

**BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

Appeal No. 28 of 2009

Date of decision: 11.02.2010

OPG Securities Private Limited

4/10, Asaf Ali Road,

New Delhi – 110 002.

..... Appellant

Versus

1. The Securities and Exchange Board of India

SEBI Bhavan, Plot No. C4-A, “G” Block,

Bandra Kurla Complex, Bandra (East),

Mumbai.

2. The Bombay Stock Exchange Ltd.

Phiroze Jeejeebhoy Towers,

Dalal Street,

Mumbai – 400 001.

..... Respondents

Shri Janak Dwarkadas, Senior Advocate with

Mr. Vinay Chauhan, Advocate for the Appellant.

Dr. Mrs. Poornima Advani, Advocate with

Ms. Megha S. Bajoria, Advocate for Respondent No.1.

None for Respondent No.2.

CORAM : Justice N.K. Sodhi, Presiding Officer
Samar Ray, Member

Per : Justice N.K. Sodhi, Presiding Officer

The dispute herein is in regard to the liability of the appellant to pay broker fee for the financial years 2006-07 and 2007-08 as demanded by the Securities and Exchange

Board of India (for short the Board) under the Securities and Exchange Board of India (Stock Brokers and Sub-Brokers) Regulations, 1992 (referred to hereinafter as the Regulations). Facts giving rise to this appeal may first be noticed.

2. The appellant is a private limited company dealing in shares, stocks and other marketable securities. It became a member of the Bombay Stock Exchange and was registered as a stock broker on January 29, 2004 with the Board. Regulation 10 of the Regulations provides that every applicant eligible for grant of a certificate of registration to carry on trade as a stock-broker shall pay to the Board such fees and in such manner as specified in Schedule III or Schedule IIIA to the Regulations, as the case may be. Schedule IIIA was inserted in the Regulations only with effect from October 1, 2006. The relevant paragraphs of these Schedules which concern us are reproduced hereunder for facility of reference:

“

SCHEDULE III

Securities and Exchange Board of India (Stock Brokers and Sub-brokers)
Regulations, 1992
[Regulation 10]

I. Fees to be paid by the Stock Broker.

1. Every stock broker shall subject to paragraphs 2 and 3 of this Schedule pay registration fees in the manner set out below:

- (a) where the annual turnover does not exceed rupees one crore during any financial year, a sum of rupees five thousand for each financial year;
- (b) where the annual turnover of the stock-broker exceeds rupees one crore during any financial year, a sum of rupees five thousand plus one hundredth of one per cent of the turnover in excess of rupees one crore for each financial year;
- (bb).....
- (c) after the expiry of five financial years from the date of initial registration as a stock-broker, he shall pay a sum of rupees five thousand for every block of five financial years, commencing from the sixth financial year after the date of grant of initial registration to keep his registration in force.

2. Fees referred to in clauses (a) and (b) of paragraph 1 above shall be paid—

- (a) in respect of the financial year 1992-93 within one month of the commencement of these regulations;
- (b) **in respect of the financial year beginning on the 1st day of April, 1993 and the following financial years, on or before the first day of October of the financial year to which such payment relates,**

and such fees shall be computed with reference to the annual turnover relating to the preceding financial year.

3. Every remittance of fees referred to in clauses (a) and (b) of paragraph 1, shall be accompanied by a certificate as to the authenticity of turnover on the basis of which fees have been computed duly signed by the stock exchange of which the stock broker is a member or by a qualified auditor or as defined in section 226 of the Companies Act, 1956.

Explanation.- For the purpose of paragraphs 1, 2 and 3, “annual turnover” means the aggregate of the sale and purchase prices of securities received and receivable by the stock broker on his own account as well as on account of his clients in respect of sale and purchase or dealing in securities during any financial year.

III. Manner of Fees to be paid.

The fees specified above shall be paid on or before the 1st day of October each year payable by draft in favour of “The Securities and Exchange Board of India” at Bombay, or at the respective regional office.

IV. Non-applicability to stock brokers governed by Schedule IIIA.

The provisions of this Schedule shall not apply to stock brokers to whom Schedule III-A applies, from the time when it becomes so applicable.

SCHEDULE IIIA

Payment of Fees by Stock Brokers

[Regulation 10(1)]

PART A

APPLICABILITY

1. This Schedule shall apply to stock brokers from the following points of time:

- (a) All stock brokers who are granted registration by the Board on or after the first day of October, 2006 – upon grant of such registration;
- (b) All stock brokers who were granted registration by the Board on or after the first day of April, 2006, but before the first day of October, 2006 – from the first day of October, 2006;
- (c) All stock brokers who have not completed five financial years from the date of grant of registration by the Board, as on the thirty first day of March, 2006 – upon completion of ten financial years from the date of grant of registration by the Board;
- (d) All stock brokers who have completed five financial years from the date of grant of registration by the Board, as on the thirty first day of March, 2006 – upon completion of the current block of five financial years, within the meaning of item I(1)(c) of Schedule III;
- (e) All stock brokers falling under sub-clause (c) or (d), who opt in accordance with clause 2 to be governed by the provisions of this Schedule – from such date as may be specified by the Board.

2. Stock brokers falling under sub-clause (c) or (d) of clause 1 may opt to pay fees in accordance with this Schedule before completion of the relevant time periods mentioned in those sub-clauses, by exercising an option in writing to that effect and communicating it to the Board, in such manner and within such time as may be specified by the Board.

PART B

CHARGE OF FEES

3. On and from the applicability of this Schedule, every stock broker shall pay to the Board in accordance with Part C, a fee in respect of the securities transactions including off-market transactions undertaken by them, at the rates mentioned below:

Sl. No.	Nature of the securities transaction	Rate of fee
(a)	All sale and purchase transactions in securities other than debt securities.	0.0002 per cent of the price at which the securities are purchased or sold (Rs.20 per crore)
(b)	All sale and purchase transactions in debt securities.	0.00005 per cent of the price at which the securities are purchased or sold (Rs.5 per crore)

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.

PART C

MANNER OF PAYMENT AND RECOVERY

5.(1) Every recognized stock exchange shall collect from every stock broker to whom this Schedule applies, the fee payable under clause 3 in respect of –

- (a) securities transactions entered into by him in that stock exchange; and
- (b) off-market transactions entered into by him which are reported to that stock exchange, -

in accordance with the provisions of its bye-laws.

Explanation.- The Board may specify the manner in which fees shall be collected from stock brokers who report the same transactions to different stock exchanges in which they are members, under clause (b).

(2) The fee collected by a recognized stock exchange under sub-clause (1) during a calendar month shall be paid by the stock exchange to the Board by the fifth working day of the following calendar month.

(3).....

(4).....”
(emphasis supplied)

Before we proceed further, it is necessary to know the fee which the appellant has paid since its registration and the one that is being claimed from it by the Board which is now in dispute before us. The learned counsel for the Board placed before us during the course of the hearing a chart showing the broker fee paid and payable by the appellant and it would be useful to refer to the same for a better understanding of the issues involved in

this appeal. The figures mentioned by the Board have not been disputed on behalf of the appellant though it disputes its liability to pay broker fee for the financial years 2006-07 and 2007-08 as claimed by the Board. Following is the chart giving the details. We have slightly modified it by including column 5A for the purpose of clarity.

Timeline approach regarding payment of fees by OPG Securities

		1	2	3	4	5	5A
A	Financial Year	2002-03	2003-04	2004-05	2005-06	2006-07 (First Half)	2007-08
B	Fees Payable (in Rs.) under Schedule III & due date		5,000	70,490 (upto 01/10/04)	12,81,225 (upto 01/10/05)	36,13,995 (upto 01/10/06)	21,60,660 01/10/07 based on half year's turnover of 2006-07
C	Fees paid (in Rs.)		5,000	70,490	12,77,232	18,00,000	Nil
D	Deficit Amount		Nil	Nil	3,993	18,13,995	21,60,660
E	Fees Payable (in Rs) under Schedule III-A						Shown in Column 6
F	Turnover (Rs.)	Nil	262,97,00,000	5054,10,00,000	14081,30,60,000	8534,48,26,320	2064,33,00,000
G	Turnover (Rs. Crore)	Nil	262.97	5054.10	14081.30	8534.48	2064.33

		6	7	8	9	10	11	12	13
	Schedule	Schedule IIIA							
A	Financial Year	Oct 06	Nov 06	Dec 06	Jan 07	Feb 07	Mar 07	Apr 07	May 07
B	Fees Payable (in Rs.) under Schedule III & due date	21,60,660 (utpo 1/10/07)							
C	Fees paid (in Rs.)	Nil							
D	Deficit Amount	21,60,550							
E	Fees Payable (in Rs) under Schedule III-A		41,287	70,423	49,374	56,633	67,125	40,157	50,725
F	Turnover (Rs.)								
G	Turnover (Rs. Crore)	2064.33	3521.11	#####	2831.63	#####	#####	2536.25	3555.15

		14	15	16	17	18	19	20	21
	Schedule	Schedule IIIA							
A	Financial Year	Jun 07	Jul 07	Aug 07	Sep 07	Oct 07	Nov 07	Dec 07	Jan 08
B	Fees Payable (in Rs.) under Schedule III & due date								
C	Fees paid (in Rs.)								
D	Deficit Amount								
E	Fees Payable (in Rs) under Schedule III-A	71,103	70,996	77,452	56,986	56,784	1,08,048	1,08,381	98,441
F	Turnover (Rs.)								
G	Turnover (Rs. Crore)	3549..80	#####	#####	#####	5402.40	5419.05	4922.05	

The Board is claiming under Schedule III the unpaid amount of Rs.18,13,995 for the financial year 2006-07 and another sum of Rs.21,60,550 as fee for the financial year 2007-08 based on the half year’s turnover of the year 2006-07. In addition, the Board is claiming interest on the delayed payment. By letter dated February 6, 2009, the appellant was required to clear the outstanding amounts. It is against this communication that the present appeal has been filed.

3. We have heard Shri Janak Dwarkadas learned senior counsel for the appellant and Dr. Mrs. Poornima Advani, Advocate for the Board. When we read paragraphs 1 and 2 of Schedule III, it is clear that broker fee is payable for each financial year and such fee is

computed with reference to the annual turnover relating to the preceding financial year. Where the annual turnover of a stock-broker does not exceed Rs.One crore during any financial year, he is required to pay a sum of Rs.5,000/- for each financial year and where the turnover exceeds Rs.One crore during any financial year, he has to pay a sum of Rs.5,000/- plus one hundredth of one per cent of the turnover in excess of Rs.One crore for each financial year. In the case before us, the appellant was registered as a stock-broker on January 29, 2004 and it was required to pay broker fee under Schedule III (which was the only schedule then in force) for the first time for the financial year 2003-04. This fee had to be computed on the basis of its turnover for the preceding year which was nil and, therefore, in terms of paragraph 1(a) of Schedule III, it deposited a sum of Rs.5000/- only. It is clear from the aforesaid chart that broker fee for the year 2004-05 was computed and paid with reference to the annual turnover for the year 2003-04 and for the year 2005-06, the same was computed on the basis of the turnover for the year 2004-05 and till the financial year 2005-06 there is no dispute between the parties. There is, however, a minor discrepancy in regard to a small amount of Rs.3993/- which has been shown as the deficit amount for the financial year 2005-06 and the appellant is willing to pay the same without raising any controversy. The dispute, however, is with regard to the fee payable for the financial years 2006-07 and 2007-08 because of the introduction of Schedule IIIA with effect from 1.10.2006. It will be seen from the provisions of Schedule IIIA which have been reproduced hereinabove that stock brokers who have not completed five financial years from the date of grant of registration by the Board as on March 31, 2006, among others, had also been brought within the purview of this Schedule only upon their completing ten financial years from the date of their registration with the Board. The appellant falls in this category as it was registered on January 29, 2004 and had not completed five years till March 31, 2006. Such brokers (like the appellant) were given an option that they could pay fee in accordance with Schedule IIIA even before the completion of ten years from the date of their registration by exercising an option in writing to that effect and communicating the same to the Board. It is common ground between the parties that the appellant chose to exercise this

option and it was allowed to be governed by the provisions of Schedule IIIA with effect from 1.10.2006. The question for our consideration is how the broker fee is to be paid for the financial years 2006-07 and 2007-08 having regard to the provisions of both the schedules. Under Schedule III, broker fee is payable for each financial year and it is computed with reference to the annual turnover of the previous financial year and becomes payable by October 1 of the year to which it relates. On the other hand, broker fee under Schedule IIIA shall be collected from the broker by the stock exchange during each calendar month and the latter shall deposit the same with the Board by the fifth working day of the following calendar month. Under both the Schedules, the taxable event is the turnover of the stock broker, the difference being that under Schedule III it is the annual turnover of the previous year on which fee is levied for the year following the previous year whereas under Schedule IIIA, it is on the current month's turnover and the fee is collected in the following month. Clause IV of Schedule III makes it clear that this schedule shall not apply to stock brokers from the time when Schedule IIIA becomes applicable to them. Para 4 in Schedule IIIA, however, provides that the liability of a stock broker to pay fees under Schedule III which accrued before Schedule IIIA became applicable to him shall not be affected in any way and he shall have to discharge that liability in terms of Schedule III as if the provisions of this Schedule did not cease to apply to him. What it means is that even when the provisions of Schedule IIIA become applicable to any stock broker, he must discharge his liability to pay broker fee under Schedule III upto the date of the application of Schedule IIIA to him and till such time that liability is discharged, Schedule III shall not cease to operate qua him. In other words, a stock broker may have to pay fee under both Schedules III and IIIA in a financial year till he extinguishes his liability under Schedule III. As already observed, in the case before us, Schedule IIIA became applicable to the appellant on the exercise of its option with effect from October 1, 2006. It follows that fee on the turnover generated by the appellant upto September 2006 has to be levied and paid in accordance with the provisions of Schedule III. In terms of this schedule, broker fee for the year 2006-07 shall be computed with reference to the annual turnover of the preceding year 2005-06. The

annual turnover for the year 2005-06 was Rs.14081,30,60,000/- and on this basis the broker fee works out to Rs.36,13,995 as shown in the chart. Admittedly, the appellant has paid only Rs.18,00,000 and the Board is right in claiming that a sum of Rs.18,13,995 is due for the year 2006-07. Fee on the turnover generated for the period from April 1, 2006 to September 30, 2006 in terms of Schedule III would become due for payment on April 1, 2007 and could be paid upto October 1, 2007. The question which faces us is how the fee has to be computed since Schedule III takes annual turnover of the preceding year as the basis for calculation whereas the turnover in question is for half a year. Textually speaking, Schedule III does not provide for anything other than “annual turnover” as the basis for computation of broker fee. However, going by the commonsense construction rule which was followed by the learned judges of the Supreme Court in *Bombay Dyeing & Mfg. Co. Ltd. vs. Bombay Environmental Action Group and others* (2006) 3 SCC 434, we hold that since the turnover for the period from April 1, 2006 to September 30, 2006 was for half the year, the same should be taken for computing the broker fee for the financial year 2007-08. In other words, broker fee for the financial year 2007-08 will have to be paid under Schedule III based on the previous half year’s turnover notwithstanding the fact that the appellant had switched over to Schedule IIIA with effect from October 1, 2006. The applicability of Schedule IIIA to the appellant with effect from October 1, 2006 did not extinguish its liability to pay broker fee under Schedule III on the turnover generated upto September, 2006. This is what is explicitly stated in para 4 of Schedule IIIA. The Board is, therefore, right in claiming the unpaid amount of Rs.18,13,995 for the financial year 2006-07 and another sum of Rs.21,60,550 for the financial year 2007-08 based on the half year’s turnover of the year 2006-07. When this amount is paid, it is only then that the appellant shall discharge its liability under Schedule III to pay broker fee on the turnover generated upto September, 2006. Thereafter, with effect from October 1, 2006 Schedule IIIA has become applicable and the appellant is paying broker/turnover fee on monthly basis and there is no dispute in this regard.

