BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No.84/2002

In the matter of:

Zee Telefilms Ltd **Appellant**
Vs.
The Adjudicating & Enquiry Officer,
Securities & Exchange Board of India **Respondent**

Appearance:

Shri R. Sethuraman
Chartered Accountant
Shri Riddhish Purohit
Dy. Company Secretary **for Appellant**

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

ORDER

The Respondent's order dated 19.8.2002 holding the Appellant guilty of not complying with the reporting requirements under certain provisions of chapter II of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the 1997 Regulations) and the consequential imposition of monetary penalty is under challenge in the present appeal.

The Securities and Exchange Board of India, (SEBI) on noticing that the Appellant had failed to comply with the reporting requirements under regulations 6(2), 6(4) and 8(3) of the 1997 Regulations decided to refer the matter for adjudication and for the purpose an

Adjudicating Officer was appointed vide order dated 17.6.2002. The said Adjudicating Officer issued show cause notice to the Appellant and carried out necessary enquiries and concluded that the Appellant had failed to comply with the requirements of regulations 6(2), 6(4) and 8(3) and in that context imposed a penalty of five lakh rupees on the Appellant.

Shri R. Sethuraman, authorized Representative of the Appellant submitted that the Appellant had not intentionally suppressed any material information, which was to be disclosed under the regulations that the Appellant on its own had disclosed the belated reporting in the letter of offer issued by it in the context of the public offer made by it relating to the acquisition of shares in ETC Networks Ltd., that a copy of the same was filed with SEBI and it was on the basis of the self disclosure made therein by the Appellant adjudication was ordered by the Respondent. He submitted that the fact that the Appellant itself had disclosed voluntarily the default, goes to prove the bonafides of the Appellant, that if it had not so disclosed, perhaps SEBI would have never noticed the failure and proceeded against for such failure. Shri Sethuraman submitted that the delay in reporting was because of the reason that the 1997 Regulations was new and that it took some time for the Appellant to set up the system to regularize and ensure filing of the return within the time specified and that it was not a wilful default. He submitted that the failure to comply with the reporting requirement was common and the Respondent also knew about the magnitude of such failures and that is why it took a pragmatic view and offered a regularization scheme to enable the defaulting entities to make good the defaults by filing the reports by paying a nominal amount of ten thousand rupees that the Appellant is also entitled to the said relief.

Learned Representative read out extensively from the text of the "SEBI Regularization Scheme, 2002" (the Scheme) permitting the entities who had not made disclosures or had made belated disclosures enabling them to make disclosures/get the delay condoned by paying the

lumpsum amount specified in the Scheme, that the amount specified is Rs.10,000 per each failure irrespective of the extent of the delay involved. He submitted that the Scheme provides benefit to those who failed to report in terms of regulations 6(2), 6(4) and 8(3) though for which penalty has been provided under section 15 A(b) of the Securities and Exchange Board of India, Act, 1992 (SEBI Act):

Shri Sethuraman submitted that since the Appellant had not acted wilfully the Respondent should not have imposed any penalty. In this context he referred to this Tribunal's decision in Cabot International Capital Corporation V. Securities and Exchange Board of India [(2001) 29 SCL 399] and submitted that the Respondent has ignored the ratio in the said case while imposing the monetary penalty. He also referred to the principle laid down by the Hon'ble Supreme Court in Hindustan Steel ltd V. State of Orissa (AIR 1970 SC 253) as relied on by the Tribunal in Cabbot's case and submitted that the principle laid therein that penalty is not leviable for an omission or commission not done wilfully, has been ignored by the Respondent, despite the finding by the Respondent that there was no mensrea on the part of the Appellant. He further submitted that neither the Appellant, nor its promoters secured any disproportionate gain or unfair advantage that the belated reporting has not resulted in wrongful loss to any investor, and the delay in reporting was an isolated one and was not of repetitive nature, that these aspects have not been considered by the Respondent while imposing the monetary penalty, despite the specific requirement to consider such factors under section 15J of the Act. He submitted that the Respondent has not refuted the Appellant's submission that the default was not wilful, that it was an isolated one and the default has not adversally affected anybody's interest and that the Appellant has not benefited in any manner by reporting belatedly. He further submitted, that without taking into consideration the submissions made by the Appellant and the mandatory requirement under section 15J, the Respondent proceeded mechanically and imposed the penalty. Learned Representative, submitted that the Hon'ble Supreme Court's decision in R.S.Joshi V. Ajit Mills (1977) 4 SCC 98, has been wrongly relied

