

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 599 OF 2015

The Principal Commissioner of Income Tax-8
Mumbai

.. Appellant

v/s.

M/s. Yes Bank Ltd.

.. Respondent

Mrs. S.V. Bharucha for the appellant

Mr. Madhur Agarwal a/w Mr. Atul K. Jasani for the respondent

**CORAM : S.V. GANGAPURWALA &
A.M. BADAR, J.J.**

DATED : 1st AUGUST, 2017

PC.

1. The present appeal pertains to Assessment Year 2007-08.
2. The Tribunal has set aside the order of the Commissioner passed under Section 263 of the Act. The learned Counsel for the appellant submits that the Tribunal was not justified in holding that the proposal for initiation of refund proceedings must be initiated by the the Commissioner of Income Tax. The said proceedings need not emanate from the Commissioner. No such restrictions are placed. According to the learned Counsel, the order passed by the Assessing

Officer granting benefit under Section 35D of the Act was erroneous and the same was prejudicial to the interest of the Revenue. As such, ingredients of Section 263 of the Act were attracted. The Commissioner has rightly exercised its revisionary power.

3. Mr. Agarwal, learned Counsel for the respondent supports the order and submits that the Assessing Officer had before passing the assessment order, called for explanation from the assessee. The explanation was given for claiming deduction under Section 35D of the Act in respect of expenses incurred by the company in connection with the issue of public subscription of the shares and debentures of the company for a period of 5 years. The assessee submitted that it is an industrial undertaking for the purpose of Section 35D of the Act and relied upon the judgment of this Court in a case of the ***Commissioner of Income Tax Vs. Emirates Commercial Bank Ltd.*** **262 ITR 55** wherein this Court has held that the banks are industrial undertakings and eligible for deductions under Section 32A. According to the learned Counsel, the CIT(A) could not have exercised revisional jurisdiction even if it came to the conclusion that there are two possible views. The learned Counsel relies on the

judgment of the Apex Court in the case of *Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax*, 243 ITR 81 and another judgment of the Apex Court in a case of *Commissioner of Income Tax Vs. Max India Ltd.*, reported in (2007) 295 ITR 282.

4. We have considered the submissions. The Tribunal has considered the decision of the Apex Court in the case of *Malabar Industrial Co. Ltd.* (supra) and held that when two possible views are available and the issue is debatable, then, initiation of revision is not permissible under Section 263 of the Act. It appears that the Assessing Officer had made an inquiry while passing the assessment order. In return of income, the assessee had made the following note.

“Deduction of Rs.3,27,82,000/- claimed under section 35D of the Income Tax Act, 1961 (“the Act”)

- *During the financial year 2005-06, the assessee had incurred an aggregate expenditure of Rs.16,39,10,000/- on Initial Public Offering (“IPO”) of equity shares made. The Issue closed on June 12, 2005. It has claimed a deduction under Section 35D for Rs.3,27,82,000/- being one-fifty of the total expenses incurred. This is the second year of claim for deduction.*
- *The assessee submits that section 35D grants a deduction / amortization in respect of expenses incurred by a company in connection with the issue, for public subscription, of shares or debentures of a company over a period of five years. Since the foregoing expenses on IPO are in connection with the issue of*

shares for public subscription, one-fifth of the total amount thereof is eligible for deduction under section 35D.

- *The assessee further submits that it is an “industrial undertaking” for the purpose of section 35D based on the following cases:*
- *CIT Vs. Emirates Commercial Bank Ltd. (262 ITR 55) where the Bombay High Court, which is also the jurisdictional High Court, has held that Banks are “industrial undertakings” and eligible for deduction under section 32A of the Act.*
- *HSBC Securities and Capital Markets (India) Pvt. Ltd. (1384/M/2000) where the Hon'ble Mumbai ITAT has held that even a share broking entity is an “industrial undertaking” for the purpose of section 35D.*
- *Therefore, the claim of assessee for deduction under section 35D is in accordance with law and is allowable.”*

5. It appears that the Assessing Officer sought clarification from the assessee about the correctness of the amount of one-fifth of the total expenses incurred under Section 35D of the Act. The assessee under letter dated 26.10.2004 gave specific explanation on the issue raised by the Assessing Officer and thereafter, the assessment order was passed. To substantiate his claim, the assessee has placed reliance upon *Malabar Industrial Co. Ltd. (supra)*. The possible view, it appears, was taken by the Assessing Officer. The Tribunal on the said count has held that the revisional jurisdiction ought not to have been exercised by the CIT(A). Only because the Commissioner thought that other view is a better view, would not enable Commissioner of Income Tax to exercise power under Section 263 of

the Act. It would not be a reopening of assessment or re-assessment.

6. In the light of the above, we are not inclined to entertain the present appeal. It is made clear that we have not given any finding in regard to the applicability of Section 35D of the Act *vis-a-vis* the assessee so also have not considered the observations of the Tribunal with regard to exercise of revisional powers only on his own accord and not an application by the Assessing Officer.

7. The appeal is dismissed. No costs.

(A.M. BADAR, J.)

(S.V. GANGAPURWALA, J.)