WTM/MPB/EFD-DRA4/ 8 /2017

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA, MUMBAI
CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

ORDER

Under Sections 11, 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992 in the matter of Digstar Projects Limited in respect of :

1) **Digstar Projects Limited**
2) **Shri Laltu Piyada (DIN: 02598416)**
3) **Shri MD Nasibul Haque (DIN: 03421893)**
4) **Shri Gautam Naskar (DIN: 02598391)**

Background

1. Securities and Exchange Board of India ("SEBI") conducted an examination into the fund–raising activity of Digstar Projects Limited ("DPL") in respect of issue of *Redeemable Preference Shares* ("RPS") to ascertain whether DPL had made any public issue of securities without complying with the provisions of the Companies Act, 1956; Securities and Exchange Board of India Act, 1992 ("SEBI Act") and the Rules and Regulations made thereunder.

2. The examination revealed that DPL had issued and allotted RPS to approximately 10408 investors during the financial years 2009-10, 2010-11, 2011-12 and 2012-13 (hereinafter referred to as the "offer of RPS").

3. As the aforesaid offer of RPS was *prima facie* found to be in violation of respective provisions of the SEBI Act and the Companies Act, 1956, SEBI passed an interim order dated December 1, 2015 (hereinafter referred to as the "*interim order*") in respect of DPL and its directors namely, Shri Laltu Piyada, Shri MD Nasibul Haque and Shri Gautam Naskar (hereinafter collectively referred to as "the Noticees"), *inter alia*, in view of the following: -

   i. DPL was incorporated on May 28, 2009, with CIN as U74140WB2009PLC135468. Its Registered Office is at Madarat Road, P. S. Baruipur, Kolkata–700144, West Bengal, India.

ii. The Directors of DPL are Shri Laltu Piyada, Shri MD Nasibul Haque and Shri Gautam Naskar.

*iii. From the material on record, it is observed that DPL issued "Redeemable Preference Shares" ("**Offer of Redeemable Preference Shares**") to investors, details of which are provided below –*

Type of Security	***Year***	***No. of persons to whom preference shares were allotted***
Redeemable Preference Shares	*2009–10*	*636*
	2010–11	*5928*
	2011–12	*3070*
	2012–13	*774*
Total		***10408***

4. The above offer and allotment of RPS was *prima facie* a deemed public issue of securities under the first proviso to Section 67(3) of the Companies Act, 1956. It was observed that the resultant requirements under section 60 read with section 2(36), section 56(1), 56(3), section 73(1), 73,(2) and 73(3) were not complied with by DPL in respect of the offer of RPS.

5. In view of the *prima facie* findings on the violations, the following directions were issued in the *interim order* with immediate effect:

"i. DPL shall not mobilize any fresh funds from investors through the Offer of Redeemable 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 till further directions;
ii. DPL and its Directors, viz. Shri Laltu Piyada (DIN: 02598416), Shri MD Nasibul Haque (DIN: 03421893) and Shri Gautam Naskar (DIN: 02598391), are prohibited from issuing prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, till further orders;
iii. DPL and its abovementioned Directors, are restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, either directly or indirectly, till further directions;
iv. DPL shall provide a full inventory of all its assets and properties;
v. DPL's abovementioned Directors shall provide a full inventory of all their assets and properties;

vi. DPL and its abovementioned Directors shall not dispose of any of the properties or alienate or encumber any of the assets owned/acquired by that company through the Offer of Redeemable Preference Shares, without prior permission from SEBI;
vii. DPL and its abovementioned Directors shall not divert any funds raised from public at large through the Offer of Redeemable Preference Shares, which are kept in bank account(s) and/or in the custody of DPL;
viii. DPL and its abovementioned Directors shall furnish complete and relevant information in respect of the Offer of Redeemable Preference Shares (as sought by SEBI letter dated October 9, 2015), within 14 days from the date of receipt of this Order."

