

BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. ASK/AO/119/2014-15]

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

In respect of
Elara India Opportunities Fund Limited
(PAN: AABCE6307N)

In the matter of
M/s Austral Coke and Projects Limited

Background

1. Securities and Exchange Board of India (**SEBI**) conducted investigation into the alleged irregularities in the affairs of M/s Austral Coke and Projects Limited (**Company**). The investigation revealed that Elara India Opportunities Fund Limited (**Noticee**) was holding 8.85% stake in the company during the quarter ended September 30, 2009 and it off-loaded its entire stake in the company during the period October 12, 2009 - November 10, 2009. It was observed that the Noticee was required to make disclosures under SEBI (Prohibition of Insider Trading) Regulations, 1992 (**PIT Regulations**) regarding such change in the shareholding, to the company and the Noticee had not made the required disclosures.

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2. SEBI has, therefore, initiated adjudicating proceedings under the Securities and Exchange Board of India, 1992 (**SEBI Act**) to inquire into and adjudge under section 15A(b) of the SEBI Act, the alleged violations of the provisions of regulations 13 (3) of PIT Regulations committed by the Noticee.

Appointment of Adjudication Officer

3. The undersigned was appointed as Adjudicating Officer vide order dated July 21, 2014 under section 15-I of SEBI Act read with rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalty by Adjudicating Officer) Rules, 1995 (**Adjudication Rules**) to inquire into and adjudge under section 15A(b) of the SEBI Act the alleged violations of the provisions of regulation 13 (3) of PIT Regulations by the Noticee.

Show Cause Notice, Reply and Personal Hearing

4. Show Cause Notice dated August 21, 2014 (**SCN**) was issued to the Noticee under rule 4(1) of the Adjudication Rules to show cause as to why an inquiry should not be initiated and penalty be not imposed against it under section 15A(b) of the SEBI Act for the alleged violations specified in the SCN.
5. The Noticee vide letter dated September 04, 2014 filed reply to the SCN. Thereafter, the Noticee was granted an opportunity of hearing on September 24, 2014. As the Noticee did not appear for hearing on the scheduled date, another opportunity of personal hearing was granted to the Noticee on December 22, 2014. In response, the Noticee, vide letter dated December 22, 2014, submitted that it had not received the Hearing Notice for the hearing scheduled for September 24, 2014. It also requested for a short adjournment for the personal hearing scheduled for December 22, 2014. Accordingly,

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another opportunity of hearing was granted to the Noticee on January 08, 2015 when Shri Ajay Achuthan, Advocate appeared as Authorized Representative (AR) of the Noticee. The AR re-iterated the submissions made by the Noticee vide letter dated September 04, 2014 and requested for 2 days time for filing additional submissions. Vide letter dated January 12, 2015 additional submissions were filed on behalf of the Noticee.

Consideration of Issues, Evidence and Findings

6 I have carefully perused the material available on record, written and oral submissions made by the Noticee.

7 The issues that arise for consideration in the instant case are:

- a. Whether the Noticee has violated the provisions of regulation 13 (3) of PIT Regulations?
- b. Do the violations if any, on the part of the Noticee attract penalty under section 15A (b) of SEBI Act?
- c. If so, how much penalty should be imposed on the Noticee taking into consideration the factors mentioned in section 15J of the SEBI Act?

8 The relevant provisions of PIT Regulations are as under:

PIT Regulations

Regulation 13

Disclosure of interest or holding by directors and officers and substantial shareholders in a listed company - Initial Disclosure

(1)

(2).....

(3) Any person who holds more than 5% shares or voting rights in any listed company shall disclose to the company in [in Form C] the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below 5%, if there has been change in such holdings from the last disclosure made under sub-regulation (1) or under this sub-regulation: and such change exceeds 2% of total shareholding or voting rights in the company. .