on by the Respondent as the factual and legal position based on which the Hon'ble Court had made the observation that it is not necessary to establish mensrea for the purpose of imposing penalty is not comparable in the present case. He submitted that the said decision was in the case of Sales Tax laws, where the law provided the authority with absolute discretion, infact obligation, to levy fine in certain circumstances of default;

that it is not so under the SEBI Act that section 15J mandales the Adjudicating Officer to take into consideration the factors stated there under and it was obligatory on the part of the Respondent to establish mensrea on the part of the Appellant before levying penalty. Learned Representative submitted that the Respondent has levied maximum penalty leviable under the Act in total disregard of the provisions of Section 15J. He referred to section 15H and submitted that the gravity of the offence for imposition of penalty under section 15H is more as the failure to make public offer has a direct bearing on the interest of investors, and still the maximum penalty provided there under for such a serious offence is only five lakh rupees, and therefore for an unintentional technical failure to report the shareholding, under regulations 6 and 8 with no significant consequences cannot be met with such a heavy penalty of Rs. 5 lakhs.

Learned Representative submitted, that if for any reason it is felt that the unintentional failure on the part of the Appellant need be penalised, the quantum of penalty leviable should not be more than what is provided in the Scheme, as SEBI itself has decided the quantum of penalty for failure to comply with the requirements of regulations 6 and 8 at ten thousand rupees and imposition of any amount as penalty in excess of what is prescribed in the Scheme would be unjust, unfair and improper.

Shri Ananta Barua, learned Representative of the Respondent submitted that the Regularization Scheme, is not available to the Appellant as the default in reporting was not due to over sight or lack of knowledge of the requisite provisions of the regulations by the

Appellant.

Shri Barua submitted that, the Appellant has not disputed that the reporting was done belatedly. In this context he referred to the factual position as disclosed in

the impugned order and stated that the delay involved is substantial, as the requirement of regulations 6(2) and 6(4) was complied with involving a delay of 239 days, and requirement of compliance of regulation 8(3) with reference to the 12 month periods ended 30.4.1997, 30.4.1998, 30.4.1999 and 30.4.2000, the delay was 166 days, 143 days, 81 days and 186 days respectively, that having regard to the number of days in which the breach continued and also taking into consideration the submissions made by the Appellant, the Adjudicating Officer decided to impose the monetary penalty of five lakh rupees against the provision to levy five thousand rupees for the failure for each day of the failure period. He submitted that the Appellant's claim that the Regulations were new and that it took some time to set up the system to regularize and ensure filing of the returns is not correct as could be seen from the impugned order that the Appellant had repeatedly failed to comply with the requirements year after year from 1997 onwards, that the failure as claimed by the Appellant is not an isolated one. Learned Representative submitted that the Appellant's case is not "a case of over sight or due to lack of knowledge of the requirements" as stated in the Scheme and as such the Scheme is not applicable to the Appellant. The fact that the default was repeated year after year is indicative of the attitude of the Appellant to defy the law and that the ratio in the Cabbot's case and Hindustan Steel case relied on by the Appellant cannot have application to the instant case.

Shri Barua submitted the Appellant has attempted to mislead the Tribunal by attributing certain findings to the Adjudicating Officer. In this context he referred to the averment in the appeal that "the Adjudicating Officer has accepted the pleadings of the Appellant Company that

the default is not wilful and is an isolated one" and stated that there is no such finding in the order. He further referred to the Appellant's averment that "The Adjudicating Officer has accepted that the default has not resulted in any disproportionate gain or advantage nor has caused any loss to any investor" and submitted that it is also wrong as there is no such finding in the

order. Shri Barua submitted that the Appellant with mischievous motive has attributed such wrong statements to the Adjudicating Officer and therefore the conduct of the Appellant should not to be viewed leniently.

Shri Barua countered the Appellant's version that mensrea is required to be established for the purpose of imposing penalty, stating that this Tribunal in SRG Infotech Case (1999) 22 SCL (422) and in several other decisions had held that for the purpose of imposition of penalty under section 15A, mensrea need not be established. In this context he reiterated the view expressed by the Adjudicating Officer citing R.S.Joshi (supra).