4. What is argued by Shri Janak Dwarkadas learned senior counsel for the appellant is that the taxing event under Schedule III is the registration of the broker and every broker has to pay fee for each year to keep his registration alive though the previous year's turnover is taken only as a measure to compute the fee. He does not dispute that under Schedule IIIA, the taxable event is the monthly turnover. His argument is that since the appellant switched over to Schedule IIIA with effect from October 1, 2006, it is liable to pay fee under Schedule III for the financial year 2006-07 only on half year's turnover of the year 2005-06 and on this basis he justifies the payment of Rs.18,00,000 made by the appellant though the fee on the basis of the whole year's turnover works out to Rs.36,13,995 as shown in the chart. He strenuously argued that having paid this amount, the appellant is liable to pay fee under Schedule IIIA on monthly basis with effect from October 1, 2006 which it has been paying. According to the learned senior counsel, the appellant has paid fee for the financial year 2006-07 partly under Schedule III and partly under Schedule IIIA and, therefore, the Board is not justified in claiming the sum of Rs.21,60,550 as fee under Schedule III for the financial year 2007-08 based on half year's turnover of the year 2006-07. The argument may look attractive in the first flush but has no merit when examined in the context of the two Schedules and the well settled principles of interpretation of fiscal provisions. We do not agree with the learned senior counsel that the taxable events under the two Schedules are different. As already observed, the fee under both the Schedules is levied on the turnover of the broker. This has been so held by the Hon'ble Supreme Court in Veneet Aggarwal vs. Union of India (2007) 13 SCC 116 wherein the learned Judges observed "Before proceeding further, it may be mentioned that under Regulation 10 of the SEBI Act, 1992, the registration fee is levied on the annual turnover of the stockbrokers and sub-brokers..." and they describe the fee as turnover fee. While interpreting the provisions of the two Schedules, we have to bear in mind that no part of the turnover is left out from the levy and that fee is not levied twice on any part of the turnover. If the argument of the learned senior counsel were to be accepted, the turnover for the period from October 1, 2005 to September, 2006 would escape the levy. This cannot be allowed. For the financial year 2005-06, the

appellant has paid fee on the basis of its turnover of the previous year 2004-05. Having paid this amount, it wants to pay for the next financial year 2006-07 only on the basis of half year's turnover of the previous year 2005-06 on the plea that it switched over to Schedule IIIA with effect from October 1, 2006 forgetting that it has not yet discharged its liability to pay fee on the turnover generated upto September, 2006. How will the turnover of the remaining half year of 2005-06 and again for the period from 2006-07 upto September 2006 be brought to levy. The provisions of para 4 in Schedule IIIA have to be given full effect to and when we do that the appellant has to pay the fee on the turnover generated by it till September, 2006 as claimed by the Board and as discussed in the earlier part of our order. In this view of the matter, no fault can be found with the impugned communication requiring the appellant to discharge its liability under Schedule III notwithstanding that it switched over to Schedule IIIA with effect from October 1, 2006.

In the result, there is no merit in the appeal and the same stands dismissed. There is no order as to costs.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

After the order was pronounced, the learned counsel for the appellant made an oral application with a prayer that the recovery of the broker fee as claimed by the Board be stayed for a period of four weeks to enable the appellant to approach the Supreme Court. He contends that the appellant apprehends that in case the amount is not deposited, its certificate of registration may be suspended. Having regard to the facts and circumstances of the case, we direct that the recovery of the impugned amount shall remain stayed for a period of four weeks from today.

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Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

11.02.2010/ddg
Prepared and compared by DDG