BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No.81/2002

In the matter of:

VMC Software Ltd., **Appellant**
Vs.
Securities and Exchange Board of India **Respondent**

Appeal No.82/2002

In the matter of:

1. **Sanjay Doshi**
2. **Ashish M. Shah**
3. **Himat B. Patel**
4. **Amrish Purohit**
5. **Kishorechandra M. Sanghvi** **Appellants**

Vs.
Securities and Exchange Board of India **Respondent**

Appeal No.83/2002

In the matter of:

Total Network Solutions Ltd. **Appellant**
Vs.
Securities and Exchange Board of India **Respondent**

Appearance:
Shri Jayant M. Thakur,
Chartered Accountant **For Appellants**

Shri Ananta Barua
Jt. Legal Adviser,
SEBI
Shri Vinay Chauhan
Legal Officer,
SEBI **For Respondent**

ORDER

Under challenge in these three appeals are two separate orders passed by the adjudicating officer appointed by the Respondent. Order dated 26.8.2002 imposing a monetary penalty of Rs.2 lakhs on the Appellant is challenged in appeal No.81/2002. In appeals No.82/2002 and 83/2002, the common order dated 27.8.2002 imposing Rs.1,50,000 on Total Network Solutions Ltd.,(Appellant in appeal No.83 of 2002) and a consolidated penalty of Rs.50,000 on the five Appellants (in appeal No.82 of 2002) has been challenged separately. Taking into consideration the nature of the charge the factual matrix, the nature of the penalty imposed and the reasoning given by the adjudicating officer, and also that the adjudicating officer was common in both the adjudications, it was felt that all these three appeals be heard together and disposed of by a common order as consented by the representatives of the parties. The Appellants in the three appeals are represented by Shri J. M. Thakur and the Respondent by Shri Ananta Barua.

The specific facts in respect of each of the appeals as could be gathered from the material available on record are as follows:

Appeal No.81/2002

Date of impugned order	:	26.8.2002
Quantum of penalty imposed	:	Rs. 2 lakhs
Section under which penalty imposed	:	15A(b) of the SEBI Act.
Nature of the violation	:	Delayed reporting under regulation 6(2), 6(4) and 8(3)

Extent of delay involved:

Regulation	Due date for compliance as per Regulation	Actual date of compliance	Delay (No. of days)
			705
6(2)	20.5.1997	26.4.1999	705
6(4)	20.5.1997	26.4.1999	24
8(3)	30.4.2000	24.5.2000	

Appeal No.82/2002 and
Appeal No.83/2002 (Facts common to both the appeals)

Date of impugned order :27.8.2002

Quantum of penalty imposed :Rs.1,50,000 on Total Networks Solutions Ltd., (TNS) And a consolidated sum of Rs.50,000 on Shri Sanjay Doshi and 4 others.

Section under which Penalty imposed 15A(b) of the SEBI Act.

Nature of the violation : Delayed reporting under regulation 6(1), 6(3) , 8(1) and 8(2) by TNS
Delayed reporting under regulation 6(1), 6(3) and 8(2) by the 5 Appellants.

Extent of delay involved:

Regulation	Due date for compliance as per Regulation	Actual date of compliance	Delay (No. of days)
			736
6(1)	20.4.1997	26.4.1999	736
6(3)	20.4.1997	26.4.1999	360
8(1)	21.4.1998	26.4.1999	360
8(2)	21.4.1998	26.4.1999	5
8(1)	21.4.1999	26.4.1999	5
8(2)	21.4.1999	26.4.1999	3
8(1)	21.4.2000	24.4.2000	3
8(2)	21.4.2000	24.4.2000	

Shri Jayant M. Thakur, learned Representative of the Appellants explained the background of the case. He submitted that the Appellant in Appeal No.81/2002 is a listed company, that the Appellant had substantially complied with the requisite reporting under

regulation 6(2), 6(4) and 8(3) of the Securities and Exchange Board of India ((Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the 1997 Regulations), that it had no intention to suppress any information from the Respondent. He submitted that the information of holding of the promoters and other shareholders was already with the public and with the stock exchanges as early as 1996 and no change has taken place thereafter, that a public issue was made in 1999 and once again the relevant information was made public through various public documents including the prospectus, that the promoters and directors have remained same during this period and there was no change in the information, that these factors were not given due weight and penalty was levied arbitrarily as a matter of course. He submitted that the Appellants in Appeal No.82/2002 and 83/2002 are promoters of the Appellant in appeal No.81/2002 that these promoters had also voluntarily furnished the requisite information as required under regulation 6(1), 6(3) and 8(1) & 8(2).

