WTM/ GM /SEBI/ERO/IMD/05/JAN/2017

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

UNDER SECTIONS 11, 11(4) AND 11B OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992, IN THE MATTER OF –

1. **ZENITH HIGHRISE INFRACON LIMITED (CIN : U45400WB2012PLC173631)**

2. **ITS DIRECTORS, VIZ.**

   A. **KALYAN BANERJEE (PAN : ADXPB9527D; DIN: 05189364)**
   B. **SHIPRA BANERJEE ((PAN : AKKPB3858M; DIN: 03061691)**
   C. **KUNTAL BANERJEE (PAN : BCUPB1092G; DIN: 06399077)**
   D. **NAMITA DE PAL (DIN: 03550694)**

---

1. Securities and Exchange Board of India ("SEBI") was in receipt of complaints stating that they are holders of Fixed Deposits issued by Zenith Highrise Infracon Ltd. ("Zenith") and that Zenith has closed all of its branches and defaulted on their payments. The complainants submitted copies of preference share certificates issued by Zenith. The complaints were filed by three persons in relation to a total of 1050 preference shares issued to them.

2. SEBI sought information from Zenith and its directors viz. Kalyan Banerjee, Shipra Banerjee and Kuntal Banerjee vide letters dated November 3, 2015 and November 19, 2015, in the context of fund raising activities by Zenith through issue of Redeemable Preference Shares, mainly seeking the following information:
   - *i. Copy of the Memorandum and Articles of Association of the company.*
   - *ii. Copy of Audited Annual Accounts of the company for the last 3 years;*
   - *iii. Name, address and occupation of all the directors of the company*
   - *iv. Names and details of the Key Managerial Personnel of the company;*
   - *v. Nature of Business and PAN of the company.*
   - *vi. Information in respect of issue of shares/debentures–*
     - *a. Copy of Prospectus/Red Herring Prospectus/Statement in lieu of Prospectus/Information Memorandum filed with Registrar of Companies ("**ROC**") for issuance of shares/debentures;*
     - *b. Date of opening and closing of the subscription list for the said shares/debentures;*
     - *c. Number of application forms circulated inviting subscription for shares/debentures and number of applications received;*

d. Details of allottees in the format given below ;

Financial Year	*Date of Allotment*	*Type of securities*	*Name of allottee*	*Address of allottee/contact details*	*No. of securities issued to each Allottee*	*Issue price per security*	*Amount of shares/debentures allotted (Rs.)*
				Total:			

e. Copies of the minutes of Board/Committee meeting in which the resolution has been passed for raising such additional capital and also for allotment of shares/debentures;

f. Copies of application forms, pamphlets, advertisements and other promotional material circulated for issuance of shares/debentures;

g. Terms and conditions of the issue of shares/debentures.

h. Whether the company has applied for listing of its securities with any of the stock exchanges

i. Copies of Form 2 and Form 10 filed with the ROC

j. Details of debenture trustee viz , name, address, board resolution authorizing their appointment etc.

While the letter sent to Zenith returned undelivered, no reply was received in relation to the letters delivered to the aforesaid directors.

3. When a site visit was made to the registered office address of Zenith on July 18, 2016, the company was not traceable. This was subsequently brought to the notice of the Registrar of Companies ("**RoC**"), Kolkata vide letter dated July 19, 2016. Further, documents such as Form 2, annual return etc. filed by the company were obtained from RoC.

4. Based on the filings made by the company with RoC, a preliminary examination was carried out by SEBI. The details of company are as follows:

i) Date of Incorporation : 07/02/2012

ii) Type of Company (Private Limited/Public Limited) & if converted: Public Limited

iii) CIN : U45400WB2012PLC173631

iv) PAN: Not available

v) Registered Office Address: Metro Plaza, 2nd Floor, 4 HL Sarkar Road, Bandshroni, Kolkata-700070

vi) Extracts of the details of securities issued by the company are as under:

Table A: - Details of Securities Issued

Year	Date of allotment	Type	Nos of allottee	Amount (Rs.)
2012-13	28-03-2013	RPS	49	4,304,000

vii) Details of any Board meetings held by the company as per RoC record in which this issue came up for discussion:

Date of Board meeting	Date of passing resolution	Amount proposed to be raised	Type of issue
30/05/2012	30/05/2012	Rs.45,00,000	Increase in Share Capital

5. While the RoC records indicate allotment of preference shares in the financial year 2012-13 only to 49 persons, the list of allottees available on record, does not include the three complainants referred to in para 1 of this order, who allegedly have been issued preference shares. As per the certificates of Letter of Allotment submitted by the complainants, they have been allotted 1050 preference shares in the financial year 2012-13. Though the complainants stated themselves as FD holders, from the documents produced by complainant it is seen that they were holders of preference shares. Therefore it appears there is a mismatch between the number of allottees as per RoC records and the complaints received by SEBI. Considering the complaints received by SEBI, there are prima facie grounds to believe that the number of persons to whom preference shares have been offered and allotted exceeded the number of 49, which has been filed by Zenith with RoC.

6. In the context of the abovementioned details of the offer and allotment of preference shares, the issue for determination in the instant matter is whether or not the mobilization of funds by Zenith as described above, during the period 2012-13 is in accordance with the provisions of the Companies Act, 1956 read with the provisions of the SEBI Act, 1992.

7. Section 67 of the Companies Act, 1956 deals with the conditions or circumstances under which an offer of shares/debentures by a company would be construed as one made to the public. Extracts of the relevant provisions of section 67 of the Companies Act, 1956, dealing with offer of shares or debentures to the public, are reproduced as under:

> ***"Construction of reference to offering shares or debentures to the public, etc.***
>
> ***67.*** *(1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any*

section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(2) Any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(3) No offer or invitation shall be treated as made to the public by virtue of sub- section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-

(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation.

***Provided** that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:*

***Provided further** that nothing contained in the first proviso shall apply to non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956)."*

8. For ascertaining whether the *offer and allotment of preference shares* by Zenith would fall within the scope of Section 67 of the Companies Act, 1956, the number of persons to whom offer was made by the Company is crucial. In terms of the first proviso to section 67(3), an offer of shares or debentures made to fifty persons or more would constitute an offer to the public. In this regard, it is observed from the documents obtained from RoC and complaints received by SEBI, that during the Financial Year 2012–13, Zenith made an offer and allotted preference shares to more than 49 persons.

9. From the above, it will follow that the *offer and allotment of preference shares* made by Zenith *prima facie* qualifies to be construed as an offer made to the public in terms of section 67 of the Companies Act, 1956. Such a public issue makes it imperative for Zenith to comply with the mandate of Section 73 of the Companies Act.

Relevant extract of Section 73 of the Companies Act, 1956, is reproduced as under:

"Allotment of shares and debentures to be dealt in on stock exchange.

> ***73.*** *(1) Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognised stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.*
>
> *(1A) ...*
>
> *(2) Where the permission has not been applied under subsection (1) or such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it,* ***the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate****, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.*
>
> ....*"* (emphasis supplied)

10. As *the offer and allotment of preference shares* is, *prima facie,* a public issue in accordance with the provisions of the Companies Act, 1956, the same will attract the requirement for such shares to be dealt on a recognised stock exchange in terms of Section 73 of the Companies Act, 1956, as stated above. I find that Zenith is *prima facie* in breach of the provisions of Section 73.

11. Further, in connection with the public issue, Section 56 of the Companies Act, 1956 mandates that the prospectus issued by a company shall state the matters specified thereunder and Section 60 of the Companies Act, 1956 mandates registration of such prospectus with the ROC. I find that there is no evidence on record to indicate that Zenith has complied with the provisions of Sections 56 and 60 of Companies Act, 1956, in respect of the *offer and allotment of Preference Shares*. In view of the same, I find that Zenith is *prima facie* in breach of the provisions of Sections 56 and 60 of the Companies Act, 1956 in connection with the subject offer and allotment of preference shares.

12. SEBI has a statutory duty to protect the interests of investors in securities and promote the development of, and to regulate, the securities market. Section 55A of the Companies Act, 1956, confers the jurisdiction on SEBI *inter alia* to administer provisions specified therein, in relation to public issue of securities. Section 11 of the SEBI Act has empowered it to take such

measures as it deems fit for fulfilling its legislative mandate. Further, sub-section (4) of section 11 lists measures that SEBI may take, by an order in writing, either pending or on completion of investigation or inquiry, in the interest of investors in the securities market. Section 11B empowers SEBI to issue such directions as may be appropriate, in the interest of investors in securities and the securities market, *inter alia*, to any company in respect of issue of capital, transfer of securities etc.

13. In terms of Section 73(2), the obligation of compliance with the provisions of Section 73 of the Companies Act, 1956 is cast on the company and every director who is an officer in default. As per available information, the details of the appointment of directors of Zenith are as under:

Name of the director	**Date of appointment**	**Date of cessation**
Kalyan Banerjee	07.02.2012	N.A
Shipra Banerjee	07.02.2012	N.A
Namita De Pal	07.02.2012	30.10.2012
Kuntal Banerjee	30.10.2012	N.A

14. From the above table, it is noted that Kalyan Banerjee, Shipra Banerjee, Kuntal Banerjee and Namita De Pal were the directors of Zenith at the time of the issue and / or allotment of preference shares in 2012-13 and were responsible for the affairs of Zenith at the relevant point of time. Further it is seen that Kalyan Banerjee, Shipra Banerjee and Kuntal Banerjee, as directors, are presently responsible for the affairs of Zenith.

15. In light of the facts in the instant matter, I find this to be a fit case to pass interim directions against Zenith and its Directors, for preventing the company from continuing with its fund mobilizing activity. In view of the foregoing, I, in exercise of the powers conferred upon me under Sections 11, 11(4) and 11B of the SEBI Act, 1992 hereby issue, with immediate effect, the following directions, which shall remain in force until further orders:-

    i. Zenith shall cease to mobilize fresh funds from investors through the offer and allotment of Preference Shares or through the issuance of equity shares or any other securities, to the public and/or invite subscription, in any manner whatsoever, either directly or indirectly;

ii. Zenith and the aforesaid Directors are prohibited from buying, selling or otherwise dealing in the securities market, either directly or indirectly, or associating themselves with any listed company or company intending to raise money from the public;

iii. Zenith and the aforementioned Directors shall not dispose of, alienate or encumber any of its/their assets or not divert any funds raised from public through *the offer and allotment of preference shares*; and

iv. Zenith and the aforementioned Directors shall co-operate with SEBI and shall furnish all information/documents in connection with the *offer and allotment of preference shares.*

16. The *prima facie* observations contained in paragraphs 9 to 11 of this Order are made on the basis of the material available on record and information obtained from RoC. Zenith and its abovementioned directors are also called upon to show cause as to why suitable directions/prohibitions under Sections 11, 11(4), and 11B of the SEBI Act should not be issued/imposed, including the following directions, namely:-

    i. Zenith and its above named directors, to jointly and severally refund money collected through the *offer and allotment of preference shares*, with an interest of 15% per annum (the interest being calculated from the date when the repayments became due in terms of Section 73(2) of the Companies Act, 1956 till the date of actual payment) within a period of 180 days from the date of receipt of this order, supported by a certificate of two independent Chartered Accountants to the satisfaction of SEBI; and

    ii. Zenith and its above named directors be refrained / prohibited from accessing the securities market by issue of prospectus / offer document / advertisement and buying, selling or otherwise dealing in securities in any manner whatsoever, directly or indirectly, for a period of four years from the date of effecting the refund as directed above.

17. Zenith and its abovementioned directors, may, within 21 days from the date of receipt of this interim order -cum- show cause notice, file their respective replies. Zenith and the directors named above are also directed to furnish an inventory of their assets in their reply. In the event of the company or any of its aforementioned directors intending to avail an opportunity of personal hearing, they may do so by seeking a confirmation in writing from SEBI for the same, within 90 days from the date of receipt of this order. In the event of the directors or the company failing to file replies or request for an opportunity of personal hearing, within the said 90 days, then the *prima facie* findings regarding the violations at paragraphs 9 to 11 of this

order shall become final and absolute, without any further orders. Consequentially, Zenith and its abovementioned Directors shall automatically be bound by the directions contained in paragraphs 15 & 16 above till the expiry of a period of four years from the date of repayment to the satisfaction of SEBI.

18. In case of failure to comply with the aforesaid directions within a period of one hundred eighty (180) days from the date of receipt of this order, appropriate enforcement actions in terms of the SEBI Act, 1992, shall be initiated including reference to the State Government/ Local Police.

19. Copy of this Order shall be forwarded to the recognized stock exchanges and depositories for information and necessary action. A copy of this order may also be forwarded to MCA/concerned RoC for their information and necessary action with respect to the directions imposed on company and directors.

Place: Mumbai **G. MAHALINGAM**

Date: January 10, 2017 **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA