

OPG SECURITIES PRIVATE LTD.

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v.

S.E.B.I. & ANR.

(Civil Appeal No. 3548 of 2010)

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DECEMBER 04, 2015

[VIKRAMAJIT SEN AND SHIVA KIRTI SINGH, JJ.]

Securities and Exchange Board of India (Stock-brokers and Sub-brokers) Regulations, 1992: Dispute arose on account of amended Regulations effective from 1.10.2006 introducing Schedule IIIA into the Regulations – For stock brokers, the measure of fee under Schedule III was “turnover of the previous year” on yearly basis and the same was replaced by concept of monthly fee on the basis of monthly turnover – Demand of registration fee from appellant stock broker not only on the basis of turnover of the previous year but also for the entire turnover earned after the turnover of the previous year and till the implementation of the Schedule IIIA – Held: Demand liable to be quashed in view of specific provisions of the Regulations, particularly clause IV to Schedule III and whole of Schedule IIIA which were introduced together by the third amendment to the Regulation w.e.f. 1.10.2006 – After 30.9.2006, Schedule IIIA admittedly became applicable to the appellant and, therefore, no provisions in Schedule III could be applied in the instant case – Registration fee for any future period since 1.10.2006 to be calculated on the basis of monthly turnover and payable each month as per provisions in Schedule IIIA.

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Allowing the appeal, the Court

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HELD: After Schedule IIIA became applicable, the Registration fee for any future period since 1.10.2006 could not be levied or demanded on the basis of

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A **Schedule III. It had to be calculated on the basis of monthly turnover and payable each month as per provisions in Schedule IIIA. [Para 12] [178-A-B]**

B *B.S.E. Brokers' Forum v. Securities and Exchange Board of India* (2001) 3 SCC 482 – relied on.

Case Law Reference

(2001) 3 SCC 482 relied on Para 8

C CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3548 of 2010.

From the Judgment and Order dated 11.02.2010 of the Securities Appellate Tribunal in Appeal No. 28 of 2009.

D Shyam Divan, Sr. Adv., Yashraj Singh Deora, Ms. Shreya Agrawal, G. Kalla, Ms. Priya Darshnee Singh, M/s. Mitter & Mitter Co. for the Appellant.

E Chander Uday Singh, Sr. Adv., Dhaval Mehrotra, Bhargava V. Desai, Ms. Saumya Mehrotra, Rishi Gautam, Pratap Venugopal, Ms. Surekha Raman, Anuj Sarma, Ms. Niharika, Ms. T. Mukherjee, M/s. K. J. Jonh & Co. for the Respondents.

F The Judgment of the Court was delivered by

G **SHIVA KIRTI SINGH, J.** 1. This is a statutory appeal preferred under Section 15Z of the Securities and Exchange Board of India Act, 1992 (for brevity 'the Act') against the judgment and order dated 11th February, 2010 passed by the Securities Appellate Tribunal, Mumbai (for brevity 'the SAT') in Appeal No. 28 of 2009. The dispute between the parties has arisen on account of amended Regulations effective from 1.10.2006 introducing Schedule IIIA into the Regulations. For stock brokers the measure of fee under Schedule III was

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“turnover of the previous year” on yearly basis and the same has been replaced by concept of monthly fee on the basis of monthly turnover. The dispute is whether the latter would come into effect immediately from the date Schedule IIIA becomes applicable to a stock-broker or the earlier measure of fee on yearly basis would continue for a limited period till fee in accordance with Schedule III and the principle of turnover of the whole year is realized not only as per the previous year’s turnover but for the entire up to date turnover till Schedule IIIA comes into effect in respect of a stock-broker.

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2. According to the impugned judgment and order of the SAT, SEBI was justified in demanding registration fee from the appellant, a stock-broker, not only on the basis of turnover of the previous year but also for the entire turnover earned after the turnover of the previous year and till the implementation of the Schedule IIIA, so that no part of the turnover of the stock-broker escapes from the net of registration fee. According to appellant’s case, argued by learned senior counsel Mr. Shyam Divan, such view of the SAT is impermissible in view of specific provisions of the Regulations, particularly clause (IV) to Schedule III and whole of Schedule IIIA which were introduced together by the third amendment to the Regulations with effect from 1.10.2006. Per submissions, the view is also contrary to the distinction between a turnover tax / tax on income in which case the annual turnover is targeted as the subject matter of levy on one hand, and a levy imposed in the present case as registration fee on the other, in which the annual turnover of a stock-broker is only a measure of the levy and not its subject matter.

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3. On the contrary, the stand of the respondent is that the demand made by SEBI is justified by clause 1(a) & (b) of Schedule III and such demand is saved by clause 4 of Schedule IIIA.

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A 4. Since the question to be answered is dependent
solely upon interpretation of provisions of Securities and
Exchange Board of India (Stock-brokers and sub-brokers)
Regulations, 1992 (for short the Regulations) as amended from
time to time including Schedule III and IIIA, it is not necessary
B to go into the facts. It is sufficient to notice that the appellant is
a stock-broker trading, inter alia, as a member of the Bombay
Stock Exchange Limited since 29.1.2004. It is not in dispute
that the appellant and stock-brokers in general are regulated
under the provisions of the Act and for conducting their trade
C or business they are required to be registered with SEBI under
the Regulations. Such registration is mandatory in terms of
Section 12 of the Act whereas Regulation 10 requires that for
obtaining certificate of registration from SEBI, every applicant
shall pay such fees and in such manner as specified in
D Schedule III or IIIA, as the case may be. The part relating to
Schedule IIIA was inserted by the SEBI (Stock Brokers and
sub-Brokers) Act (third amendment) Regulations 2006 with
effect from 1.10.2006. Regulation 10 also empowers SEBI to
suspend the Registration Certificate of a stock-broker if he
E fails to pay the fees and on such suspension the stock-broker
shall cease to sell or deal in securities as a stock-broker.

5. The appellant paid the registration fee in accordance
with Regulation 10 read with Schedule III without any dispute
F for the financial years 2003-04, 2004-05 and 2005-06 based
on the previous year turnover. After Schedule IIIA was inserted
w.e.f. 1.10.2006, the appellant exercised the option under
clause 2 of Schedule IIIA and started paying fee as per
Schedule IIIA w.e.f. 1.10.2006 on the basis of monthly turnover
G as the measure of registration fee payable on monthly basis.

6. In case there had been no option offered by way of
introduction of Schedule IIIA, the appellant would have been
required to pay for the whole of the year 2005-06 on the basis
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[SHIVA KIRTI SINGH, J.]

of turnover of previous year but on account of exercise of option and switching over to regime under rule IIIA with effect from 1.10.2006, the appellant paid pro rata only for the period upto 30.9.2006 on the basis of turnover of the previous year (1.4.2005 to 30.9.2005). SEBI, on the other hand, claimed that appellant had paid only half of his liability whereas he was liable to pay further Rs.18,13,995/- even for the period from October 2006 to March 2007 regardless of the fact that from October 2006, as per Schedule IIIA he was liable to pay and had paid the registration fee on monthly basis on monthly turnover. Not only this, SEBI claimed further amount of Rs.21,60,600/- for the year 2007-08 on the ground that no amount of turnover reached by the appellant till he opted to come under Schedule IIIA should escape from levy of registration fee. Such demands by the SEBI were regardless of the fact that the appellant, without any dispute came to be governed by Schedule IIIA from 1.10.2006 and he paid Registration Fee in accordance with Schedule IIIA for the remaining part of 2006-07, i.e, from 1.10.2006 and for the year 2007-08.

7. As noticed earlier, due to above dispute the appellant preferred appeal No. 28 of 2009 under Section 15T of the Act. The SAT decided against the appellant and dismissed his appeal by the impugned order.

