

BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. IVD-ID9/TDL-AG/AO/DRK-AKS/EAD3-463/6 -2014]

UNDER SECTION 15 I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5(1) OF SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 1995

In respect of:

Shri Atul Gupta

Director Tulive Developers Ltd.

5 Subba Rao Avenue

First Street, Nungambakkam

Chennai-600006

PAN No. AFZPG6089H

FACTS IN BRIEF

1. Securities and Exchange Board of India (hereinafter referred to as '**SEBI**') while conducting an investigation in the scrip of Tulive Developers Ltd. (hereinafter referred to as '**TDL / scrip**') for the period from 12.05.2010 to 31.01.2011 observed certain non compliances with Chapter IV of SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as '**PIT Regulations**') alleged to have been committed by Shri Atul Gupta (hereinafter referred to as '**noticee**').

APPOINTMENT OF ADJUDICATING OFFICER

2. I was appointed as the Adjudicating Officer under Section 15 I of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act**'), read with Rule 3 of Securities and Exchange Board of India

(Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as '**Adjudication Rules**') to inquire into and adjudge under Section 15A (b) of the SEBI Act the violation of Regulation 13 (4) read with Regulation 13 (5) of PIT Regulations alleged to have been committed by the noticee and the same was communicated vide proceedings of the Whole Time Member appointing Adjudicating Officer dated 12.06.2013.

SHOW CAUSE NOTICE, HEARING AND REPLY

3. A Show Cause Notice No. A&E/EAD3/DRK-AKS/17980/2013 dated 23.07.2013 (herein after referred to as '**SCN**') was served on the noticee in terms of the provisions of Rule 4 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 requiring the noticee to show cause as to why an inquiry should not be held against the noticee and why penalty, if any, should not be imposed on the noticee under Section 15A (b) of the SEBI Act.
4. In the said SCN, it was alleged based on the investigation report (herein after referred to as '**IR**') that on 26.08.2010 noticee's cumulative net sell value in the scrip exceeded ₹ 5 Lakh in value for which the noticee has failed to make the required disclosure under Regulation 13 (4) read with Regulation 13 (5) of PIT Regulations. It was also alleged based on the IR that on 06.10.2010 noticee's cumulative net sell value in the scrip again exceeded ₹ 5 Lakh in value for which the noticee again failed to make the required disclosure under aforesaid PIT Regulations.
5. The noticee vide his letter dated 07.08.2013 replied to the SCN as follows:
 - Noticee would like to state that the initial part of Regulation 13(4) requires disclosure by the Director of the total number of shares or voting rights held and the change therein. The subsequent part of Regulation 13(4) provides various criteria to determine when the disclosure is required to be made. The

regulation 13(4) lays down three criteria, and when the lower of any of the three is exceeded, it would trigger disclosure, viz:

- a) ₹ 5 Lakh in value;
- b) 25,000 shres; or
- c) 1% of the total shareholding or voting rights.

- Hence, the criteria of ₹ 5 Lakh in value or 25,000 shares or 1% of total shareholding or voting rights have to be calculated qua the number of shares. The only logical manner in which ₹ 5 Lakh in value qua the number of shares could be calculated is ₹ 5 Lakh of nominal value of shares. The criteria of ₹ 5 Lakh in value may have been provided since many scrips listed on the exchange have face value of ₹ 100. In which case ₹ 5 lakh in value would mean 5,000 shares, which is lower than 25,000 shares.
- On a harmonious reading of the PIT Regulations, ₹ 5 Lakh in value is required to be computed based on nominal value of the shares and not the market value. Here noticee would like to draw the attention to SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 (herein after referred to as '**SAST Regulations**'), where the SAST Regulations clearly makes use of the words "market price" in "volume weighted average market price".
- Noticee would also like to draw the attention to the provisions of SAST Regulations, 1997. The explanation to Regulation 12, as it stood prior to the explanation being amended by SAST Regulations, 2002 made use of the word "market value", as opposed to the term "value" used in the PIT Regulations. If it was intended under the PIT Regulations that a Director is to make a disclosure, when there is a change based on ₹ 5 Lakh in "net sell value" or "market value" then the PIT Regulation would have made use of the term "market value" as used in the erstwhile SAST Regulations, 1997.
- Assuming, without accepting, that the PIT Regulations uses the term "value" to mean "market value" or "net sell value", then all Directors will be required to report under Regulation 13(4) if the share price fluctuation results in variation in the value of shares held by the Director by more than ₹ 5 Lakh, even if the Director would not have traded or acquired any shares of the company.
- Without prejudice to the above submission, it is submitted that in case if the above interpretation is ultimately held to be incorrect, the said violation of