6. Vide the *interim order*, the Noticees were also called upon to show cause as to why suitable directions/prohibitions under Sections 11(1), 11(4), 11A and 11B of the SEBI Act including the following, should not be taken/imposed against them:

"i. Directing them jointly and severally to refund money collected through the Offer of Redeemable Preference Shares alongwith interest, if any, promised to investors therein;
ii. Directing them not to issue prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, for an appropriate period;
iii. Directing them to refrain from accessing the securities market and prohibiting them from buying, selling or otherwise dealing in securities for an appropriate period."

Service of interim order and hearing notice.

7. *Interim order* in the matter was passed on December 1, 2015 and was hosted on SEBI's website. The *interim order* was also sent to the Noticees on December 15, 2015 through RPAD on the addresses available on record. No response was received from the Noticees. Thereafter, the *interim order* was served upon the Noticees through substituted service by way of notifications dated November 9, 2016, published in the newspapers *The Times of India* and *Ananda Bazar Patrika*. In the interest of natural justice, an opportunity of personal hearing was provided to the Noticees on July 11, 2017. In this regard, vide notification dated June 10, 2017, published in the newspapers *The Times of India* and *Ananda Bazar Patrika,* the Noticees were notified by SEBI that they would be granted an opportunity of personal hearing on July 11, 2017 at the time and venue mentioned therein.

Submissions and Hearing

8. No response was received form DPL or any of its directors. Further, on the date of hearing scheduled in the matter i.e. July 11, 2017, all the Noticees failed to avail the

opportunity of hearing. Considering the above, I am of the view the principles of natural justice have been complied with in these proceedings. I also find that sufficient opportunities to file reply/submissions and appear for personal hearing have been provided to the Noticees and this matter should now be disposed of on the basis of the material available on record.

9. I have considered the allegations, and materials on record. On perusal of the materials on record, the following issues arise for consideration. Each question is dealt with separately under different headings:

   i) Whether DPL came out with the offer of RPS as stated in the interim order?
   ii) If so, whether the said issues were in violation of sections 56(1), 56(3), 60 read with 2(36), 73(1), 73(2) and 73(3) of the Companies Act, 1956 as mentioned in the *interim order*?
   iii) If the findings on Issue No. 2 are found in the affirmative, who are liable for the violation committed?

   Whether DPL came out with the offer of RPS as stated in the interim order?

10. On the basis of the information obtained from MCA-21, it is noted that DPL allotted RPS during the Financial Years 2009-10, 2010-11, 2011-12 and 2012-13 to 636, 5928, 3070 and 774 persons, respectively i.e. to total of 10408 persons. In this regard, neither the company nor its directors have disputed the said fact of issue and allotment of RPS by DPL. I, therefore, am of the view that DPL did come out with the offer of RPS to more than 50 persons in financial years 2009-10, 2010-11, 2011-12 and 2012-13.

    If so, whether the said issues were in violation of sections 56(1), 56(3), 60 read with 2(36), 73(1), 73(2) and 73(3) of the Companies Act, 1956 as mentioned in the interim order?

11. The provisions alleged to have been violated (as mentioned above) are applicable to an offer of RPS made to the public. Therefore, the primary question that arises for consideration is whether the issuance of RPS in the present case is 'public issue'. At this juncture, reference may be made to section 67 of the Companies Act, 1956:

    "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)."*

12. The following observations made by the Hon'ble Supreme Court of India in its judgement and order dated August 31, 2012 in the matter of *Sahara India Real Estate Corporations Limited & Ors. Vs SEBI & Anr.* [(2013) 1 SCC 1] (hereinafter referred to as the *"Sahara Case"*), while examining the scope of Section 67 of the Companies Act, 1956, are worth consideration:

"Section 67(1) deals with the offer of shares and debentures to the public and Section 67(2) deals with invitation to the public to subscribe for shares and debentures and how those expressions are to be understood, when reference is made to the Act or in the articles of a company. The emphasis in Section 67(1) and (2) is on the "section of the public". Section 67(3) states that no offer or invitation shall be treated as made to the public, by virtue of subsections (1) and (2), that is to any section of the public, if the offer or invitation is 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 otherwise as being a domestic concern of the persons making and receiving the offer or invitations. Section 67(3) is, therefore, an exception to Sections 67(1) and (2). If the circumstances mentioned in clauses (1) and

(b) of Section 67(3) are satisfied, then the offer/invitation would not be treated as being made to the public.

The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. … Resultantly, after 13.12.2000, any offer of securities by a public company to fifty persons or more will be treated as a public issue under the Companies Act, even if it is of domestic concern or it is proved that the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation."

13. Section 67(3) provides for situations when an offer is not considered as offer to public. As per the said sub section, if the offer is one which is not 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, if the offer is the domestic concern of the persons making and receiving the offer, the same are not considered as public offer. Under such circumstances, they are considered as private placements of shares and debentures. It is noted that as per the first proviso to Section 67(3) Companies Act, 1956, the public offer and listing requirements contained in that Act would become automatically applicable to a company making the offer to fifty or more persons.

14. In the instant matter, it is amply clear from the record that DPL had allotted RPS during the financial years 2009-10, 2010-11, 2011-12 and 2012-13 to 636, 5928, 3070 and 774 persons, respectively i.e. to total of 10408 persons. Thus, I find that the offer of RPS by DPL, being an offer made to more than 50 persons, falls within the ambit of first proviso of section 67(3) of Companies Act, 1956. Neither the Company nor the directors have disputed that the offer and issuance of RPS does not fall within the ambit of first proviso of section 67(3) of Companies Act, 1956. Hence, such issues are deemed to be public issues and DPL was mandated to comply with the 'public issue' norms as prescribed under the Companies Act, 1956.

15. I note that the jurisdiction of SEBI over various provisions of the Companies Act, 1956 including the above mentioned provisions in the case of public companies, whether listed or unlisted, when they issue and transfer securities, flows from the provisions of section 55A of the Companies Act, 1956. While examining the scope of Section 55A of the Companies Act, 1956, the Hon'ble Supreme Court of India in *Sahara Case* had observed that:

"We, therefore, hold that, so far as the provisions enumerated in the opening portion of Section 55A of the Companies Act, so far as they relate to issue and transfer of securities and non-payment of dividend is concerned, SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized stock exchange in India."

"SEBI can exercise its jurisdiction under Sections 11(1), 11(4), 11A(1)(b) and 11B of SEBI Act and Regulation 107 of ICDR 2009 over public companies who have issued shares or debentures to fifty or more, but not complied with the provisions of Section 73(1) by not listing its securities on a recognized stock exchange"

16. In this regard, it is pertinent to note that by virtue of Section 55A of the Companies Act, 1956, SEBI has to administer Section 67 of that Act, so far as it relates to issue and transfer of securities, in the case of companies who intend to get their securities listed.

17. I note that while interpreting the phrase "intend to get listed" in the context of deemed public issue the Hon'ble Supreme Court in Sahara Case observed as under:-

"…But then, there is also one simple fundamental of law, i.e. that no-one can be presumed or deemed to be intending something, which is contrary to law. Obviously therefore, "intent" has its limitations also, confining it within the confines of lawfulness…"
"…Listing of securities depends not upon one's volition, but on statutory mandate…"
"…The appellant-companies must be deemed to have "intended" to get their securities listed on a recognized stock exchange, because they could only then be considered to have proceeded legally. That being the mandate of law, it cannot be presumed that the appellant companies could have "intended", what was contrary to the mandatory requirement of law…"

18. Since the offer of RPS is a public issue of securities, such securities ought to have been listed on a recognized stock exchange, as mandated under section 73 of the Companies Act, 1956. As per section 73(1) and (2) of the Companies Act, 1956, a company is required to make an application to one or more recognized stock exchanges for permission for the shares or debentures to be offered to be dealt with in the stock exchange and if permission has not been applied for or not granted, the company is required to forthwith repay with interest all moneys received from the applicants. The allegations of non-compliance of the above provisions were not denied by DPL or its directors. I also find that no records have been submitted to indicate that DPL had made an application seeking listing permission from stock exchange, or refunded the amounts

on account of such failure. Therefore, I find that DPL has contravened the said provisions. Further, DPL has not provided any records to show that the amount collected by it is kept in a separate bank account. Therefore, I find that DPL has also not complied with the provisions of section 73(3).