Learned representative submitted that it is settled law that penalty can not be levied as a matter of course and judicial view should be taken of the facts of the case and also the mitigating factors, that penalty should not be levied where the default was bonafide. Learned Representative submitted that the penalty has been imposed by the adjudicating officer ignoring the factors to be taken into consideration as provided in section 15J of the SEBI Act. He submitted that the adjudicating officer imposed the penalty simply for the reason that there was delay in filing the reports, that he has ignored the relevant factors placed before him for consideration. In this context he cited the principles laid down by the Hon'ble Supreme Court in Hindustan Steels Ltd. V State of Orissa (AIR 1970 SC 253) that "penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation." He also cited this Tribunal's decision in Escort Mutual Fund V Sri Sai Ram (2002) 1 CLJ 330 in support of his contention that penalty is not leviable per se violation. He submitted that belated filing of the reports was unintentional and with no malafides and hence the adjudicating officer should have taken a lenient view, the fact that there was no allegation of malafides against the

Appellants has been admitted by the adjudicating officer and recorded in the order.

Shri Thakur referred to the SEBI Regularization Scheme 2002 (the Scheme) and submitted that under the said Scheme, the Respondent has permitted the defaulters to pay a nominal fee of ten thousand rupees for violation of the provisions of regulations 6 and 8 irrespective of the fact that the non compliance was intentional or not and also not taking into consideration the number of delays involved. He submitted that in view of the policy adopted by the Respondent to take on record the delayed returns on payment of just ten thousand rupees there is no justification for imposing such a huge penalty on the Appellants and that if for any reason the Tribunal comes to a conclusion that penalty is leviable, the amount of penalty so leviable may be restricted to the quantum prescribed in the Scheme. Shri Thakur submitted that the observation made by the Hon'ble Supreme Court in R. S. Joshi's case (1977) 4 SCC 98 (supra) has no application to the facts of the case.

Shri Ananta Barua, learned Representative appearing for the Respondent in all the three appeals submitted that the Appellants had admitted the delay in reporting under regulation 6 and 8 before the adjudicating officer and their request to the adjudicating officer as could be seen from the impugned order was to take a lenient view. In this context he referred to the factual position recorded in the impugned order showing the length of delay involved in submitting the reports to the concerned authorities by the Appellants. Shri Barua submitted that the adjudicating officer has taken into consideration the factors stated in Section 15J is evidenced from the nominal sum of penalty imposed, though the penalty could have been a very huge amount if he had worked out the same at the rate of Rs.5000/- per day for each day of delay.

Learned Representative submitted that the question whether the delay was intentional or not or that the belated disclosures were made voluntarily or not is not of any

relevance for the purpose of imposition of penalty in the light of the admitted fact that the reporting was done involving exorbitant delay. In this context he referred to the R. S. Joshi's case. (1977) 4 SCC 98 relied on by the adjudicating officer and submitted that there is no need to establish mensrea, for the purpose of imposing monetary penalties.

With reference to the Appellants' contention that in the light of the amount required to be paid with reference to the violation of regulation 6 and 8, as provided in the Scheme the penalty imposed by the Respondent is unduly harsh, Shri Barua submitted that the benefit of the scheme is not available to the Appellants as the failure on their part was not on account of oversight or lack of knowledge.

I have very carefully examined the rival contentions. Unfortunately both the parties have failed to bring in adequate evidence in support of their contentions. The Appellants' contention is that the failure on their part was not wilful and penalty was not warranted . The Respondent on the other hand has canvassed that the Appellants had admitted that there was delay on their part and the relief sought was only to take a lenient view.

In the absence of adequate evidence from the Appellants showing that they had substantially complied with the disclosure requirements, that the default was not wilful and the disclosure was made on their own though belatedly, it is difficult to completely exonerate them of the charges leveled against them. However, as Shri Thakur pointed out, I do not see any reason as to why they should not be denied of the benefit available under the Scheme and be forced to pay a huge amount as they are eligible to have the benefit under the Scheme.

In this context it is felt necessary to consider the said Scheme and examine as to whether the Appellant's case is also governed under the scheme. The background of the scheme has been stated in the following few paragraphs:-

"In terms of Chapter II of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as 'the Takeover Regulations, 1997') certain categories of persons are required to disclose their shareholding and/or control in a listed company to that company. Such companies, in turn, are required to disclose such details to the stock exchanges where shares of the company are listed. It has been observed that many listed companies and/or their promoters/shareholders have either not complied at all or have complied with the said requirements after the expiry of the time specified in the said regulations.

In terms of Section 15A of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'the SEBI Act'), such persons are liable to a penalty not exceeding five thousand rupees payable for every day during

which such failure to furnish information, return, report, or document etc. continues. Besides, such persons are also liable for prosecution under section 24 of the SEBI Act.