Learned Representative submitted that it is not correct to say that the Adjudicating Officer has not considered the submissions made by the Appellant that it could be seen that the order contains a gist of the submissions made by the Appellant and the Adjudicating Officer has expressed his views thereon. He submitted that the Appellant had brought to the notice of the Adjudicating Officer, the factors required to be considered under Regulation 15J for the purpose of imposition of penalty and he decided the quantum of penalty taking into consideration those factors. In this context Shri Barua referred to the following observation of this Tribunal in Samrat Holdings Ltd V. SEBI (2001) 29 SCL 417 (SAT):

"in terms of section 15-I whether penalty should be imposed for failure to perform the statutory obligation is a matter of discretion left to the Adjudicating Officer and that discretion has to be exercised judicially and on a consideration of all the relevant facts and

circumstances. Further in case it is felt that penalty is warranted the quantum has to be decided taking into consideration the factors stated in section 15J. It is not that the penalty is attracted per se the violation. Te Adjudicating Officer has to satisfy that the violation deserved punishment.

:7:

Supreme Court decision in Additional Commissioner of Income-tax (supra), which is a reiteration of the ratio in the Gujarat Travancore Agency case (supra) relied on by the Respondent to show that is not necessary to prove mens rea for imposing penalty is not relevant to the present case in view of the distinguishable nature of the relevant provisions under the Income-tax and the SEBI Act. These two decisions are with specific reference to provisions of section 271 (1)(a) of the Income-tax Act. The said section 271(1) (a) provides that a penalty may be imposed if the Income-tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of income. Thus the burden is ultimately on the assessee to plead and prove the reasonable cause. Consequently no mens rea could arise at all. On the contrary there is no such requirement in section 15A. The section does not require pre-existence of a guilty mind to impose penalty. But the Act circumscribes the powers of the Adjudicating Officer in the filed of imposition of penalty. The case law relied on by the Respondent is of no help to the Respondent to justify imposition of penalty against the Appellant in view of the facts and circumstances peculiar to this case, discussed in detail above.

It is not the case of the Respondent, that the Appellant has 'acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation". [Emphasis supplied].

Shri Barua submitted that the Appellant has repeatedly violated the provisions of the Regulations and as such imposition of penalty is justified that the quantum of penalty imposed is after taking into consideration all the relevant factors.

I have carefully considered the rival contentions and the material placed before me by the parties. The fact that the Appellant had failed to comply with the requirements of regulations 6(2), 6(4) and 8(3) has been admitted by the Appellant.

These regulations are on reporting. The text of these regulations is extracted below:

"6(2). Every company whose shares are held by the persons referred to in sub-regulation (1) shall, within three months from the date of notification of these Regulations, disclose to all the stock exchanges on which the shares of

the company are listed, the aggregate number of shares held by each person.

6(4). Every company, whose shares are listed on a stock exchange shall within three months of notification of these Regulations, disclose to all the stock exchanges on which the shares of the company are listed, the names and addresses of promoters and, or person(s) having control, over the company, and number and percentage of shares of voting rights held by each such person.

8(3). Every company whose shares are listed on a stock exchange, shall within 30 days from the financial year ending March 31, as well as the record date of the company for the purposes of declaration of dividend, make yearly disclosures to all the stock exchanges on which the shares of the company are listed, the changes, if any, in respect of the holdings of the persons referred to under sub-regulation (1) and also holdings of promoters or person(s) having control over the company as on 31st March."

It is seen that the requirement of compliance of regulations 6(2) and 6(4) is a one time requirement and the requirement of compliance of regulation 8(3) is an annual feature.

The delay involved in filing the reports has even disclosed in the impugned order as follows:

Regulations	Due date for compliance	Actual date of compliance	Delay (no.of days)
6(2)	20.5.1997	15.1.1998	239
6(4)	20.5.1997	15.1.1998	239
8(3)	30.4.1997	14.10.1997	166
8(3)	30.4.1998	21.9.1998	143
8(3)	30.4.1999	21.7.1999	81
8(3)	30.4.2000	3.11.2000	186

The factual position discloses that the delay involved was substantial and violation of Regulation 8(3) was repeated in each year. It is not an isolated case of failure as has been claimed by the Appellant. The Appellant's contention that it had voluntarily disclosed the failure and the said voluntary disclosure proves the bonafides of the Appellant, is difficult to accept. In this context it is worth to look at the Appellant's own version as stated in its memorandum of appeal that : "The Appellant Company had made a public announcement under the SEBI Takeover Code for acquisition of 20% of the equity shares of ETC Networks Ltd. In the letter of offer issued by it, the Appellant Company as part of the format of the offer letter had declared the due dates of filing and the actual dates of filing of returns under the SEBI Takeover Code. On the basis of the Appellant Company's own disclosure proceedings were initiated by SEBI against the Appellant Company." This disclosure does not in any way prove the bonafides of the Appellant as has been claimed. It was in the interest of the Appellant that it had acquired shares/control in ETC Networks Ltd., and in that context the Appellant had no choice but to comply with the requirement of making public offer and for the purpose the Appellant had to issue letter of offer and in the letter of offer the Appellant was required to disclose details of the filing date of returns with SEBI. The disclosure was made as required in the format specified. If the Appellant had not made such disclosure, its offer letter itself would not have been considered proper and the Appellant would have faced consequences. It is thus clear that the disclosure was not made on its own, but due to compelling requirements and therefore the Appellant cannot claim that it had voluntarily disclosed the failure. Further it is also noted that the Appellant had failed to comply with the

requirements of regulations 6(2) and 6(4).

The Appellant has furnished factually incorrect information, as has been rightly pointed out by Shri Ananta Barua. I too could not see any finding by the Adjudicating Officer in the order that " the Adjudicating Officer has accepted that the default has not resulted in any disproportionate gain or advantage nor has caused

any loss to any investor. The Adjudicating Officer has also accepted that the default is an isolated one and not repetitive". The only inference I could make with reference to such statements is that it was meant to support the contention that imposition of monetary penalty was not justified. The Appellant's contention that the Adjudicating Officer has not considered the requirements of section 15J and the submissions made by the Appellant, is unfounded. In this context it is to be noted that section 15J of the Act requires the Adjudicating Officer to take into consideration certain factors for the purpose of deciding the quantum of penalty. Section 15J is extracted below:

15J Factors to be taken into consideration by the Adjudicating Officer while, adjudging the 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 where ever 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.

In this context it is also pertinent to note the provisions in section 15A(b) which the Adjudicating Officer has invoked.

Section 15A is on penalty for failure to furnish, information, returns etc., clause (b) of the said section is as under:

If any person, who is required under this Act or any rules or regulations made there under:-

(a) xxxxxxxxxxx

(b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file returns or

furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty not exceeding five thousand rupees for every day during which such failure continues.

(c) Xxxxxxxxxxxxxx

It is noted from the impugned order that the Appellant had admitted the delayed reporting and had submitted before the Adjudicating Officer that:

- "The delay has occurred primarily because the filing of the details was a new requirement brought by new regulation and it took some time for the company to regularize and ensure that the filings are made on time
- That there was no wrongful gain to the company nor any loss to any body on account of the delay in filing by the company.
- The fact of the delay in filing was reported by the company."

In this context the findings recorded by the Adjudicating Officer is to be noted. Having recorded the background of the case, the gist of the Appellants submission and citing the text of the regulations 6(2), 6(4) and 8(3), the Adjudicating Officer observed in the order under the heading:- "Appreciation of Evidence and Findings", as under:

"It is not disputed that there is delay in complying with the disclosure of Regulation 6 (2), 6(4) and 8(3) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

It may be noted that pursuant to letter of offer filed by the merchant banker on behalf of the company i.e. Zee Telefilms Ltd, the merchant banker vide its letter dated April 8, 2002 has forwarded a letter of the company dated 27th March, 2002 whereby the company has informed about the delay in compliance with regulation 6(2), 6(4) and regulation 8(3) as per the above table.

:12:

It was pleaded on behalf of the company that the breach was unintentional with no malafides, and there was no wrongful gain to the company or any loss to the investors on account of the delay, hence to take a lenient view in the matter. There is no allegation of malafides against the company in the notice served. A seven judge Bench of the Hon'ble Supreme Court in R.S. Joshi, STO v. Ajit Mills Ltd, AIR 1977 SC 2279 held that it is not necessary that penalty should be confined only to wilful acts of omission and commission in contravention of the provisions of the enactment. For proper enforcement of provisions of Law, it is common knowledge that absolute liability is imposed and the acts with out mensrea are made punishable.

In para 19 of the Judgment, the Apex Court observed as under:

"The notion that a penalty or a punishment cannot be cast in the form of an absolute or no fault liability but must be preceded by mensrea must be rejected. The classical view that no mensrea, no crime has long ago been eroded especially regarding economic crime."

