

BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. - AA/AO- 1/2010]

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

In respect of
Kailash Ficom Limited

FACTS OF THE CASE IN BRIEF

1. Securities and Exchange Board of India (hereinafter referred to as SEBI) had examined the dealings in the scrip of Kailash Ficom Ltd. (hereinafter referred to as KFL), during the period from October 23, 2008 to November 17, 2008. On the basis of such examination, it was observed that Dash Pharmaceutical Pvt. Ltd. (hereinafter referred to as 'DPL') acquired 7,40,850 i.e. 6.99% of the share capital of KFL, during the aforesaid period.
2. It was observed that KFL did not make the necessary disclosure under regulation 7 (3) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as 'SEBI (SAST) Regulations') and regulation 13(6) of the SEBI (Prohibition of Insider Trading) Regulations, 1992, (hereinafter referred to as 'SEBI (PIT) Regulations') with respect to the above acquisition of shares to the stock exchanges. The Bombay Stock Exchange (hereinafter referred to as "BSE") has confirmed vide their letter no.DCS/DISS/SEBI/BM/019/2009-10 dated June 12, 2009 that the disclosure is not

received by them. Thus, it was alleged that KFL was liable for penalty under section 15 (A) (b) of the Securities and Exchange Board of India Act, 1992 (the SEBI Act, 1992).

APPOINTMENT OF ADJUDICATING OFFICER

3. The undersigned was appointed as Adjudicating Officer vide order dated August 10, 2009 under section 15 I of the SEBI Act read with rule 3 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as 'Adjudication Rules') to inquire into and adjudge the alleged violations of provisions of the SEBI (SAST) Regulations and the SEBI (PIT) Regulations .

SHOW CAUSE NOTICE, HEARING AND REPLY

4. A Show Cause Notice (SCN) ref no:EFD/AO/AA/185524/2009 dated November 30, 2009 was issued to KFL under rule 4 of the Adjudication Rules mentioning in detail, the allegations/charges against KFL and asking KFL to show cause as to why action in terms of section 15I of the SEBI Act read with rule 4 of the Adjudication Rules should not be initiated . The said SCN was served upon KFL, which was duly acknowledged.
5. I note that despite the receipt of the SCN, KFL has not replied to the SCN. KFL was granted an opportunity of hearing on February 2, 2010 which was communicated to it vide letter dated EFD/AO/190183/2010 dated January 8, 2010. The aforesaid notice for hearing was duly served upon KFL and was acknowledged by it. However, no one appeared on behalf of KFL on the scheduled date. A further opportunity of hearing was granted on February 23, 2010 vide letter EFD/AO/193654/2010 dated February 3, 2010. Despite the notice dated February 3, 2010 being duly served upon KFL and it being acknowledged by KFL, KFL failed to attend the personal hearing without furnishing any reason.
6. I note that KFL was given ample opportunities to explain the charges leveled against it in the aforementioned SCN but even after due service of the SCN/ Notice for Personal Hearing under rule 7 of the Adjudication Rules, KFL failed to reply to the allegations leveled against it in the aforementioned SCN and also failed to appear for personal

hearing. As per rule 4 (7) of the Adjudication Rules, if any person fails, neglects, and refuses to appear as required by sub rule (3) before the Adjudicating Officer, the adjudicating Officer may proceed with the inquiry in the absence of such person, after recording the reasons to do so. Therefore, I am compelled to proceed the matter ex-parte based on material available on record.

7. I have gone through the letter dated May 15, 2009 submitted by KFL before SEBI during its inquiry. In the said letter, KFL stated that DPL vide its letter dated November 11, 2008 and November 17, 2008 informed KFL about the acquisition of shares of KFL in excess of 5% and 10% respectively. It is also submitted that they have intimated the disclosures to BSE under regulation 7(3) of the SEBI (SAST) Regulation on November 12, 2008 and November 18, 2008 after obtaining the intimation from DPL. The copies of the dispatch slips from the courier agency were also produced as annexures.

CONSIDERATION OF ISSUES AND FINDINGS

8. The issues that arise for consideration in the instant case are :-
 - a. Whether KFL violated regulation 7(3) of SEBI (SAST) Regulations and regulation 13(6) of SEBI (PIT) Regulations.
 - b. Whether the violations, if any, attract monetary penalty under section 15 (A) (b) of SEBI Act.
 - c. If yes, what is the amount of penalty that shall be imposed?

9. Regulation 7(3) of the SEBI (SAST) Regulations provides that:-

“Every company, whose shares are acquired in a manner referred to in [sub-regulations (1) and (1A)], shall disclose to all the stock exchanges on which the shares of the said company are listed, the aggregate number of shares held by each of such persons referred above within seven days of receipt of information under [sub-regulations (1) and (1A)].

Regulation 13(6) of the SEBI (PIT) Regulations provides that:-

“Every listed company, within five days of receipt, shall disclose to all stock exchanges on which the company is listed, the information received under sub-regulations (1), (2), (3) and (4) [in the respective formats specified in Schedule III.]”

10. On an examination of the date wise trades of DPL in the scrip of KFL, it is seen that the acquisition of 7,40,850 shares of KFL by DPL, amounted to acquiring of 6.99% shares of the then share capital of KFL. As stated in paragraph 7 above, in its letter dated May 15, 2009, KFL submitted before SEBI that they have received intimation from DPL under regulation 7(1) of the SEBI (SAST) Regulations vide letters dated November 11, 2008 and November 17, 2008 on acquiring shares/voting rights by DPL exceeding 5% and 10% respectively. KFL further submitted that upon getting the intimation from DPL they have informed BSE about the acquisition of DPL on November 12, 2008 and November 18, 2008 in compliance with regulation 7(3) of the SEBI (SAST) Regulations. I also noted that BSE in a letter dated June 12, 2009 intimated SEBI that it has not received disclosure dated November 12, 2008 and November 18, 2008 submitted in terms of regulation 7(3) of the SEBI (SAST) Regulation by KFL. A copy of the letter from BSE also was annexed to the show cause notice dated November 30, 2009 issued to KFL.
11. I further note that KFL has not made disclosures under regulation 13(6) of the SEBI (PIT) Regulation. I note that SEBI vide letter dated January 19, 2009 *inter alia* advised KFL to submit information whether KFL has made necessary disclosure to Stock Exchange regarding the acquisition of shares by DFL required under regulation 7(3) of the SEBI (SAST) Regulation and regulation 13(6) of SEBI (PIT) Regulation. As no reply was received from KFL, SEBI again vide letter dated February 18, 2009 and April 15, 2009 advised KFL to submit reply /information to the queries raised vide letter dated January 19, 2009. I note that KFL vide letter dated May 15, 2009 for the first time in the reply dated January 19, 2009 submitted that KFL has informed BSE in the format as required under regulation 7(3) of SEBI (SAST) Regulation. KFL has also enclosed therewith the copies of the disclosures and courier receipt to show dispatch of the intimation relating to regulation 7(3) of the SEBI (SAST) Regulation. I note that KFL has only submitted information relating to the disclosure made under regulation 7(3) of the SEBI (SAST) Regulations. I

note that the aforesaid reply of KFL before SEBI is silent regarding the disclosure under regulation 13(6) of the SEBI (PIT) Regulations.

12. I have perused the copies of dispatch slips pertaining to the disclosures made under regulation 7 (3) of the SEBI (SAST) regulations, as provided to SEBI by KFL. This, at best, could be considered as proof of dispatch of the intimation. KFL has not produced any acknowledgement in support of delivery of the said intimation. The denial of receipt of any such intimation by BSE assumes significance here.
13. In this regard, it will be appropriate to refer to the observations of The Hon'ble High Court at Calcutta in Writ Petition 331/2001 in the matter of **Arun Kumar Bajoria v/s SEBI** – Order dated March 27, 2001. The Hon'ble Court while examining the issue of compliance with regard to regulation 7 (the provision deals with disclosure by an acquirer to the target company) of the SEBI (SAST) Regulations made the following observations:-

“The Certificate of Posting may be an evidence of engaging the Postal Authority as an agent of the sender to deliver the subject letter, but not the proof of receipt of the letter by the addressee. In the event, it is contended by the addressee that the letter has not been received by him, it must be established and if necessary through the agent that the letter has been received by the addressee. Merely because the letter was sent by post, it cannot be contended that the sender has discharged his obligations under Regulation 7 of the said Regulations as the said regulation cast the duty and obligation upon the acquirer to ensure receipt of the disclosure or information by the company concerned and argument contrary thereto is not acceptable. It is not permissible for the sender to contend that he has no control over the mode of transmission inasmuch as he has free choice of selecting the mode of transmission and for that purpose to engage a suitable agent.”

14. Based on the evidence available on record, I find that KFL has failed to comply with the provisions of regulation 7(3) of the SEBI (SAST) Regulations and regulation 13(6) of the SEBI (PIT) Regulations. In this regard, though opportunities were granted to the KFL to rebut the evidence against it, it failed to do so. Further, no records of the KFL having complied with the said Regulations within prescribed time have been found on the website of the Stock Exchange.

15. The failure to comply with the aforesaid provisions makes KFL liable for the penalty under section 15 A(b) of the SEBI Act which reads as follows:

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;

16. The Hon'ble SAT, in Appeal No.66 of 2003 order dated April 15, 2005 - **Milan Mahendra Securities Pvt. Ltd. Vs SEBI**, has also observed that, *"the purpose of these disclosures is to bring about transparency in the transactions and assist the Regulator to effectively monitor the transactions in the market. We cannot therefore subscribe to the view that the violation was technical in nature".*

17. The Hon'ble Supreme Court of India in the matter of **SEBI Vs. Shri Ram Mutual Fund** [2006] 68 SCL 216(SC) held that *"In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant..."*. Thus KFL is liable for monetary penalty under section 15A(b) of the SEBI Act.

18. While determining the quantum of penalty under section 15A (b), it is important to consider 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."

19. From the material available on record, the amount of disproportionate gain or unfair advantage to the KFL or loss caused to the investors as a result of the default is not quantifiable. Though it may not be possible to ascertain the monetary loss to the investors on account of non-disclosure by the KFL, the details of the shareholding of the persons having substantial stake, promoter-group and persons in control over the Company and timely disclosure thereof, are significant information for investors, which may ultimately prompt them to buy or sell shares of such Company. The disclosure made under regulation 7(3) of the SEBI (SAST) Regulations and regulation 13(6) of PIT by a Company is made public only through the Stock Exchanges. Therefore, it is mandatory for the public listed companies to give the required information under the aforesaid regulation to the Stock Exchange, to enable the investors to take informed investment decisions. The object of mandating such disclosure of acquisition/sale beyond certain quantity under the SEBI (SAST) Regulations and the SEBI (PIT) Regulations is to give equal treatment and opportunity to all shareholders and protect their interests. By virtue of the failure on the part of KFL to make the necessary disclosures on time, the fact remains that the investors were deprived of the important information at the relevant point of time. In other words, by not complying with the regulatory obligation of making the disclosure, it concealed vital information from the investors.

ORDER:

20. 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 Rs 2,00,000/- (Rupees Two Lakhs only) on M/s Kailash Ficom Limited having address at 206, Helix Complex, Sayaji Gunj, Baroda – 390 005 in terms of the provisions of section 15A of the Securities and Exchange Board of India Act, 1992 for its failure to abide by the provisions of regulation 7(3) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2003 and regulation 13

(6) of the 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 violations committed by the Kailash Ficom Limited.

21. Kailash Ficom Limited shall pay the said amount of penalty 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 Shri S Ramann, OSD, Chief General Manager, Integrated Surveillance Department, Securities and Exchange Board of India, SEBI Bhavan, Plot No.C4-A, "G" Block, Bandra Kurla Complex, Bandra (East), Mumbai-400 051.

22. In terms of rule 6 of the Adjudication Rules, copies of this order are sent to the Kailash Ficom Limited and also to the Securities and Exchange Board of India.

PLACE: Mumbai

Anitha Anoop

DATE: March 30 , 2010

Adjudicating Officer