

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL No.3148 OF 2019
(Arising out of S.L.P.(C) No.7118 of 2018)**

The Principal Commissioner of
Income Tax-8

....Appellant(s)

VERSUS

M/s Yes Bank Ltd.

....Respondent(s)

J U D G M E N T

Abhay Manohar Sapre, J.

1. Leave granted.
2. This appeal is filed against the final judgment and order dated 01.08.2017 passed by the High Court of Judicature at Bombay in ITA No.599/2015 whereby the High Court dismissed the appeal filed by the appellant herein.

3. This appeal involves a short point as would be clear from the facts stated *infra*.

4. The appellant is the Union of India (Income Tax Department) and the respondent-Bank is the assessee.

5. In the course of assessment proceedings of the respondent-assessee(Bank) for the Assessment Year 2007-2008, the question arose as to whether the respondent-assessee(Bank) was entitled to claim deduction under Section 35-D of the Income Tax Act, 1961 (for short, "the Act") for the Assessment Year in question. In other words, the question arose as to whether the respondent-Bank is an industrial undertaking so as to entitle them to claim deduction under Section 35-D of the Act.

6. The case of the respondent was that they, being an industrial undertaking, are entitled to claim the deduction under Section 35-D of the Act.

The Assessing Officer passed an order dated 31.10.2009 which gave rise to the proceedings before the Commissioner under Section 263 of the Act which resulted in passing of an adverse order dated 14.11.2011 by the Commissioner.

7. This gave rise to filing of the appeal by the respondent before the ITAT against the order of the Commissioner. By order dated 05.12.2014, the ITAT allowed the appeal which gave rise to filing of the appeal by the Revenue (Income Tax Department) in the High Court under Section 260-A of the Act.

8. By impugned order, the High Court dismissed the appeal after hearing both the parties giving rise to filing of this appeal by way of special leave in this Court.

9. So, the short question that arises for consideration in this appeal, is whether the High

Court was justified in dismissing the appellant's appeal.

10. Having heard the learned counsel for the parties and on perusal of the record of the case, we are constrained to allow the appeal, set aside the impugned order and remand the case to the High Court for deciding the appeal afresh on merits in accordance with law.

11. In our view, the need to remand the case to the High Court is called for due to the following reasons.

12. First, the High Court did not frame any substantial question of law as is required to be framed under Section 260-A of the Act though heard the appeal bipartite. In other words, the High Court did not dismiss the appeal in *limine* on the ground that the appeal does not involve any substantial question of law; Second, the High Court

dismissed the appeal without deciding any issue arising in the case saying that it is not necessary. (see para 6).

13. Third, the main issue involved in this appeal, as rightly taken note of by the High Court in para 6, was with regard to the applicability of Section 35-D of the Act to the respondent-assessee(Bank). It was, however, not decided.

14. In our view, the High Court should have framed the substantial question of law on the applicability of Section 35-D of the Act in addition to other questions and then should have answered them in accordance with law rather than to leave the question(s) undecided.

15. It was brought to our notice that the issue with regard to applicability of Section 35-D of the Act to the respondent-Bank is already pending consideration before the High Court at the instance

of the respondent in one appeal. If that be so, both the appeals, in our view, should be decided together.

16. It is for all these reasons, we are of the view that the impugned order is not legally sustainable.

17. In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. The impugned order is set aside. The appeal is accordingly remanded to the High Court for its decision on merits in accordance with law along with another appeal, if pending, after framing proper substantial question(s) of law arising in the case.

18. We have not expressed any opinion on the merits of the case having formed an opinion to remand the appeal to the High Court for its disposal on the merits afresh. The High Court will accordingly decide the appeal uninfluenced by any

observations made in the impugned order and this
order.

.....J.
[ABHAY MANOHAR SAPRE]

.....J.
[DINESH MAHESHWARI]

New Delhi;
March 15, 2019



**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.)