on the above assessed income the average rate of tax work out to 24.28% as detailed below tax on income excluding STCG ₹ 1,22,64,164x30%=36,79,249/-tax on STCG of ₹ 49,12,36 @ 0% =4,91,214/- average rate of tax 41,70,463/17176300x100=24.28%

Accordingly, in view of provision cited above the rebate admissible on the income arising from table securities transaction, considering the average rate of income of 24.28% works out to ₹ 22,70,544 as shown below:

Income from taxable securities  
93,51,369x24.28%=22,70,52

Rebate admissible under section 88E 22,70,52/-

Rebate allowed under section 88E 30,93,497/-

Excess rebate allowed 8,22,985/-



*Add surcharge 82,299/-*

*3% cess 27,159/-*

*Total short levy 9,32,439/-. Similarly, interest under section 234B of ₹ 2,98,380/- is also leviable separately.”*

4. Accordingly, the AO restricted the rebate under section 88E of the Act at ₹ 22,70,512/- by observing that “*Therefore, the correct allowable rebate works out to ₹ 22,70,52/- [ Rs. 93,51,369 x 24.28%], rather than ₹ 30,98,497/- allowed in the order under section 143(3).*” This rectification order under section 154 was passed by the AO on 18.03.2015. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) confirmed the action of the Assessing Officer. Aggrieved, now assessee is in appeal before Tribunal.

5. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that the plea of the assessee is that this computation of rebate under section 88E of the Act amounting to ₹ 30,98,497/- was allowed by the AO while framing assessment under section 143(3) of the Act. The AO has to go through the definition of total income as given in the provisions of section 111A of the Act, since during the year under consideration, the assessee has also earned income by way of short term capital gains on which the assessee has paid STT and therefore, while computing the rebate, income from such short term capital gains should have to be reduced. Before us, the learned Counsel for the assessee filed copy of Tribunal’s order in the case of DCIT vs M/s Malhar Traders Pvt. Ltd. in ITA No. 707/Mum/2011 for AY 2007-08, wherein Tribunal has categorically held that to invoke sub section 88E of the Act, which clearly provides that the deduction of security transaction paid would be in total if the total income of the assessee includes income



chargeable under the head profits and gains of business or profession. The Tribunal has interpreted section in para 7 as under: -

*“7. Sub-section (1) clearly provides that the deduction of security transaction paid would be entitled, if the total income of the assessee includes income chargeable under the head “profits and gains of business or profession”. The second proviso provides that the amount of deduction shall not exceed the amount of income tax on such income. Sub-section (2) provides that the amount of income tax on the income arising from taxable security transaction shall be equal to the amount of calculation by applying the average rate of income tax on such income. Thus, the average rate of income tax is to be applied on the income which is computed under the head profits and gains of business or profession. Such income has to be referred only in the context of meaning given in sub-section (1). If the business income of the assessee company is taxed at maximum marginal rate, then rebate is to be allowed for the security transaction tax paid on such income only under section 88E. The short term capital gain is taxed at lower rate under section 111A, but at the same time, no security transaction tax credit is allowed against the same. The tax rate of business income is governed by altogether different provisions of the Act which could not be imported or read into section 88E. The phrase “amount calculated by applying the average rate of income tax ” as used in sub-section (2) has to be reckoned as average rate of income tax on*



*business income only. Thus, we do not find any merit in the ground raised by the Department as the directions given by the learned Commissioner (Appeals) is in accordance with the provisions of the law. Thus, the grounds raised by the Revenue are dismissed.”*

6. In the present case also, we find that the AO has computed the income while passing order under section 154 of the Act as under: -

*“Assessing Officer’s calculation in order under section 154*

<i>Total PGBP as per assessment order</i>	<i>,22,64,165</i>
<i>Less Brokerage income</i>	<i>2,44,256</i>
<i>Less Interest income</i>	<i>26,68,539/-</i>
<i>PGBP from transaction in securities liable to STT</i>	<i>93,51,370/-</i>
<i>.”</i>	

7. The learned Counsel for the assessee drew our attention to the profit and loss account for the year ending 3.03.2008, wherein income from trading business is disclosed at ₹ 1,03,655/- and brokerage income is at ₹ 2,44,256/-.

8. In view of the above, we are of the view that the 88E of the Act provides where the total income of the assessee in previous year includes any income chargeable under the head of “profits and gains of business or profession” arising from transaction chargeable to securities transaction tax, he shall be allowed deduction of an amount equal to the securities transaction tax paid by him in respect of transactions chargeable to securities transactions tax entered into in the course of



business during that previous year. From the amount of income tax on such income arising from such transaction. According to the above provisions, we are of the view that an assessee is eligible for deduction from the amount of income tax on such income arising from such transactions computed in the manner provided in section 88E of the Act i.e. an equal amount to the securities transaction paid by him in respect of taxable securities transaction entered into in the course of business during the previous year. It means that the issue has two plausible views and once, it is doubtful issue, the AO cannot resort to section 154 of the Act i.e. rectification of mistake apparent from record. Accordingly, we reverse the orders of the lower authorities and allow the appeal of the assessee.

**9. In the result, the appeal of the assessee is allowed.**

Order pronounced in the open court on 29-08-2018.

Sd/-

(एन. के. प्रधान /N.K. PRADHAN)

(लेखा सदस्य / ACCOUNTANT MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 29-08-2018

सुदीप सरकार, व.निजी सचिव / *Sudip Sarkar, Sr.PS*

Sd/-

(महावीर सिंह /MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai