BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. RKN/AO-1/2009]

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 1995

In respect of

Mr. ANIL NIBBER

FACTS OF THE CASE IN BRIEF:

1. The shares of M/s Syschem (India) Limited (hereinafter referred to as **"SIL / company"**) are listed on Bombay Stock Exchange Ltd. (hereinafter referred to as **"BSE"**) and The Delhi Stock Exchange Ltd. Securities and Exchange Board of India (hereinafter referred to as '**SEBI**') conducted an investigation into the affairs of SIL including trading in the scrip for the period January 01, 2006 to August 30, 2006 in BSE.

2. As per the findings of the investigation, the Promoters, Directors of SIL and their related entities off loaded 17,79,300 shares of SIL to entities known to them. The aforesaid shares included 4,50,000 shares of Mr. Anil Nibber (hereinafter referred to as **"noticee"**), Managing Director, 6,50,000 shares of Mr. Atul Nibber, Director and 60,100 shares of Kashmir Chand, Director. In turn, the entities who received these shares, sold 18,36,761 shares, constituting about 3% of SIL's equity, in the market in the quarter ending March 31, 2006. SIL reported loss in the last quarter ending March 2006

after reporting profit in the first three quarters of financial year 2005-06. The price of SIL scrip fell from a high of Rs. 3.99 on February 17, 2006 to Rs. 1.00 on July 25, 2006 in BSE, subsequent to the announcement of its results.

3. M/s Anil Nibber, Atul Nibber and Kashmir Chand did not reply to SEBI queries seeking status of their compliance with disclosures under SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as **"PIT"**) and also seeking details thereof, about the impugned transactions. Subsequently, adjudication proceedings were initiated against these three entities.

APPOINTMENT OF ADJUDICATING OFFICER

4. The undersigned was appointed as Adjudicating Officer vide order dated December 26, 2008 under section 15 I of the SEBI Act read with Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalty by Adjudicating Officer) Rules, 1995 (hereinafter referred to as the **'Rules'**) to inquire into and adjudge the aforesaid alleged violation under section 15A(b) of the SEBI Act.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

5. Show Cause Notice dated February 05, 2009 (hereinafter referred to as "**SCN**") was issued to the noticee under Rule 4(1) of the Rules to show cause as to why an inquiry should not be initiated against him and penalty be not imposed under section 15A(b) of SEBI Act, 1992 for his alleged failure to disclose his change in shareholding in SIL to SIL in terms of Regulations 13(4) & 13(5) of PIT.

6. In terms of Rule 4(1) of the Rules, the noticee was granted 15 days time to file reply to the SCN. The SCN also provided details of the Consent order

scheme of the Board. In response, the noticee, vide letter dated February 25, 2009, sought 15 days additional time to file his reply as he was going out of station for business work. The noticee was granted time till March 12, 2009 to file his reply to the SCN, vide letter dated March 06, 2009.

7. Subsequently, vide letter dated March 10, 2009 (by fax), the noticee sought further additional time till March 22, 2009 to file reply to the SCN, due to Holi holidays and busy schedule of his advocates / consultants due to financial year end.

8. Despite seeking extension of time twice as aforesaid, the noticee did not file reply to the SCN. Under the circumstances, the undersigned thought it fit to conduct an inquiry in terms of Rule 4(3) of the Rules. Accordingly, a notice of inquiry was issued to the noticee vide letter April 17, 2009, fixing the date of personal hearing on May 04, 2009 at SEBI Bhavan. This notice of inquiry also once again provided details of the Consent order scheme of the Board.

9. The noticee, vide letter dated April 15, 2009 (received on April 20, 2009), filed reply to the SCN and *inter alia* made the following submissions:
    a. The noticee denied the allegations in the SCN and stated that he did not sell his shares of SIL as alleged. As SIL incurred losses and SIL had no scheme for sweat equity, a part of shares held by management / Directors of SIL in SIL, was transferred to two of SIL's loyal employees, in off market transactions to provide them financial support.
    b. The noticee submitted that the aforesaid transaction was disclosed to SIL and the Stock Exchanges. Further, the noticee claimed that as this information was not updated in the BSE web site, he once again disclosed his shareholding in SIL in 2006 to the Stock Exchanges vide letter date April 04, 2009 and documents to evidence the same were enclosed vide annexure – 1.
    c. The noticee contented that in its quarterly disclosure of shareholding pattern under Clause 35 of the Listing Agreement

(LA), SIL had disclosed the aforesaid change in the shareholding of its directors and documents to evidence the same were enclosed vide annexure – 3.

d. The change in shareholding was also disclosed by noticee to SIL and in turn by SIL to the Stock Exchanges under Regulations 8(1) and 8(3) of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, respectively and documents to evidence the same were enclosed vide annexure – 4.

e. Given the small volume of the shares in the impugned transaction both in relation to the size of SIL's equity and the volume of the scrip traded in BSE, and given the paucity in availability of experienced professionals for regulatory compliance in the remote location of SIL, the noticee sought condoning of any possible unintentional lapse.

f. The noticee sought permission of the Adjudicating Officer for applying for the Consent order scheme of the Board.

10. Subsequently, in response to the notice of inquiry, the noticee vide letter dated April 22, 2009, stated that he already furnished a detailed reply to the SCN along with supporting documents and sought exemption from personal appearance. The undersigned, vide letter dated April 28, 2009 (sent by Fax) informed the noticee, that his reply to the SCN vide dated April 15, 2009 was taken on record. Further, it was also conveyed that there is no change in the contents of the notice of inquiry dated April 17, 2009, issued to him.

11. The noticee, vide letter dated May 01, 2009 (by fax) informed that he was applying to the Board for a consent order in the matter and sought adjournment of the inquiry. However, as on date the noticee has not filed copy of his application under the consent order scheme of Board before the Adjudicating Officer.

12. As the noticee sought waiver from personal appearance (vide letter dated April 22, 2009) and also did not appear before the Adjudicating Officer on

the date of inquiry, the undersigned decided to proceed ahead in the matter with the material available on record, in terms of provision of Rule 4(5) & 4(7) of the Rules.

CONSIDERATION OF ISSUES

13. I have carefully perused the material on record and the issues that arise for consideration are :

    a. Whether the noticee attracted the disclosure requirements under Regulations 13(4) read with 13(5) of PIT and if so, whether complied or not?
    b. Does the non-compliance, if any, attract monetary penalty under section 15A(b) of SEBI Act?
    c. If so, what would be the amount of monetary penalty that can be imposed taking into consideration the factors mentioned in section 15J of SEBI Act?

Background information:

14. Before recording my findings, it may be relevant to revisit some facts of the case from the investigation in the matter. As mentioned earlier in this Order, M/s Anil Nibber, Atul Nibber and Kashmir Chand are stated to have off loaded 450,000, 650,000 and 60,100 shares of SIL respectively in the run up to the quarter ended March, 2006, when SIL reported loss after reporting profit in the previous three quarters. The price of SIL scrip fell from a high of Rs. 3.99 on February 17, 2006 to Rs. 1.00 on July 25, 2006 in BSE subsequent to the release of the results.

15. SEBI sought details of their transactions in the shares of SIL from M/s Anil Nibber, and Kashmir Chand, vide letters dated June 25, 2007 and once again vide letters dated January 14, 2008. In response, vide letter dated February 12, 2008, SIL informed SEBI that 560,100 and 600,000 shares of

SIL were transferred by SIL to two of its employees vide loan agreements dated February 13, 2006.

16. Subsequently, SEBI sought status of compliance with disclosures under PIT and also the details of the impugned transactions from M/s Anil Nibber, Atul Nibber and Kashmir Chand vide letters dated July 15, 2008 and August 08, 2008. They did not reply to SEBI's queries and adjudication proceedings were initiated against these entities.

FINDINGS

17. Alleged violation of 13(4) read with (hereafter r/w) 13(5) of PIT

(a) The provisions of Regulations 13(4) & 13(5) of PIT are reproduced below:

13. Disclosure of interest or holding by directors and officers and substantial shareholders in a listed company – Initial Disclosure

Continual Disclosure

(4) Any person who is a director or officer of a listed company, shall disclose to the company [in Form D], the total number of shares or voting rights held and change in shareholding or voting rights, if there has been a change in such holdings from the last disclosure made under sub-regulation (2) or under this sub-regulation, and the change exceeds Rs. 5 lakh in value or 25,000 shares or 1% of total shareholding or voting rights, whichever is lower."

(5) The disclosure mentioned in sub-regulations (3) and (4) shall be made within 4 working days of :

(a) the receipts of intimation of allotment of shares, or

(b) the acquisition or sale of shares or voting rights, as the case may be.

(6) Every listed company, within five days of receipt, shall disclose to all stockexchanges on which the company is listed, the information received under subregulations (1), (2), (3) and (4) 46[in the respective formats specified in Schedule III.].