It has also been brought to the notice of the Securities and Exchange Board of India (SEBI) that the disclosures were not made either on account of oversight or lack of knowledge. The monetary penalty under Section 15A of the SEBI Act may be imposed after adjudication and enquiry under Chapter VI A of the SEBI Act. Further, the prosecution proceedings involve considerable time and even if concluded in conviction, the penalty, monetary or otherwise, may be very nominal.

In view of the above, SEBI has decided to introduce a scheme, namely, "SEBI Regularization Scheme, 2002" (hereinafter referred to as 'the Scheme') to enable such persons and companies to comply with these requirements. Under the Scheme, the persons and companies who have not made disclosures or who have made disclosures after expiry of the period as specified in the Takeover Regulations, 1997 are permitted to make disclosures to the company and the stock exchange as the case may be, and pay the lump-sum amount specified herein.

This is to provide one time opportunity to enable the companies and the

specified persons to comply with the law of the land. By implementation of the Scheme, the listed companies as well as the stock exchanges shall have the required information. Besides, the public will also have access to the necessary information about the shareholding etc. of such persons in the company.

The Scheme will be in operation for a limited period as specified hereinafter. The persons and the companies may, therefore, take full advantage of this Scheme. It is also clarified that after the expiry of the Scheme, SEBI may have to initiate appropriate action against defaulting persons and the companies, which may result in heavy penalties against such persons and

companies, as per the provisions of the SEBI Act".

It has been stated in para 1 therein that "under the Scheme, the eligible persons and companies may make disclosures and pay the lumpsum amount within the period specified under the Scheme".

In terms of para 2, of the Scheme, "following are eligible for availing benefit under this scheme.

a) Persons who have failed to comply with or who have complied with the requirements of regulations 6(1), 6(3) and 8(1) and 8(2) of the Takeover Regulations, 1997, after expiry of the period specified in the said regulations.

b) The listed companies which had failed to comply with or complied with the requirements of regulations 6(2), 6(4) and 8(3) of the Takeover Regulations, 1997, after expiry of the period specified in the said regulations.

c) In respect of the listed companies, where there was no change in the shareholding of persons specified under regulations 8(1) and 8(2) of the Takeover Regulations, 1997, in a particular year, the disclosure under regulation 8(3) for that year if not made earlier, can be made under this scheme specifying that there was no change in shareholding of the said persons. Such companies will not be required to pay any amount. This benefit will not be available to persons covered under regulations 8 (1) and 8(2).

In para 3 the cases to which the scheme is not applicable have been stated as follows:

"Scheme not to apply in certain cases

The benefit of this Scheme will not be available in cases where penalty under the SEBI Act read with Takeover Regulations, 1997 has already been imposed.

However, where such proceedings under the SEBI Act read with Takeover Regulations are in progress, persons/companies may avail the benefit of the Scheme."

The amount payable by persons and/or companies who have not complied with the requirements of Chapter II of the 1997 Regulations or who have complied with the requirements after expiry of the period specified in the said Regulations, as specified in para 5 is as follows:

Regulation/Sub-Regulation	Non compliance by	Due date for compliance in terms of Regulations	Amount payable in (Rs.)
6(1)-transitional provision	Persons holding 5% or more	April 20, 1997	10,000
6(2)-transitional provision	Company	May 20, 1997	10,000
6(3)-transitional provision	Promoters and persons in control	April 20, 1997	10,000
6(4)-transitional provision	Company	May 20, 1997	10,000
8(1)–annual disclosures	Persons holding 15% or more	April 21st of each financial year	10,000 for each year
8(2)–annual disclosures	Promoters or persons in control	April 21st of each financial year	10,000 for each year
8(2)–annual disclosures	Promoters or persons in control	21 days from the record date for dividend declaration	10,000 for each record date
8(3)–annual disclosures	Company	April 30th of each financial year	10,000 for each year
8(3)–annual disclosures	Company	30 days from the record date for dividend declaration	10,000 for each record date

The Scheme as originally notified was valid for the period as mentioned below:

(a) For a period of 3 months, i.e. from October 1, 2002 to December 31, 2002 for persons referred to in clause (a) of the Scheme.

(b) For a period of 4 months, i.e. from October 1, 2002 to January 31, 2003 for

companies referred to in clause 2(b) and (c) of the Scheme.

SEBI vide its order dated 31.12.2002 has extended the currency scheme for compliance by person referred at (a) above upto 28.2.2003 and for those referred to at (b) up to 31.3.2003.

Shri Ananta Barua's submission that the scheme is available only to those failures which "were due to over sight or lack of knowledge" has no support in the light of the unqualified eligibility provided in para 2 of the Scheme. The Appellants in terms of para 2 of the Scheme are entitled to avail of the Scheme, provided it does not suffer the disqualification provided in para 3 of the Scheme.