Regulation 13(4) of the PIT Regulations was inadvertent and with no malafide intention. Without prejudices, the noticee has out of abundant caution along with his letter dated March 1, 2013 submitted Form D to SEBI.

6. As requested by the noticee, vide personal hearing notice dated 23.08.2013, the noticee was granted an opportunity of hearing on 13.09.2013 at 11:00 am at SEBI Southern Regional Office, Chennai. The said notice was served on the noticee by Registered Post Acknowledgement Due and proof of service is on record. However, vide hearing notice dated 08.10.2013, the scheduled hearing was postponed to 15.10.2013 at 11:00 am at SEBI Southern Regional Office, Chennai. In response to the same, the noticee vide his letter dated 15.10.2013 authorised Shri S Eshwar, Practising Company Secretary, (herein after referred to as '**AR**') to attend the scheduled hearing.
7. At the time of hearing the AR denied the allegations made in the SCN and reiterated the submissions made in the reply dated 07.08.2013. The AR submitted that the term "value" mentioned in the PIT Regulations should be interpreted as "nominal value" of the shares and not the "market value" of the shares. Further, the AR undertook to submit case laws, if any in support of his submission. The AR further submitted that provided that even if there was any violation, there was neither any disproportionate gain or unfair advantage accrued to the noticee nor any loss caused to any investor or group of investors as mentioned under Section 15J of the SEBI Act. The AR undertook to submit whether the said disclosure was made to the Company and to the Exchange(s) within a week from the date of hearing.
8. The AR vide his letter dated 28.10.2013 sought additional 10 days time to submit the documents as undertaken by him at the time of hearing. However, we have not received any documents post hearing from the noticee / AR till date.

CONSIDERATION OF EVIDENCE AND FINDINGS

9. I have taken into consideration the facts and circumstances of the case and the material made available on record.
10. It is observed from the IR that the noticee had failed to make disclosures under PIT Regulations on 2 instances i.e. on 26.08.2010 and on 06.10.2010 when he sold shares of TDL worth more than ₹ 5 Lakh. The noticee has submitted that the term “value” mentioned in the PIT Regulations should be interpreted as “nominal value” of the shares and not the “market value” of the shares. However, the noticee’s contention is not acceptable as one of the principles of statutory interpretation as held in *Sussex Peerage*¹ case “..If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the law giver..”.
11. As held in *Renula Bose v Rai Manmathnath Bose*² “..It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so..”. It can be observed from the PIT Regulations itself that when a similar provision to Regulation 13 (4) was inserted recently in August 2011 for Promoters, the drafters still did not use the term “nominal value”. In other words, if the term “value” in Regulation 13 (4) of PIT Regulations meant “nominal value” than it would have been included expressly as done under SAST Regulations.
12. Further, if we look at the Form D mentioned in Regulation 13 (4) of PIT Regulations for the purpose of throwing light as to what the term “value” signifies in Regulation 13 (4), it would become amply clear that it signifies “market value” and not “nominal value”. Form D mentions about buy and sell

¹ (1844) 11 C1 & F85, p.143

² AIR 1945 PC 108, p.951

quantity and buy and sell value. Shares are bought and sold at market value and not at nominal value. Moreover a copy of Form D submitted by the noticee to SEBI mentions sell value of shares calculated at market price prevalent at that time.

13.No evidence has been brought on record to show that the noticee has made the requisite disclosure under Regulation 13 (4) of PIT Regulations within 2 working days of 26.08.2010 and 06.10.2010 to the Company and to the Stock Exchange when his sell value of shares exceeded ₹ 5 Lakh.

14.The noticee has contended that there was neither any disproportionate gain or unfair advantage accrued to the noticee nor any loss caused to any investor or group of investors as mentioned under Section 15J of the SEBI Act.

15.In this case, it becomes necessary to quote the order of the Hon'ble Securities Appellate Tribunal, in *Ms Sunita Gupta Vs SEBI* dated 12.12.2013 wherein it was held as follows:

"..Section 15J does not postulate that penalty can be imposed only if the violations lead to gain / unfair advantage to the person violating the provisions or loss to the investors or the violation is repetitive in nature...In other words, a person who has violated provisions of SEBI Act and the Regulations made thereunder cannot escape penalty merely because that person has not made unlawful gains or that the investors have not suffered or that the violations were committed for the first time.."

16.In view of the above facts and circumstances of the case and the material made available on record, it can be concluded that the noticee has violated Regulation 13 (4) read with Regulation 13 (5) of PIT Regulations. The text of the said provision is reproduced below:-

SEBI (Prohibition of Insider Trading) Regulations, 1992

Continual disclosures

....

13 (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 subregulation, and the change exceeds ₹ 5 lakh in value or 25,000 shares or 1% of total shareholding or voting rights, whichever is lower.

13 (5) The disclosure mentioned in sub-regulations (3), (4) and (4A) 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.

17. The said violation attracts penalty under Section 15A (b) of the SEBI Act. The text of the said provision is reproduced below:-

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,-

...

(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.

18. In this regard, the provisions of Section 15J of the SEBI Act and Rule 5 of the Rules require that while adjudging the quantum of penalty, 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

19. It has been noted from the material available on record that it is difficult to quantify any gain or unfair advantage accrued to the noticee as a result of this

kind of default by the noticee. SEBI's examination has also not quantified the profit / loss for the nature of default / non compliance by the noticee and no material is made available on record to assess the disproportionate gain or unfair advantage and amount of loss caused to an investor or group of investors as a result of default of the noticee.

20. In view of the abovementioned conclusion and after considering the factors under Section 15J of the SEBI Act, I hereby impose a penalty of ₹ 4,65,000/- (Rupees Four Lakh Sixty Five Thousand only) on the noticee under Section 15A (b) of the Securities and Exchange Board of India Act, 1992 for its failure to make disclosure under Regulation 13 (4) read with Regulation 13 (5) of SEBI (Prohibition of Insider Trading) Regulations, 1992 which is appropriate in the facts and circumstances of the case.

ORDER

21. In exercise of the powers conferred under Section 15 I of the Securities and Exchange Board of India Act, 1992, and Rule 5 of Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995, I hereby impose a penalty of ₹ 4,65,000/- (Rupees Four Lakh Sixty Five Thousand only) on Shri Atul Gupta, Director of Tulive Developers Ltd. having PAN No. AFZPG6089H in terms of the provisions of Section 15A (b) of the Securities and Exchange Board of India Act, 1992 for his failure to make disclosure under Regulation 13 (4) read with Regulation 13 (5) of SEBI (Prohibition of Insider Trading) Regulations, 1992. In the facts and circumstances of the case, I am of the view that the said penalty is commensurate with the default committed by the noticee.

22. The penalty shall be paid by way of 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 Deputy General Manager- IVD- ID10, Securities and Exchange Board of

India, Plot No. C4-A, 'G' Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400051.

23. In terms of the provisions of Rule 6 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules 1995, copies of this order are being sent to Shri Atul Gupta residing at 5, Subba Rao Avenue, First Street, Nugambakkam, Chennai-600006 and also to the Securities and Exchange Board of India, Mumbai.

Place: Mumbai

Date: February 04, 2014

**D. RAVI KUMAR
CHIEF GENERAL MANAGER &
ADJUDICATING OFFICER**