In view of the above observations of the apex court, what is to be seen in such a situation is whether there is a factum of breach of the Regulations by the Company. If the

breach is established, factors like intentions, capacity to pay the penalty are not germane to the issue.

Timely disclosure as envisaged under regulations 6(2), 6(4) and 8(3) is very important for achieving the object of the Act. The requirement of making a time bound disclosure to the stock exchanges by a listed company as envisaged under the Regulations is an important material information and has a bearing on the investment or disinvestment decisions of the investing public.

It is not in dispute that there has been delay in complying with regulations by the company as under:

Regulations	Due date for compliance	Actual date of compliance	Delay (no.of days)
6(2)	20.5.1997	15.1.1998	239
6(4)	20.5.1997	15.1.1998	239
8(3)	30.4.1997	14.10.1997	166
8(3)	30.4.1998	21.9.1998	143
8(3)	30.4.1999	21.7.1999	81
8(3)	30.4.2000	3.11.2000	186

Order

Having regard to the number of days in which the breach has continued and also taking into account the submissions made by the Company, I, hereby impose a penalty of Rs.5,00,000 (Rupees five lakhs only) under section 15A(b) of SEBI Act, 1992 M/s. Zee Telefilms Ltd, for the delay in complying with the disclosure requirements to the Stock Exchange under regulations 6(2), 6(4) and 8(3) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997."

In fact, the Respondent cannot be faulted for such a brief order, as the Appellant appears

to have made only limited submissions as referred to earlier in this order and these submissions are relatable to the facts of the case stated in the impugned order leaving little scope to any detailed discussion. In the light of the admitted delay and in the absence of any convincing explanation for the delay, the Respondent cannot be faulted for having come to the conclusion that the Appellant was guilty of the failure referred to in section 15A(b) of the Act.

I do not consider it necessary to go deep into the details and the authorities cited by the parties to dispose of this appeal. As stated earlier the failure on the part of the Appellant to comply with the requirements of regulations 6(2), 6(4) and 8(3) remains conclusively established. Appellant's submission that the delay has occurred primarily because the filing of the details was a new requirement brought by new regulation and it took some time for it to regularize and ensure that filings are made on time, can not be swallowed without a pinch of salt. It is seen that the delay was not only in filing the return in 1997. The Appellant was filing the returns

belatedly under regulation 8(3) in 1998, 1999 and 2000 also. The delay involved in filing the return for the year 1997 was 166 days, for the year 1998 it was 143 days, for the year 1999 it was 81 days, and for the year 2000 the delay involved was 186 days. In the light of the glaring facts the Appellant's submissions cited above is unacceptable. The cause of delay, can be attributed to indifference or negligence. Therefore the ratio of the court decisions cited by the Appellant in support that penalty is not leviable is not available to the Appellant.

The Appellant has contended that the quantum of penalty imposed by the Respondent is unjust and unfair. In this context the Appellant had canvassed that as per the Scheme the maximum penalty payable for each failure is Rs.10,000 and as such the sum of five lakh rupees imposed by the Respondent is unjust.

In this context it is felt necessary to consider the said Scheme and examine as to whether the Appellant's case is also covered under the Scheme. The Scheme is still in force. 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.

:17:

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.

:18:

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 Appellant in terms of para 2 of the Scheme is 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 Appellant 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 Appellant.

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 Appellant whose appeal is pending in the Tribunal, is entitled to avail of the benefit and that since the Appellant's 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 the submission. I do not find any justification to deny the benefit of the Scheme, to the Appellant which it is entitled to avail of. Therefore in my view imposition of penalty of five lakh rupees in this case appear to be unfair and that ten thousand rupees as penalty for each failure as provided in para 5 of the Scheme would be reasonable.

In the light of the facts and circumstances of the case, and taking into consideration the Appellants submissions that it is eligible to avail of the benefit under the SEBI Regularization Scheme, 2002, and the Scheme is still in operation, I am of the view, that the portion in the order levying five lakh rupees as penalty need be modified to be in tune with the amount specified in the Scheme. Accordingly the

Respondent's direction to the Appellant to pay five lakh rupees is modified to the extent reducing the quantum of penalty to sixty thousand rupees. The impugned order with reference to quantum of penalty levied on the Appellant stands modified to the extent stated above. The Appellant is directed to remit the sum of penalty as per the modified order with in three weeks from the date of this order.

The appeal is disposed of in the above lines.

Sd/-

(C. ACHUTHAN)

PRESIDING OFFICER

Place: MUMBAI

Date: January 29, 2003

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