As per para 3 of the Scheme the benefit under the Scheme is not available in cases where penalty under the SEBI Act read with Takeover Regulations, 1997 has already been imposed. But an exception to this has been provided in the following words: "Where such proceedings under the SEBI Act read with Takeover Regulations are in progress persons/companies may avail the benefit of the scheme."

It is clear that in the instant case, the Adjudicating Officer in exercise of the powers available under section 15I of the Act passed the order imposing monetary penalty as provided in section 15 A(b) of the Act. and the Appellants filed the present Appeal under section 15T of the Act and the appeal proceedings are in progress. It is in this context one has to see the applicability of the Scheme to the Appellants

It is well settled that the appeal proceeding is a continuation of the adjudication, and that this view is supported by the Hon'ble Supreme Court's decision in Hasmat Rai Vs. Raghunath Prasad ((1981) 3 SCC 103). Even the cases where the appeal proceedings are in progress against the order passed by the Respondent are eligible to avail of the benefit under the scheme is clear from the provisions in the scheme itself. As stated earlier it has been stated

in para 3 that the Scheme will not be available in cases where penalty under the SEBI Act with Takeover Regulations, 1997 has already been imposed. If the said disqualification was absolute, there was no need to provide for an exemption stating that where such proceedings under the SEBI Act read with Takeover Regulations are in progress, persons/companies may avail the benefit of the scheme. The adjudication by the Adjudicating Officer for the purpose of imposing monetary penalty is a quasi judicial function and on passing the final order in adjudication, the Adjudicating Officer becomes functus officio and there is no scope for any further proceedings in the matter before him or before SEBI. There is no review power with SEBI. The only proceeding under the Act which is possible in a case where an adjudication order has been passed, is appeal proceeding before the Tribunal, in an appeal filed under section 15T by the person aggrieved as a result of the order. The exemption so provided in the Scheme, which is in tune with the well settled principle that the appeal proceeding is a continuation of the adjudication, in my view is referable to the proceedings in progress in an appeal filed against the order passed by the Adjudicating Officer. In this context it is to be noted that the appeal proceeding in an appeal filed under section 15T is also a proceeding under the Act. In that view of the matter and further that the Scheme is still in operation , the Appellants whose appeals are pending in the Tribunal, are entitled to avail of the benefit and that since the Appellants' Counsel has expressed that the penalty if at all leviable should not be more than the amount prescribed under the Scheme merits consideration. I have considered this submission. I do not find any justification to deny the benefit of the Scheme, to the Appellants which they are entitled to avail of.

Therefore, in my view imposition of one lakh and fifty thousand rupees on the Appellant in appeal No.83/2002 and imposition of a consolidated penalty of fifty thousand rupees on the five Appellants in appeal No.82/2002 deserves to be reconsidered The quantum of penalty imposed in these two appeals appears to be unfair in the light of the quantum specified under para 5 of the Scheme. In my view a penalty of ten thousand rupees for each failure as provided in para 5 of the Scheme would be reasonable.

On a perusal of the impugned order in appeal Nos. 82 and 83, I do not find any sound reasoning to treat the Appellant in appeal No.83 on a different footing vis-à-vis the Appellants in appeal No.82. The slight difference is that the Appellant in appeal No.83/2002 had additionally failed to comply with the requirements of regulation 8(1). But this by itself in my view is not a sound reason to levy a disproportionate penalty. I am of the view that a consolidated penalty of eighty thousand rupees worked out on the basis of ten thousand rupees per failure as provided in the Scheme would be reasonable and the Appellants in both the appeals together shall pay the said consolidated penalty. It is for the Appellants to apportion the monetary liability among themselves, if they so desire.

In the light of the above discussion, the order impugned in appeal no.81 is modified to the extent that the monetary penalty directed to be paid by the Appellant will be thirty thousand rupees. The impugned order in appeal number 82/2002 and 83/2002 is modified to the extent that a consolidated sum of eighty thousand rupees shall be payable by the Appellants therein.

The impugned orders with reference to the quantum of penalty payable by the Appellants stand modified to the extent stated above.

The Appellants are directed to remit the penalty amounts as per the modified order within three weeks from the date of this order.

The appeals are disposed of in the above lines.

Sd/-

(C. ACHUTHAN)
PRESIDING OFFICER

Place: MUMBAI
Date: January 29, 2003.

Copy to:

1. The Appellants as above
2. The Chairman,Securities and Exchange Board of India.. Respondent

CERTIFIED TRUE COPY
BY ORDER

REGISTRAR
SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date: November , 2002