8. On hearing learned senior counsel for the appellant Mr. Divan and learned senior counsel for the SEBI, Mr. C.U. Singh, we find that the demands raised by SEBI is illegal being contrary to the Regulations particularly clause IV of Schedule III. It is also based on a misconception that the entire annual turnover regardless of the formula accepted under Schedule III which took into account only the annual turnover of previous year as a measure of levy, must be the subject matter of levy even after Schedule IIIA became applicable. This

A misconception is due to a wrong mind set that the annual turnover is the subject matter of levy and not merely a measure of levy. Such misconception is directly in teeth of what has been clearly held in Paragraph 45 of this Court's Judgment in the case of **B.S.E. Brokers' Forum v. Securities and Exchange Board of India**, (2001) 3 SCC 482 decided by a three Judges Bench. Relevant part of para 45 of that judgment reads as follows:-

C "45. It cannot be disputed that the "annual turnover" of a broker is not the subject-matter of the levy but is only a measure of the levy. In other words, the fee is not being levied on the turnover as such but the fee is being levied on the brokers making their annual turnover as a measure of the levy which is a fee for regulating the activities of the securities market and for registration of the brokers and other intermediaries in the said market. Therefore, it is futile to contend that such levy would be either a tax or a fee on the turnover."

E 9. The main contention of Mr. C.U. Singh to support the impugned judgment of the SAT is based upon clause 1(a) & (b) of Schedule III. According to him that clause is the charging provision which requires taking note of annual turnover during any financial year for levy of registration fee for each financial year. In reply Mr. Divan has contended that the charging provision is in fact Regulation 10 which requires every applicant for a certificate of registration to pay fees. Only the quantum and manner of payment of such fees has been left to be determined as per Schedule III or Schedule IIIA.

G 10. Further reply is that in clause 1(a), the annual turnover of the financial year has not been made the basis for computing registration fee for that financial year and in fact under the applicable provisions in clause 2(b) such fee is required to be computed with reference to the annual turnover relating to the

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preceding financial year. It was further pointed out on behalf of the appellant that while introducing Schedule IIIA, the SEBI also introduced a contemporaneous change in Schedule III by inserting clause IV, which is as follows :

“IV. Non-applicability to stock brokers governed by Schedule III- The provisions of this Schedule shall not apply to stock brokers to whom Schedule IIIA applies, from the time when it becomes so applicable.”

11. We find ourselves in agreement with submissions advanced on behalf of the appellant that after 30th September, 2006 i.e. after Schedule IIIA admittedly became applicable to the appellant, no provisions in Schedule III could be applied to his case. We also find no merit in the contention advanced on behalf of SEBI that clause 4 of Schedule IIIA protects the demand raised by SEBI. Clause 4 of Schedule IIIA along with clause 3 occurs in Part B which relates to charge of fees. It reads as follows :

“4 – Nothing in clause 3 shall affect the liability of any stock broker to pay fees under Schedule III, which accrued before this Schedule became applicable to him and such fees shall be paid as per the relevant provisions of Schedule III as if they had not ceased to be applicable to him.”

The aforesaid clause is clarificatory in nature. It clarifies that the liability to pay fees as per Schedule III which has already accrued and got fastened to a stock-broker before the Schedule IIIA became applicable, would remain payable as per the provisions of Schedule III even after they cease to be effective for subsequent period.

12. This clause in our view does not affect the enforceability of Schedule IIIA from the date it became applicable to the appellant on account of option permitted by

A the relevant provisions. After Schedule IIIA became applicable, the Registration fee for any future period since 1.10.2006 could not be levied or demanded on the basis of Schedule III. It had to be calculated on the basis of monthly turnover and payable each month as per provisions in Schedule IIIA.

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12. In view of clear legal provisions noticed above, we find the impugned order of the SAT under appeal to be contrary to law. The same is accordingly set aside. The Appeal is allowed. As a result the demand made upon the appellant by

C SEBI which was under challenge before the SAT shall stand quashed. Whatever amount the appellant had paid towards such demand shall be refunded to it along with interest at the rate of 10% per annum from the date of deposit till refund. The refund should be effected without any delay and in any case
D within two months. There shall be no order as to costs.

Devika Gujral

Appeal allowed.