IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 3497/MUM/2018
Assessment Year: 2010-11

Yes Bank Limited, 9th floor, Nehru Centre, Discovery of India, Dr A B Road, Worli, Mumbai-400018.	Vs.	Dy. Commissioner of Income Tax-2(2)(2), 545, Aayakar Bhavan, M K Road, Mumbai-400020.
PAN No. AAACY2068D **Appellant**		**Respondent**

Assessee by	:	Mr. Yogesh A. Thar/Ms. Vidhi Doshi, AR
Revenue by	:	Mr. Purushottam Tripuri, DR
Date of Hearing	:	20/02/2020
Date of pronouncement	:	14/07/2020

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2010-11. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-5, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under :

1st ground

On the facts and circumstances of the case and in law, the ld. CIT(A) erred in disallowing the deduction u/s. 35D of the Act on the assumption that the shares may have been allotted only to selected Qualified Institutional Buyers ("QIBs").

2nd ground

On the facts and circumstances of the case and in law, the ld. CIT(A) erred in disallowing deduction of Rs.2,82,80,291/- claimed u/s 35D in respect of expenses incurred in connection with the QIP on the alleged ground that the issue of shares to QIP does not tantamount to public subscription and such capital expenses are not eligible for deduction u/s. 35D of the Act.

3rd ground

On the facts and circumstances of the case and in law, the ld.CIT(A) erred in disallowing the expenses in connection with QIP on the ground that the expense may not be allowable in view of section 40(a)(i)/(ia) of the Act.

3. Briefly stated, the facts of the case are that the appellant, a public limited company raised Rs.1033.87 crore by issue of share capital (38,362,709 shares at Rs.269.50 per share) through a Qualified Institution Placement ("QIP") in which it placed its share capital with Qualified Institutional Buyers ("QIB"). In connection with the QIP, the appellant incurred expenses aggregating to Rs.14,14,01,453/- on account of payments to Lead Managers of the Issue and payments to Legal consultants and Auditors for the finalization of placement document for the QIP. The appellant has claimed 1/5th of these expenses amounting to Rs.2,82,80,290/- u/s 35D of the Act for the captioned year.

The question involved in this appeal is whether QIB can be regarded as "public" and whether the offer made to them can be regarded as "offer made to public" for the purpose of section 35D of the Act.

The said matter was earlier heard by the ITAT and sent back to the file of the ld. CIT(A) to decide the matter after affording an opportunity to the

appellant in accordance with law. It was the contention of the appellant before the ld. CIT(A) that the said issue is directly covered in favour of the assessee by the order of the ITAT Hyderabad Bench 'A' in the case of *DCIT v. Deccan Chronicle Holdings Limited* (2015) 60 taxmann.com 240 (Hyderabad-Trib.). However, the ld. CIT(A) has held that the said decision does not apply in the appellant's case on the ground that the question before the Tribunal was not whether the issue of shares to QIB tantamount to public and secondly, the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("SEBI ICDR") were not considered by the Tribunal, which specifically deal with QIPs. Thus the ld. CIT(A) has held that the expenditure of Rs.14,14,01,453/- was not incurred in connection with the issue for public subscription of shares 3,83,62,709 within the meaning of section 35D of the Act. Thereby holding that the assessee is not entitled to any deduction u/s 35D of the Act, the ld. CIT(A) rejected its claim for deduction of Rs.2,82,80,291/- i.e @ 20% of Rs.14,14,01,453/-.

4. Before us, the Ld. counsel for the appellant submits that the said issue is directly covered in favour of the assessee by the order of the Tribunal in *Deccan Chronicle Holdings Limited* (supra). It is elaborated by him that in the said order the Tribunal has considered the definition as per various laws and held that QIBs are a class of investors, which form a part of the larger investor community and accordingly, would be considered as "public" for the purpose of section 35D of the Act. Referring to the relevant provisions of the SEBI Regulations, it is submitted that the issue of shares to QIB amounts to issue of shares for public subscription.

Further, referring to the decision of the Hon'ble Kerala High Court in the case of *Nitta Gelatine India Limited v. ACIT* (243 Taxman 245) and the judgment of the Hon'ble Supreme Court in the case of *CIT v. Andhra Chamber of Commerce* AIR 1965 SC 1281, it is submitted by him that "a section of public qualifies as public".

5. On the other hand, the Ld. Departmental Representative (DR) refers to the following:

> "3.6 (5) Clause 84 (1) of the SEBI—ICDR 2009 prescribes that the QIP shall be made on the basis of a placement document which will contain all material information including those specified in Schedule XVIII and column (1) of the schedule XVIII named disclosures in placement document reads as follows:-
>
> > "Disclaimer to the effect that the memorandum relates to an issue made to QIBs under chapter VIII of the SEBI—ICDR 2009 and that "no offer is being made to the public or any other class of investors."