(4)

4(A)

(5)

9 I note that Austral Coke and Projects Limited is a company listed on The Mumbai Stock Exchange Limited (BSE) and the National Stock Exchange Limited (NSE). During the period October 15-30, 2009, price of the scrip of the company fell by around 20%. This was just prior to the disclosure of results on November 02, 2009 for the quarter ended September 30, 2009. The Noticee was a shareholder of the company. The investigation conducted by SEBI revealed that the Noticee was holding 8.85% stake in the company during the quarter ended September 30, 2009 and it off-loaded its entire stake in the company during the period October 12, 2009 - November 10, 2009. The day wise selling of the Noticee and change in the shareholding is as under:

Date	Offloading of shares on		Total offloading (no. of shares)	Change in Holding in %	Cumulative change (%)
	NSE	BSE			
12-Oct-09	1250000	1250000	2500000	0.86	0.86
14-Oct-09	2620000	0	2620000	0.90	1.76
21-Oct-09	2700000	2500000	5200000	1.79	3.55
22-Oct-09	2800000	2300000	5100000	1.76	5.31
23-Oct-09	2800000	2200000	5000000	1.72	7.03
5-Nov-09	2300000	0	2300000	0.79	7.83
6-Nov-09	2215023	0	2215023	0.76	8.59
10-Nov-09	742267	0	742267	0.26	8.85

It was further revealed that the shareholding of the Noticee in the company had changed by more than 2% shares on October 21, 2009 and October 23, 2009 and the Noticee ought to have disclosed such a change in its shareholding to the company as per regulation 13 (3) of PIT Regulations. As the required disclosures was not made by the Noticee, it was alleged in the SCN that the Noticee had violated the provisions of regulation 13 (3) of PIT Regulations.

10 In response to the allegations, the Noticee made the following submissions:

- Being a foreign fund, it had no knowledge of disclosures to made under regulation 13 (3) of PIT Regulations.

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- It relied on its Compliance Officer, who had in turn informed the Noticee that all statutory and regulatory requirements, including filings and disclosures with appropriate authorities as required under applicable laws have been taken care of.
- After receiving the SCN in the instant proceedings, the Noticee has made the disclosures with the company on September 03, 2014.
- The alleged disclosure was neither deliberated nor willful on the part of the Noticee and it had no malafide intentions.
- The shareholding pattern of the company clearly shows that how the Noticee off-loaded the shares of the company and the details regarding the shareholding of the Noticee in the company was available on the website of the stock exchanges.
- The irregularities committed by the Noticee has not resulted in any loss to ant investors nor any undue financial gain to the Noticee.
- Reliance was placed on the order of Securities Appellate Tribunal (SAT) in the matter of Rajendra G Parekh vs SEBI decided on January 21, 2010.

11 From the above submissions of the Noticee, I note that the Noticee has not disputed the aforesaid transactions relating to off-loading of shares in the company and consequent changes in the shareholding of the Noticee in the company. The Noticee has submitted that being a foreign fund it was not aware of the disclosure requirements to be made under PIT Regulations. I also note that post issuance of the SCN, the Noticee has filed the required disclosures with the company.

12 Regulation 13(3) of PIT Regulations requires that any person who holds more than 5% of shares shall disclose to the company any change in shareholding exceeding 2% of the total shareholding or voting rights in the company. In the instant case, as stated in the foregoing paragraphs, consequent upon off-loading of the shares in the company, the shareholding of the Noticee had undergone change by more than 2% on two occasions i.e, on October 21, 2009 and on October 23, 2009. The Noticee

had crossed the prescribed limits of regulation 13 (3) of PIT Regulations on both the occasions and was under the obligation to make disclosures as mandated under the relevant provisions of PIT Regulations. I find that the Noticee failed to make the requisite disclosures regarding change in its shareholding consequent upon the transactions listed in the above table, wherein it had statutory obligation to disclose to the company under PIT Regulations. I note that the Noticee has made certain disclosures recently i.e, after the issuance of SCN to it. In this regard, it is pertinent to state here that timeliness is the essence of disclosure and delayed disclosure would serve no purpose at all. I am of the view that when mandatory time period is stipulated for doing a particular activity, completion of the same after that period would constitute default in compliance and not delay.

13 I note that the Noticee has submitted that it is a foreign fund and was not aware of the disclosure requirements under PIT Regulations. Even though it is a foreign fund, while operating in the securities market of another country, it is mandatory that the Noticee should be conversant with the relevant laws of the host country. It cannot simply act ignorant of such regulatory requirements. It is noted that *Ignorantia juris non excusat*, that is to say, ignorance of law is not an excuse. Ignorance of law of the state does not exclude any person from the penalty for the breach of it, because every person is bound to know the law, and is presumed so to do. If any individual should infringe the law of the country through ignorance or carelessness, he must abide by the consequences of his error. Hence, I do not find any merit in the submissions of the Noticee that he was ignorant about the disclosure requirements.

14 I also note that the Noticee has placed reliance on the order of SAT in the matter of Rajendra G Parekh vs SEBI. I have perused the order of Hon'ble SAT in the said matter wherein the AO had imposed a monetary penalty of Rs 15 Lakh on appellants for violating the SEBI (Prohibition of Unfair Trade Practices relating to Securities Market) Regulations, 2003 (**PFUTP Regulations**) as well as PIT Regulations without bifurcating the penalty amount for each violations. The Hon'ble SAT had set aside the findings pertaining to the violation of PFUTP Regulations and reduced the

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penalty to Rs. 3 lakhs for violating the PIT Regulations. Thus I find that Hon'ble SAT did not grant any relief to the Appellants therein for violating the PIT Regulations. As such, the order cited by the Noticee would be of not much assistance to it, because in the instant case, the violation has been established hereinabove and penalty, therefore, becomes imposable based on the facts and circumstances of the case on hand.

15 On the basis of the foregoing discussion, I find that the Noticee has violated the provisions of regulations 13(3) of PIT Regulations on both the occasions. At this juncture, it is relevant to quote the judgment of Supreme Court in the matter of *SEBI vs. Shri Ram Mutual Fund* wherein it was inter alia held that “*once the violation of statutory regulations is established, imposition of penalty becomes sine qua non of violation and the intention of parties committing such violation becomes totally irrelevant. Once the contravention is established, then the penalty is to follow.*”

16 Thus, the aforesaid violation by the Noticee make it liable for penalty under section 15A(b) of the SEBI Act which reads thus:

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 there under,-*

(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”.

17 While determining the quantum of penalty, it is important to consider the factors stipulated in section 15J of SEBI Act, which reads as under:-

Factors to be taken into account by the adjudicating officer.

While adjudging quantum of penalty under S.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.”*

18 It is difficult, in cases of this nature, to quantify exactly the disproportionate gains or unfair advantage enjoyed by an entity and the consequent losses suffered by the investors. There is no material on record which dwells on the extent of specific gains made by the Noticee by not making the specified disclosures on the due dates. However the fact remains that by not making the required disclosures, the Noticee had deprived the investors of important information at the relevant time. It is pertinent to mention here that our entire securities market stands on disclosure based regime and accurate and timely disclosures are fundamental in maintaining the integrity of the securities market. There are two instances of non- disclosure and hence the violation committed by the Noticee is repetitive in nature.

Order

19 After taking into consideration all the facts and circumstances of the case, I am convinced that this is a fit case for imposing monetary penalty on the aforesaid Noticee, Elara India Opportunities Fund Limited. I, in exercise of the powers conferred upon me under section 15- I (2) of the SEBI Act, impose a penalty of ₹. 10,00,000/- (Rupees Ten lakh only) on the Noticee in terms of section 15A(b) of the SEBI Act. The above mentioned penalty will be commensurate with the violation committed by the Noticee.

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- 20 The penalty shall be paid by way of a duly crossed 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 the Division Chief, Enforcement Department - DRA- II, Securities and Exchange Board of India, Plot No. C4-A, 'G' Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400051.
21. In terms of the provisions of Rule 6 of the Rules, copies of this order are being sent to the Noticee and also to SEBI.

DATE: January 14, 2015	A SUNIL KUMAR
PLACE: Mumbai	ADJUDICATING OFFICER