(b) In the instant case, the status of the noticee as Director of SIL is not disputed. Further, the noticee has admitted that 4,50,000 shares of SIL, valued at Rs. 16.65 lacs were transferred out from his demat account on February 16, 2006. Since the aforesaid transaction involved change

in shareholding of more than 25,000 shares, the noticee was required under Regulation 13(4) r/w 13(5) of PIT to disclose the same to SIL within 4 days. The noticee has furnished copy of letter dated April 04, 2009 addressed to the Stock Exchanges and to SIL, which is a stated to be a resubmission of his purported letter dated February 17, 2006, disclosing the change in his shareholding, as annexure – 1 to his reply dated April 15, 2009. I find that the noticee has disclosed his transaction in February 16, 2006 to SIL and Stock Exchanges vide letter dated letter dated April 04, 2009 i.e. more than three years after the transaction and not within the 4 days as required u/r 13(5) of PIT. Further, the noticee has not furnished any document to support his contention of having made the disclosure to SIL about the change in his shareholding on February 16, 2006 within four days.

(c) Regulation 13(4) of PIT is concerned with change in shareholding and not about the means by which such change occurred. The averment by the noticee that he did not sell the shares, but only transferred them in lieu of loan, is therefore, of no avail. The noticee's claim of having disclosed the impugned transaction to the Stock Exchanges is also of no avail, as it is not required under PIT.

(d) I have examined the material furnished by the noticee vide annexure 3 & 4 of noticee's reply to the SCN dated April 15, 2009. In terms of Clause 35 of the LA, listed companies are required to file a detailed break up of their shareholding pattern to the Stock Exchanges, for every quarter within 21 days of the end of the quarter. Annexure 3 is copy SIL's disclosure for the quarter ended March 2006. It is true that the change in shareholding of noticee is also captured in the aforesaid disclosure made by SIL under Clause 35 of the LA and hence the information is disclosed to the public. However, the noticee was required u/r 13(5) of PIT to disclose his transaction on February 16, 2006 within 4 days to SIL. In turn, SIL has to disclose the same to Stock Exchanges within 5 days u/r 13(6) of PIT, for public dissemination. Therefore, under PIT, disclosure of certain transactions

by directors is required to be made public within 9 days of the transaction. However, the disclosure under Clause 35 of LA is required to be filed by the company within 21 days of quarter ending March 31, 2006. Therefore, the earliest possible date of filing under Clause 35 of LA by SIL could be on or after April 01, 2006, which is well after the 9 days of the impugned transactions as required under PIT. In other words, the requirement to disclose within 9 days of the transaction under PIT remains unfilled, notwithstanding the disclosure made under Clause 35 of LA.

(e) The aforesaid rationale is also applicable *mutatis mutandis* for the disclosure made by SIL u/r 8(3) of SAST, within a period of 30 days from year ending March 31, 2006, copy of which has been furnished vide annexure 4. It is a well settled position of law[1] that, when a time frame has been prescribed for complying with statutory requirement, doing it after that time period constitutes default in compliance and not delay.

(f) While contending to have complied with PIT, the noticee simultaneously also sought condoning possible lapse on his part, if any as the volume of transaction was low, both in relation to the size of SIL's equity and the volume of the scrip traded in BSE, and as professionals were not readily available for regulatory compliance. Given the aforesaid and as there is no document to evidence disclosure made to SIL within 4 days of the impugned transaction, as detailed earlier, the charge against the noticee stands established.

(g) The SCN dated February 05, 2009 and the notice of inquiry dated April 17, 2009 provided the noticee with details of applying for the consent order scheme of the Board. The noticee is yet to forward copy of his application for consent order to the undersigned, as required under the

[1] SAT order dated May 04, 2001 in the appeal No. 36 of 2000 in the matter of Yodi Sungwon (India) Ltd. Vs. SEBI.

SEBI Circular dated Circular no. EFD/ED/Cir-1/2007 dated April 20, 2007.

(h) The charge against the noticee thus having been established, I now proceed to determine the penalty.

PENALTY:

18. It is important to understand the objectives of PIT before proceeding on the aspect of penalty for the violation. Section 11(2)(g) of the SEBI Act, 1992 empowers SEBI to prohibit insider trading in securities. This was done with the specific objective of protecting the interest of the investors viz-a-vie the insiders. Accordingly, PIT was promulgated; its cardinal principles being 1) Equality of treatment and opportunity for all category of shareholders (insiders and others) 2) transparency and fairness for informed decision making. The aforesaid objectives are sought to be achieved through well defined process of disclosures and certain restrictions on transactions of insiders.

19. The shareholding of insiders in a company is an important parameter of it valuation as it reflects the insider perspective and perception about the company's growth prospects, earnings etc. Hence, the disclosure requirement under Regulation 13(4) r/w (5) of PIT for Directors and officers to disclose change in shareholding to the company within 4 days. In turn, the company is required u/r 13(6) of PIT to disclose the same to all the stock exchanges in which its shares are listed, for public dissemination. Thus, insiders on one hand and other shareholders (including potential shareholders) on the other hand are brought on equal footing vide disclosures. Existing shareholders and potential investors get an opportunity to reformulate their perception about the prospects of the company vide the disclosure. Therefore, disclosures u/r 13(4), (5) & (6) of PIT brings about informed decision making by all stakeholders resulting in proper price discovery, which is vital to the functioning of the markets.

Accordingly, non compliance to the same needs to be viewed seriously and not as a mere technicality.

20. The contention of the noticee that the volume of his transaction is very small in relation to the total volume of SIL's shares traded in the market, is of no relevance. It is not the volume of transaction that matters, but the status of the persons (as insider) transacting the shares, which is material.

21. The Hon'ble Supreme Court of India in the matter of *SEBI Vs. Shri Ram Mutual Fund [2006] 68 SCL 216 (SC)* held that *"once the violation of statutory regulations is established, imposition of penalty becomes sine qua non of violation and the intention of parties committing such violation becomes totally irrelevant. Once the contravention is established then the penalty is to follow"*.

22. In view of the foregoing, I am convinced that it is a fit case to impose monetary penalty under section 15A(b) of the SEBI Act, which is reproduced here under :

15A. ***Penalty for failure to furnish, information , return etc.***

If any person, who is required under this Act or any rules or regulations made thereunder, -
(a)…
(b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to [a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less];

23. The noticee was required to disclose the transaction of 4,50,000 shares of SIL on February 16, 2006, to SIL within 4 days and in turn by SIL to Stock Exchanges within 5 days. In other words the transaction on February 16, 2006 is required to be disseminated to public within 9 days, by March 01, 2006[2]. However, as noted earlier, the earliest possible public dissemination of this transaction was only on or after April 01, 2006. Therefore, the 'default' continued for a minimum period of 31 days from

[2] Including the intervening weekends.

March 01, 2006 to April 01, 2006. In terms of 15A(b) of SEBI Act, the penalty that can be imposed for each day of default is Rs. 100,000 or Rs. One crore, which ever is less. Accordingly, the penalty amount that can be imposed on the noticee works out Rs. 31,00,000 (31 days X Rs.100,000).

24. While determining the quantum of monetary penalty under section 15A (b), I have considered the factors stipulated in section 15J of SEBI Act, which reads as under:-

> ***"15J - Factors to be taken into account by the adjudicating officer***
>
> *While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-*
> *(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;*
> *(b) the amount of loss caused to an investor or group of investors as a result of the default;*
> *(c) the repetitive nature of the default."*

25. On February 16, 2006, when 4,50,000 shares of SIL were transacted by the noticee, the lowest price of the SIL scrip in BSE was Rs. 3.50. This transaction by the director (an insider) assumes significance as SIL reported profit in the first three quarters of 2005-06, before declaring loss in the last quarter. The earliest possible public dissemination of the impugned transaction was only on or after April 01, 2006, when the lowest price in BSE was Rs. 2.15[3]. Although it may not be possible to predict the behaviour of price of SIL shares after the disclosure, the difference between the price of SIL shares on the date of transaction and its price after the public dissemination could be inferred as the possible unfair advantage gained by the noticee over other shareholders on account of his default. The amount of unfair gain, thus works out to Rs. 607,500 [450,000 shares x (Rs. 3.50 – 2.15)].

26. However, taking the totality of facts and circumstances of this case, I am of the view that a penalty of one third amount of the possible gains by the noticee would be appropriate to meet the ends of justice.

[3] As no quotes are available in BSE for April 01,2006, the lowest price on March 31, 2006 is used.

ORDER

27. In view of the foregoing, I impose a penalty of Rs.2,00,000/- (Rupees two lakh only) under section 15A(b) of the SEBI Act, 1992 on the Mr. Anil Nibber. He shall pay the same by way of demand draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, within 45 days of receipt of this order. The said demand draft should be forwarded to Mr. S. Ramann, Officer on Special Duty, Integrated Surveillance Department, SEBI, SEBI Bhavan, Plot No. C – 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

28. In terms of rule 6 of the Rules, copies of this order are sent to the Noticee and also to the Securities and Exchange Board of India.

Date: **May 15, 2009** **R.K. NAIR**

Place: **MUMBAI** **ADJUDICATING OFFICER**