It is argued by him that the allotment of equity shares made by the assessee under the QIP scheme under Chapter VIII of SEBI-ICDR 2009 to QIBs was not made to the public but to a select band of investors called QIBs as defined in SEBI-ICDR 2009 whose details are not made available to the tax authorities.

Reiterating the findings of the ld. CIT(A), the Ld. DR explains that SEBI-ICDR 2009 govern the allotment of equity shares to QIBs under QIP scheme that "the offer made under the QIP scheme cannot be equated with offer of equity shares of public" and hence, these guidelines override the provisions of section 67 of the Companies Act, 1956.

Relying on the order of the ld. CIT(A), the Ld. DR submits that in the case of *Deccan Chronicle Holdings Limited* (supra), the Tribunal has not dealt with specifically the other provisions of SEBI-ICDR 2009 and even the provisions of section 80 to 88 of SEBI-ICDR 2009 and its rules and schedules, which put restriction on its classification as a public issue.

Thus the Ld. DR submits that the order of the Ld. CIT(A) be confirmed.

6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

The appellant is a banking company. It filed its revised return of income for the AY 2010-11 on March 30, 2012 declaring total income at Rs.7,90,10,18,157/-.

As mentioned earlier, the question involved in this appeal is whether QIB can be regarded as "public" and whether the offer made to them can be regarded as "offer made to public" for the purpose of section 35D of the Act.

In *Deccan Chronicle Holdings Limited* (supra), the Tribunal has held as under :

> "6. With respect to ground No. 4 for the assessment year 2008-09, we find that the Assessing Officer has not disallowed for the assessment years 2006-07 and 2007-08. However, the Assessing Officer has disallowed the expenditure on the issue of qualified institutional buyers for the assessment year 2008-09 which has been allowed by the Commissioner of Income-tax (Appeals) holding as under :
>
> "5. I have gone through the factual and legal contentions of the appellant in support of its argument that the deduction was claimed under section 35D read with section

37 i.e., both under sections 35D and 37. I agree with the argument of the appellant that the language used in section 35D is so plain and unambiguous that the only condition laid down in that section is that the issue should be offered for public subscription and the mode of placement is immaterial. Thus, the only issue for consideration is whether QIB can be called 'public' or not. After a careful and comprehensive consideration of the relevant provisions of the Company Law, Securities Contract (Regulation) Rules, SEBI Guidelines/Instructions, I am of the considered opinion that QIBs constitute 'public' and accordingly, the subscription made by the amount to public subscription. In this view of the matter and also considering the facts with regard to the utility of funds raised through QIB issue, I hold that the issue expenditure, to the extent attributable to the funds utilised for extension of the appellant's undertakings, is eligible for deduction under section 35D. So far as the remaining funds, utilised for modernisation and working capital requirements of the appellant's business are concerned, I have considered both factual and legal submissions of the applicant, in support of its contention that the expenditure was in the nature of revenue expenditure since the primary object and intent of raising these funds was to meet the operational requirements, in order to run the business more efficiently and profitably. The hon'ble High Court of Delhi, after analysing plethora of case law on this subject, had laid down certain broad guidelines, in the case of *CIT* v. *J.K. Synthetics Ltd.* [2009] 309 ITR 371 (Delhi), to decide whether a particular expenditure is capital or revenue in nature. Tested against these broad legal principles, I am of the opinion that there is considerable force in the arguments of the appellant-company that the expenditure claimed by it clearly falls in the revenue field. These guidelines were impliedly approved by the hon'ble Supreme Court, in view of the fact that the special leave petition filed against this decision was dismissed. There is also merit in the argument of the appellant-company that the facts of its case are distinguishable from those in the case of Brooke Bond, for the detailed reasons submitted by it, and therefore its claim cannot be denied by relying on that decision. It was further claimed that though the entire expenditure was allowable in one year under section 37, the same was treated as

deferred revenue expenditure and claimed over five years, starting from the assessment year 2007-08. The concept of deferred revenue expenditure is now legally recognised by various judicial authorities and in fact, this was upheld even in the case of the appellant by my predecessor, while deciding the appeal for assessment year 2006-07. In view of the above facts, I hold that the expenditure of Rs. 2,07,00,112 claimed for assessment year 2008-09 is allowable under sections 35D and 37. As the claim of this expenditure under section 35D read with section 37 is in order, the disallowance on this account is deleted."

