

BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. ASK/AO/11/2014-15]

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

Sudhir Prabhakar Pathak

PAN- ACJPP8388H

In the matter of Mahindra and Mahindra Limited

Background

1. Mahindra and Mahindra Limited (**company**) had, vide letter dated August 07, 2013 informed Securities and Exchange Board of India (**SEBI**) that few of its designated employees had dealt in the shares of the company during April 01- May 31, 2013 when the trading window was closed on account of announcement of annual audited financial results of the company for the year ended March 2013. SEBI examined the trading details of the said employees of the company and observed that Shri Sudhir Prabhakar Pathak, Senior Vice President, MFG, SCM & CME (**Noticee**) had traded during the said period and the value of his transaction had exceeded Rs. 5 Lakh. It was observed that the Noticee had not made disclosure under Regulation 13(4) read with 13(5) of SEBI (Prohibition of Insider Trading) Regulations, 1992 (**PIT Regulations**). Hence, it was alleged that the Noticee has violated the provisions of regulation 13(4) read with 13(5) of PIT Regulations.

Adjudication Order in the matter of Mahindra and Mahindra Limited - Sudhri P Pathak

2. SEBI has, therefore, initiated adjudicating proceedings under the SEBI Act, 1992 **(SEBI Act)** to inquire into and adjudge under section 15A(b) of the SEBI Act, the alleged violations of the provisions of regulations 13(4) read with regulation 13(5) of PIT Regulations committed by the Noticee.

Appointment of Adjudication Officer

3. The undersigned was appointed as Adjudicating Officer vide order dated December 23, 2013 under section 15-I of the Securities and Exchange Board of India Act, 1992 **(SEBI Act)** read with rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalty by Adjudicating Officer) Rules, 1995 **(Adjudication Rules)** to inquire into and adjudge under section 15A(b) of the SEBI Act the alleged violation of provisions of regulation 13 (4) read with 13 (5) of PIT Regulations.

Show Cause Notice, Reply and Personal Hearing

4. Show Cause Notice dated February 05, 2014 **(SCN)** was issued to the Noticee under rule 4(1) of the Adjudication Rules to show cause as to why an inquiry should not be initiated and penalty be not imposed against him under section 15A(b) of the SEBI Act for the alleged violations specified in the SCN.
5. The Noticee vide letter dated February 20, 2014 responded to the SCN. Thereafter, the Noticee was granted an opportunity of hearing on March 28, 2014 when he appeared personally and re-iterated submissions already made on record.

Consideration of Issues, Evidence and Findings

6. I have carefully perused the material available on record, written and oral submissions made by the Noticee.

7. The issues that arise for consideration in the instant case are:

- a. Whether the Noticee has violated the provisions of regulation 13(4) read with regulation 13 (5) of PIT Regulations?.
- b. Do the violation, if any, on the part of the Noticee attract penalty under section 15A (b) of SEBI Act?
- c. If so, how much penalty should be imposed on the Noticee taking into consideration the factors mentioned in section 15J of the SEBI Act?

8. The relevant provisions of PIT Regulations are as under:

PIT Regulations

Regulation 13

Disclosure of interest or holding by directors and officers and substantial shareholders in a listed companies - Initial Disclosure

(1).....

(2).....

(3).....

(4) Any person who is a director or officer of a listed company, shall disclose to the company and the stock exchange where the securities are listed 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 of such person and his dependents (as defined by the company) 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.

4(A).....

(5) The disclosure mentioned in sub-regulations (3) and (4) shall be made within two 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.

9. From the material available on record, I note that vide letter dated August 07, 2013 the company had submitted that few of its designated employees had dealt in its shares during April 01- May 31, 2013. The details of the dealings by such employees were also annexed to the said letter. It was revealed in the said letter that during the said period the trading window was closed on account of announcement of Annual audited Financial Results of the company for the year ended March 2013.
10. I note that SEBI had examined into the trading details of such employees and observed that the Noticee who was holding the position of Senior Vice President, MFG, SCM & CME in the company at the relevant period had sold 12000 shares of the company for a value of Rs. 1,21,12,391/- .
11. In this regard, I note that as per the provisions of regulation 13(4) read with 13(5) of PIT Regulations, any person who is a director or officer of a listed company has to disclose to the company and to the stock exchange where the securities are listed, within two working days, if change in holding of such person from the last disclosure exceeds Rs. 5 Lakh in value, or 25,000 shares or 1% of the total shareholding or voting rights whichever is lower. In the instant case, as a result of the aforesaid transaction done by the Noticee, there has been a change in his shareholding, which exceeded the benchmark limit of Rs. 5 lakh.
12. I note from the reply of the Noticee to the SCN that the Noticee has not disputed the trades done him. The Noticee, inter alia, submitted that he was not an "officer" under SEBI insider trading regulations and that the requirement of disclosure did not apply to him.
13. Now, before moving further, it is to be examined as to whether the Noticee was an 'officer' of the company within the meaning of the provisions of regulation 13(4) read with 13(5) of PIT Regulations. As mentioned above, the requirement

of the disclosure under regulation 13(4) read with 13(5) of PIT Regulations is cast upon 'any person who is a director or officer of a company' to make disclosure to the company and to the stock exchange. In this regard, I note that SEBI vide e-mail dated October 15, 2013 had sought from the company (i) organizational chart showing hierarchy of the employees within the organization and (ii) no. of employees, like senior managers/managers, executives and officers and other staff etc., under the supervision of/reporting to, the concerned employees. I also note that the company vide e-mail dated October 22, 2013 furnished the documents required by SEBI. On perusal of the said documents, it is noted that the Noticee was occupying the position of Senior Vice President, MFG, SCM & CME at the relevant time. By virtue of the position held by the Noticee, it can be stated without any hesitation that the Noticee was holding a senior position of responsibility and that he had the authority to give directions to other employees of the company at the relevant period.

14. In this regard, it is pertinent to mention here the observations of Hon'ble Securities Appellate Tribunal (SAT) in the matter of *Sundaram Finance Limited vs SEBI (decided on 16.09.2010)* which are as under:

"....we are of the view that an 'officer' means a person holding an appointment to an office which carries with it an authority to give directions to other employees. Thus, an 'officer' as distinct from a mere employee is a person who has the power of directing any person or persons to do anything whereas an employee is one who only obeys. Any person who occupies a position of responsibility in a company will be an officer and this has been clarified by the Department of Company Affairs, Government of India as per its letter dated October 07, 1963...."

Thus, I conclude that the Noticee was an 'officer' within the meaning of provisions of regulation 13(4) read with 13(5) of PIT Regulations.

15. Having concluded that the Noticee was an 'officer' of the company at the relevant period, I note that, consequent to his aforesaid sale transaction and the resultant

change in his shareholding, he was clearly under the obligation to make necessary disclosure to the company and to the stock exchanges as mandated under the provisions of regulation 13(4) read with 13(5) of PIT Regulations. From the material available on record, I note that the Noticee admittedly has not made any disclosure. Further, I note that the National Stock Exchange Limited (NSE), vide e-mail dated October 03, 2013 has confirmed that the Noticee has not filed with them the requisite disclosure.

16. The Noticee has submitted that it was an isolated case which occurred purely due to inadvertent act. In this context, it is relevant to quote the judgment of Supreme Court in the matter of *SEBI vs. Shri Ram Mutual Fund* wherein it was inter alia 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.”*
17. On the basis of the foregoing discussion, I find that the Noticee has not made disclosure under regulation 13(4) read with 13(5) of PIT Regulations. I, therefore, hold that the Noticee has violated the provisions of regulation 13(4) read with 13(5) of PIT Regulations.
18. Thus, the aforesaid violation by the Noticee make him liable for penalty under section 15A(b) of the SEBI Act which reads thus:

SEBI Act

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”.

19. While determining the quantum of penalty, it is important to consider the factors stipulated in section 15J of SEBI Act, which reads as under:-

Factors to be taken into account by the adjudicating officer.

While adjudging quantum of penalty under S.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.”*

20. It is difficult, in cases of this nature, to quantify exactly the disproportionate gains or unfair advantage enjoyed by an entity and the consequent losses suffered by the investors. There is no material on record which dwells on the extent of specific gains made by the Noticee by not making the specified disclosures on the due dates. However the fact remains that by not making the required disclosures, the Noticee had deprived the investors of important information at the relevant time. It is however, noted that there was only one instance of such violation committed by the Noticee and hence the violation is not repetitive in nature.

Order

21. After taking into consideration all the facts and circumstances of the case, I am convinced that this is a fit case for imposing monetary penalty on the aforesaid Noticee, Sudhir Prabhakar Pathak. I, in exercise of the powers conferred upon me under section 15- I (2) of the SEBI Act, impose a penalty of ₹ 2,00,000/- (Rupees Two Lakh only) on the Noticee in terms of section 15A (b) of the SEBI Act. The above mentioned penalty will be commensurate with the violation committed by the Noticee.

22. The penalty shall be paid by way of a duly crossed demand draft drawn 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 shall be forwarded to the Deputy General Manager, Integrated Surveillance Department, Securities and Exchange Board of India, Plot no.C4-A, 'G' Block, Bandra Kurla Complex, Bandra (E), Mumbai- 400 051.

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

DATE: April 28, 2014
PLACE: Mumbai

A SUNIL KUMAR
ADJUDICATING OFFICER