

BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. ISD/ITCL/AK/AO/DRK-AKS/EAD3-706/31- 2015]

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 A K Chowdhury

ITC Centre, 5th Floor,
760 Annasalai,
Chennai – 600 002, Tamilnadu

FACTS IN BRIEF

1. Securities and Exchange Board of India (hereinafter referred to as '**SEBI**') examined the trading of Shri A K Chowdhury (hereinafter referred to as '**Noticee / Chowdhury**') in the scrip of ITC Ltd. (hereinafter referred to as '**ITC / Company**').

APPOINTMENT OF ADJUDICATING OFFICER

2. I was appointed as 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 15 A (b) of the SEBI Act for the violations of Regulations 13 (4) read with 13 (5) of the SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as '**PIT Regulations**') alleged to have been committed by the noticee in respect of non disclosure of change in his shareholding in ITC and the same was communicated vide communiqué dated 09.10.2013.

SHOW CAUSE NOTICE, REPLY AND HEARING

3. Show Cause Notice No. EAD3/DRK/JP/27180/2013 dated 23.10.2013 (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 him to show cause as to why an

inquiry should not be held against him and why penalty, if any, should not be imposed on the noticee under Section 15 A (b) of the SEBI Act.

4. In the said SCN, it was alleged that the noticee had sold 5,000 shares of ITC on April 17, 2013 for value of ₹ 15,50,000/- during the period of closure of trading window which was not in adherence with the model code of conduct of the Company. Further, noticee being a designated officer / employee of the Company, had failed to disclose to the Company / Stock Exchange about the change in his shareholding, which took place by virtue of aforesaid sale of shares. The change in said shareholding was considered on account of exceeding the transaction value of ₹ 5 lakh as prescribed under Regulation 13 (4) of the PIT Regulations.
5. The noticee vide his letter dated 07.11.2013 submitted a reply to the SCN as follows:
 - a. Noticee had inadvertently sold 5,000 shares of ITC on 17th April, 2013 when the Trading Window was closed. The said shares were sold out of 30,000 shares held by him, allotted to him upon exercise of options under the ITC Employee Stock Option Scheme, held in the demat account with HDFC Bank Limited under account no. IN/301549/1511358.
 - b. Noticee was not privy to any matters being in the nature of 'price sensitive', as he was working in the Education & Stationery Products Business, located in Chennai.
 - c. Noticee has paid ₹ 1,16,000/- to the ITC Rural Development Trust' vide cheque no. 000180 dated 27th May, 2013 drawn on Standard Chartered Bank, Chennai, as penalty, imposed on him by the Company for such inadvertent error. Insofar as disclosure with respect to the aforesaid sale is concerned, noticee submits that he is not a Director or Officer of the Company within the meaning of Regulation 2(g) of the SEBI (Prohibition of Insider Trading) Regulation, 1992. Accordingly, he is not required to make any disclosure under Regulations 13(4) and 13(5) of the said Regulations.
6. As requested by the noticee, vide personal hearing notice dated 15.05.2014, noticee was granted an opportunity of hearing on 18.06.2014 at 04:00 pm at SEBI Bhavan, Mumbai. In response to the same, M/s Amarchand & Mangaldas & Suresh A. Shroff & Co., (New Delhi Office) (herein after referred to as '**AMSS**') on behalf of the noticee vide their letter dated 09.06.2014 requested adjournment of the hearing by 3 weeks as they were recently engaged by the noticee and their lawyers had prior commitments.
7. Acceding to their request, vide final hearing notice dated 04.07.2014, the noticee was advised to appear for the hearing on 22.07.2014 at 11:00 am at SEBI Bhavan, Mumbai. AMSS vide its letter dated 19.07.2014 confirmed that its representatives, Shri Dhruv Dewan, Advocate, Ms. Anannya Ghosh, Advocate and Shri Kostubh Devnami, Advocate (herein after referred to as '**ARs**') would be representing the noticee.

8. The ARs reiterated the submissions as made in the reply dated 07.11.2013. Further, the ARs submitted that they would like to file the written submissions covering the points argued / contended by them during the hearing. They undertook to also submit the proof of imposition of penalty by ITC Ltd. and payment thereof by the noticee. The ARs undertook to submit the certified copy of Key Managerial Personnel as prescribed by ITC Ltd., noticee's position / designation coupled with responsibilities and the number of employees reporting to the noticee during said time, if any. The ARs were given a week to submit all the aforesaid proof / submissions from the date of hearing.
9. The ARs vide letter dated 01.08.2014 submitted additional reply as follows:
- a. Noticee was an employee in the Education and Stationery Products Strategic Business Unit ("**Relevant SBU**") of ITC Ltd. ("**the Company**"). The Relevant SBU is one of the eleven business divisions of the Company, which is a multi business conglomerate.
 - b. Noticee was employed with the Relevant SBU as the "Head-Operations" at the time of the alleged contravention. Quite contrary to the averments in the SCN, noticee was not the "General Manager" of the Relevant SBU at that time. As the "Head-Operations", the noticee was only concerned with the manufacturing of products for the Relevant SBU. The rest of the functions of the Relevant SBU, including sales, marketing, finance, procurement, human resources, supply chain, logistics, etc. were taken care of by the respective persons concerned with each such function within the Relevant SBU.
 - c. On April 17, 2013, noticee inadvertently and by oversight sold 5,000 shares of the Company which were allotted to him upon exercise of the stock options granted to him by the Company, when the 'trading window' was closed as per the Company's Code of Conduct for Prevention of Insider Trading. Upon realizing the contravention, noticee brought the transaction to the Company's notice on April 24, 2013.
 - d. It is apparent from a bare perusal of Regulation 13(4) that the obligation there under is only upon a '**director**' or an '**officer**' of a listed company.
 - e. The SCN does not adduce any evidence whatsoever in support of its allegation that the noticee was either a Director or an officer of the Company. Therefore, it is respectfully submitted that SCN has failed to make out any charge against the noticee and on this basis itself, the SCN is liable to be withdrawn.
 - f. Without prejudice to the above, it is submitted that the noticee admittedly was not a Director of the Company. Therefore, the issue is whether the noticee is an "officer" of the Company within the meaning of the said expression under the PIT Regulations.
 - g. Regulation 2(g) of PIT Regulations stipulates that an "officer of a company" means any persons as defined in Section 2(30) of the Companies Act, 1956, and includes an auditor.
 - h. Section 2(30) of the Companies Act, 1956 defines "officer" as being any "...director, manager or secretary or any person in accordance with whose directions or instructions the Board of directors of any one or more of the directors is or are accustomed to act".
 - i. Noticee is admittedly neither a "director" nor an "auditor" of the Company.

- j. Section 2(45) of the Companies Act, 1956 defines "secretary" as being a Company secretary within the meaning of Section 2(1) (c) of the Company Secretaries Act, 1980, and including any other individual possessing the prescribed qualifications and appointed to perform the duties which may be performed by a secretary under the Companies Act, 1956 and any other ministerial or administrative duties. Noticee was not a company secretary and does not possess the prescribed qualifications for the same. Therefore, the noticee was not a "secretary" of the Company.
- k. Additionally, the noticee had no interaction with the Board of Directors of the Company and was not a person on whose directions or instructions the Board of Directors or any of the directors was accustomed to act. Even the SCN does not allege this to be the case.
- l. Therefore, the only question remaining would be whether the noticee was a "manager" within the meaning of Section 2(24) of the Companies Act, 1956 i.e. whether the noticee "...has the management of the whole, or substantially the whole, of the affairs of a company". By no conceivable means can it ever be said that the noticee had "the management of the whole, or substantially the whole, of the affairs of a company". The SCN also does not adduce any evidence that would indicate that the noticee has the management of the whole or substantially the whole of the affairs of the Company.
- m. Quite to the contrary, as detailed above, the noticee was involved solely with the manufacturing of products for the Relevant SBU and cannot even be said to have the management of the Relevant SBU much less of the Company as a whole. In fact, in the overall corporate hierarchy of the Company, the noticee held a relatively insignificant position. The AR submitted the relevant pages of the Annual report of the company for 2012-2013, containing the Report on Corporate Governance as required by the Listing Agreement. The same sets out inter alia "The Governance Structure" and the "Role of Various Entities" and the nature of functions being carried out by each level thereof. It is evident from the said Annual Report that while the Board of Directors of the Company carry the responsibility for the strategic supervision of the Company, the strategic management of the Company rests with the Corporate Management Committee ("**CMC**"). A review of the Report on Corporate Governance, which forms part of the Annual Report of the Company, makes it evident that the noticee as the "Head-Operations" of the Relevant SBU had no role to play in the governance and management of the Company. Given that the company has a total of eleven business divisions, by no stretch of argument can it be alleged that the noticee is in the management of whole or substantially the whole of the affairs of the Company.
- n. Furthermore, it is pertinent to note that the appointment and remuneration of a 'manager' of a company is regulated under Chapter IV, Part B of the Companies Act, 1956. Particularly, proviso to Section 386 (2) of the Companies Act, 1956 clearly stipulated that the appointment of a 'manager' of a company shall be made pursuant to the approval of the resolution by the Board of Directors passed at the Board meeting with the consent of all the directors present at the meeting with a prerequisite that a specific notice has to be served on all the directors then in India for the meeting and for the resolution proposed to be passed at the meeting. The remuneration of a manager of a company has to be determined as per Section 387 of the Companies Act, 1956 which, in turn, prescribes a procedure for determination of remuneration of the manager similar to that of a director as per the provisions of the companies Act, 1956. It is therefore submitted that the conclusion that the noticee is not a "manager" under the Companies Act is reinforced by the fact that neither of the aforesaid provisions were followed while appointing the Noticee.

- o. Accordingly, it is clear that the noticee is not an "officer" of the Company under Regulation 2(g) of the PIT Regulations.
- p. Without prejudice to the above, it is respectfully submitted that in the event it is found that the noticee was an "officer" of the Company at the relevant time, his failure to file Form D within the timeframe specified in Regulations 13(5) was a technical and venial breach occasioned only by his genuine and bona fide belief that he was not an "officer of the Company and was not required to make any such filings. Thus, the noticee had not acted in deliberate defiance of the law. Additionally, none of the factors provided for in Section 15-J of the SEBI Act, which are to be considered for the purpose of imposing of penalty under Section 15-I are applicable to the present case.

CONSIDERATION OF EVIDENCE AND FINDINGS

- 10. I have taken into consideration the facts and circumstances of the case and the material made available on record.
- 11. From a bare reading of Regulation 13 (4) of the PIT Regulations it can be seen that the said Regulation gets triggered when the following two conditions are satisfied:
 - a) The person is a Director or officer of a listed company
 - b) There has been a change in the holdings of such person and the change exceeds ₹ 5 lakh in value or 25,000 shares or 1% of total shareholding or voting rights, whichever is lower.
- 12. With respect to the first condition, whether the noticee is a Director or officer of ITC or not, noticee has submitted that ITC is a multi business conglomerate having 11 business divisions and he was employed as "Head - Operations" in the Education and Stationery Products Strategic Business Unit. From this it can be said that noticee was not a Director of ITC.
- 13. Noticee has also submitted that he cannot be classified as an "officer of the company" as defined under Regulation 2 (g) of PIT Regulations read with Section 2 (30) of Companies Act, 1956. Noticees submission at paras 9 (g) to 9 (o) is acceptable. It is seen from the tabular representation submitted by the noticee highlighting the various Strategic Business Unit of ITC and depicting the position held by him that he is very low in the chain of management and will have no interaction with the Board of Directors or would be a person on whose directions or instructions the Board of Directors or any Directors were accustomed to act. As submitted by the noticee, he was involved solely with the manufacturing of products for the relevant SBU and was not even be said to have the management of the Relevant SBU. Further, it can be seen from the Annual Report of the Company for 2012-2013 containing the Report on Corporate Governance under the heading "The Governance Structure" and the "Roles of Various Entities", that the noticee had no role to play in the governance and management of the Company.

14. In view of the above it can be concluded that the noticee has not satisfied the first condition of Regulation 13 (4) of the PIT Regulations. Since the first condition has not been satisfied, the examination of the second condition is superfluous.
15. Thus, based on the above, it is difficult to establish that the noticee has violated Regulations 13 (4) read with 13 (5) of the PIT Regulations.

ORDER

16. Considering the facts and circumstances and the material made available on record, the violation of Regulations 13 (4) read with 13 (5) of the SEBI (Prohibition of Insider Trading) Regulations, 1992 could not be established against Shri A K Chowdhury in the present adjudication proceedings and accordingly the present adjudication proceedings are disposed of.
17. 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 A K Chowdhury and also to the Securities and Exchange Board of India, Mumbai.

Place: Mumbai

Date: 26.02.2015

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