7. We find that during the year 2007-08, the company incurred debenture expenses of Rs. 2.07 crores and QIB issue expenditure of Rs. 8.28 crores, both totalling to Rs. 10.35 crores. The expenditure referred to above of Rs. 10.35 crores was adjusted against the share premium account as per the provision of the Companies Act. However, the expenditure being deferred revenue expenditure falls within the ambit of section 35D read with section 37 of the Income-tax Act which is eligible to be charged to profit and loss account. Accordingly as per the provisions of section 35D of the Income-tax Act, one-fifth of the QIB issue expenditure i.e., Rs. 207 lakhs was written off. Qualified Institutional Buyers (QIBs) are a class of investors as a part of the large investor community and the companies sought for QIB issues because the funds can be raised within a short span. This is an extremely important investment for larger investors and since the buyers are only a class of investors, the issue of shares to QIB have been considered as public issue. The expenses in connection with public issue of shares or debentures of the company are allowable. Reliance is placed on *CIT* v. *Shree Synthetics Ltd.* [1986] 162 ITR 819 (MP). Hence on the merits of the issue, the QIB expenditure can be treated as revenue expenditure and eligible for deduction under section 35D of the Income-tax Act is confirmed. Hence on merits of the issue as well as the fact that the same issue has been allowed in the earlier years and the Department cannot come upon in appeals in the subsequent years would be the reason to dismiss the Departmental appeal. We confirm the order of the Commissioner of Income-tax (Appeals) with respect to qualified institutional buyers expenses and dismiss the

Departmental appeal on this issue. In the result, the Departmental appeal for the assessment years 2007-08 and 2008-09 are dismissed."

6.1 A perusal of the above order of the Tribunal clearly indicates that the present issue is directly covered in favour of the appellant.

6.2 Further, we find that the appellant being a listed company is bound by "Listing Agreement", which provides for the disclosure requirements for the share holding pattern of a listed company. As can be seen therefrom, there are only two categories of shareholders- "promoter/promoter group" and "public". For the definition of these terms in Clause 35, reference is made to Clause 40A of the Listing Agreement. As can be seen therefrom, Mutual Funds/Financial Institutions which are QIBs are classified under "public shareholding". The terms are defined in Clause 40A of the SEBI Listing Agreement. Further, the listing agreement takes us to Securities Contracts (Regulation) Rules, 1957 (in short "SCRR"). Also Rule 19(2)(b) and Rule 19A of the SCRR provide that companies are required to maintain minimum public shareholding of 25% in case of first time listing and in case of continuous listing agreement respectively. In this context, we may refer to section 2(d) of SCRR defining the term "public". It (public) is defined to mean any person other than the promoter, promoter group, subsidiaries and associates of the company. Thus any person other than these four qualify to be considered as public. As can be seen from the list of QIBs to whom shares are issued, the shares are not issued to any of the aforesaid category. Thus QIBs, not being promoters, promoter group, subsidiaries and associates of the company would qualify as "public".

As specified in clause 40A(ii) of the listing agreement, public shareholding can be increased by any of the modes specified therein to comply with Rule 19(2) and 19A of SCRR. One such note is the issue of IIP in accordance with Chapter VIIIA of the SEBI-ICDR. Chapter VIIIA has been included to provide for fresh issue of shares to comply with minimum shareholding requirement in Rule 19(2) and 19A of SCRR. Reg. 91B defines IPP as a further public offer made only to QIBs. These regulations provide that when a company has a public shareholding lower than the requirements specified, then the company may issue IPP to QIBs and raise the public shareholding to the required levels. It thus implies that QIBs form part of public. Further, even Reg. 82 which gives conditions for QIP, provides that the same must be in compliance with the requirements of public shareholding.

That "a section of public qualifies as public" has been clarified in *Nitta Gelatine India Limited* (supra) and *Andhra Chamber of Commerce* (supra).

7. Facts being identical, we follow the order of the Tribunal in the case of *Deccan Chronicle Holdings Limited* (supra) and in view of the discussion hereinabove at para 6.2 , hold that the appellant is eligible for deduction u/s 35D of the Act.

Thus we set aside the order of the Ld. CIT(A) and allow the 1st , 2nd and 3rd ground filed by the assessee.

8. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 20.02.2020, this order thereon is being pronounced today, much after the

expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid-19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid-19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and *vide* order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "It is also clarified that while calculating time for disposal

of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly", and also observed that "arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020".

The Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that "while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly".

Viewed thus, the exception to 90 day time limit for pronouncement of orders inherent in Rule 34(5)(c) clearly comes into play in the present case.

9. In the result, the appeal filed by the assessee is allowed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/-	Sd/-
(C.N. PRASAD)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 14/07/2020
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai