

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL (IT) NO.1171 OF 2017**

Pr.Commissioner of Income Tax-7 ... Appellant
V/s.

National Stock Exchange ... Respondent

Mr.Suresh Kumar with Ms.Priyanka Tiwary and
Ms.Sumandevi Yadav, Advocate for the Appellant.
Mr.J.D.Mistri, Senior Advocate with Mr.Atul K. Jasani for
the Respondent.

**CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.
DATE : FEBRUARY 3, 2020**

P.C.:-

1. Heard Mr.Suresh Kumar, learned standing counsel, Revenue for the appellant; and Mr.J.D.Mistri learned senior counsel assisted by Mr.Atul K. Jasani, learned counsel for the respondent.

2. This appeal has been preferred by the Revenue under Section 260A of the Income Tax Act, 1961 (briefly “the Act” hereinafter) against the order dated 4th April, 2016 passed by the Income Tax Appellate Tribunal,

Mumbai Bench “B”, Mumbai (briefly “the Tribunal” hereinafter) in Security Tax Appeal No.01/Mum/2013 for the financial year 2006-07.

3. In this appeal the appellant has proposed the following two questions as substantial questions of law:-

(i) Whether in the facts and in the circumstances of the case and in law the Tribunal erred in deleting the penalty levied under Section 105(a) of the Securities Transaction Tax (STT) falling under Chapter VII of Finance (No.2) Act, 2004?

(ii) Whether in the facts and in the circumstances of the case and in law the Tribunal erred in deleting the penalty levied under Section 105(a) of the Securities Transaction Tax (STT) falling under Chapter VII of Finance (No.2) Act, 2004 in view of the failure of the assessee to discharge its statutory liability to collect the STT at prescribed rates under section 100(4) of the Securities Transaction Tax (STT) falling under Chapter VII of Finance (No.2) Act, 2004?

4. In Income Tax Appeal No.1187 of 2017, we have already set aside the order of the Tribunal dated 4th April, 2016 to the extent of deletion of the addition made by the Assessing Officer and limited by the

Commissioner of Income Tax (Appeals) to
Rs.2,80,78,444.00.

5. Ordinarily once the court holds that the respondent is not liable for the short deduction of STT, the penalty imposed thereon would not survive as in such a case the respondent cannot be construed to be an assessee in default. However, in addition to the above, we find that there are good grounds for interfering with the penalty imposed.

6. Section 105 of Chapter VII of Finance (No.2) Act, 2004 dealing with Securities Transaction Tax (STT) provides for penalty for failure to collect or pay STT. As per Section 105 any assessee who fails to collect the whole or any part of the STT as required under Section 100 or having collected the STT fails to pay such tax to the credit of the Central Government in accordance with sub-section (3) of Section 100, he shall be liable to pay penalty in addition to interest. The quantum of penalty is provided in that section itself.

7. However, as per Section 108, notwithstanding anything contained in the provisions of Section 105 or Section 106 or Section 107, no penalty shall be imposable for any failure referred to in the said provisions if the assessee proves that there was reasonable cause for the said failure and as per the proviso no order imposing a penalty shall be made unless the assessee had been given a reasonable opportunity of being heard.

8. If Section 105 is read in isolation, it would appear that failure to pay the tax by the assessee i.e., either failure to collect the STT or failure to deposit the STT so collected to the credit of the Central Government would automatically lead to imposition of penalty. This is so because of the use of the word “shall” in that section. However, Section 108 starts with a non-obstante clause by use of the expression “notwithstanding”. It is further clarified that Section 108 would have effect notwithstanding anything contained in Section 105 or the other two sections mentioned therein. In other words, Section 108 would have overriding effect over

Section 105. Section 108 makes it abundantly clear that merely because there is infraction of Section 105 imposition of penalty is not automatic. For that the assessee would have to be given a reasonable opportunity of being heard and in the process of such hearing if the assessee proves that there was reasonable cause for such failure, then in such a case the Assessing Officer shall not impose any penalty.

9. A careful and conjoint reading of the two provisions i.e. Sections 105 and 108 would therefore make it clear that imposition of penalty is to be proceeded separately as a separate proceeding. Merely because in the assessment order the Assessing Officer comes to a conclusion that the assessee had failed to collect the STT or had failed to pay such STT to the credit of the Central Government, it would not *ipso-facto* lead to imposition of penalty. Once such a conclusion is reached, the assessee is required to be provided reasonable opportunity of hearing and during the hearing if the

assessee can prove that there was reasonable cause for such failure, no penalty shall be imposed.

10. Though, as observed by the Supreme Court, the expression 'penalty' is a word of wide significance, but in substance penalty is in the nature of punishment. Therefore, before imposing penalty the Assessing Officer must come to the conclusion that there was deliberate defiance of the law or wilful contravention of the law by the assessee.

11. Reverting back to the facts of the present case, we find the Assessing Officer had passed a composite assessment order dated 30th March, 2011. In appellate proceedings, Tribunal had already held the respondent to be not liable for any alleged short deduction of STT which finding we have affirmed.

12. Thus in the facts and circumstances of the case and having regard to the discussions made above, we are of the firm view that the Tribunal was justified in

deleting the penalty imposed on the respondent by the Assessing Officer.

13. Consequently, we find no merit in the appeal. Appeal is accordingly dismissed. No cost.

(MILIND N. JADHAV, J.)

(UJJAL BHUYAN, J.)

....