19. Section 2(36) of the Companies Act read with section 60 thereof, mandates a company to register its 'prospectus' with the RoC, before making a public offer/ issuing the 'prospectus'. As per the aforesaid Section 2(36), “prospectus” means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate. As the offer of RPS was a deemed public issue of securities, DPL was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. In the present case, it is undisputed that DPL did not register a prospectus with the RoC, in respect of the offer of RPS. I, therefore, find that DPL has violated the provisions of section 60 of the Companies Act, 1956.

20. In terms of section 56(1) of the Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II of that Act. Further, as per section 56(3) of the Companies Act, 1956, no one shall issue any form of application for shares in a company, unless the form is accompanied by abridged prospectus, containing disclosures as specified. Neither DPL nor its directors produced any record to show that it has issued Prospectus containing the disclosures mentioned in section 56(1) of the Companies Act, 1956, or issued application forms accompanying the abridged prospectus. Therefore, I find that DPL has not complied with sections 56(1) and 56(3) of the Companies Act, 1956.

21. In view of the above findings, I am of the view that DPL was engaged in fund mobilizing activity from the public, through the offer of RPS and contravened the provisions of section 56(1), 56(3), 60 read with 2(36), 73(1), 73(2) and 73(3) of the Companies Act, 1956.

If the findings on question No.2 are found in the affirmative, who are liable for the violation committed?

22. It is noted that as per the MCA 21 records Shri Gautam Naskar and Shri Laltu Piyada were appointed as directors on May 28, 2009 and Shri MD Nasibul Haque was appointed as a director on February 10, 2011. The three of them have continued as directors since them. As already observed, DPL made deemed public issues during

the financial years 2009-10, 2010-11, 2011-12 and 2012-13. Thus, Shri Gautam Naskar and Shri Laltu Piyada were directors of DPL at all times when DPL made the deemed public issues of RPS. Shri MD Nasibul Haqu, who became a director of DPL in February 2011, was there as a director of DPL when it made the deemed public issue of RPS in financial years 2011-12 and 2012-2013.

23. Section 56(1) and 56(3) read with section 56(4) of the Companies Act, 1956 imposes the liability on the company, every director, and other persons responsible for the prospectus for the compliance of the said provisions. The liability for non-compliance of section 60 of the Companies Act, 1956 is on the company, and every person who is a party to the non-compliance of issuing the prospectus as per the said provision. Therefore, DPL and its directors are held liable for the violation of sections 56(1), 56(3) and 60 of the Companies Act, 1956.

24. As far as the liability for non-compliance of section 73 of Companies Act, 1956 is concerned, as stipulated in section 73(2) of the said Act, the company and every director of the company who is an officer in default shall, from the eighth day when the company becomes liable to repay, 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 if the money is not repaid forthwith.With regard to liability to pay interest, I note that as per section 73 (2) of the Companies Act, 1956, the company and every director of the company who is an officer in default is jointly and severally liable, to repay all the money with interest at prescribed rate. In this regard, I note that in terms of rule 4D of the Companies (Central Government's) General Rules and Forms, 1956 read with rule 3(1)(c) of the Companies (Prospectus and Allotment of Securities) Rules, 2014, the rate of interest prescribed in this regard is 15%. Therefore, I find that DPL and its directors are jointly and severally liable to refund the amounts collected from the investors with interest at the rate of 15 % per annum, for the non-compliance of the above mentioned provisions.

25. As noted in the *interim order*, Shri Laltu Piyada, Shri MD Nasibul Haque and Shri Gautam Naskar were the directors of DPL when it had issued and allotted RPS. All of the said persons were directors at the time of the issuance of RPS. Since these persons were acting as directors during the period of issuance of RPS, they are officers in default and accordingly they are liable to make refund along with interest under section 73(2) of the Companies Act, 1956. Since, the liability of the company to repay under section 73(2) of the Companies Act, 1956 is continuing and such liability continues till all the repayments are made. The above said directors are co-extensively responsible along with the Company for making refunds along with interest under section 73(2) of the Companies Act, 1956 read with rule 4D of the Companies (Central Government's)

General Rules and Forms, 1956 and rule 3(1)(c) of the Companies (Prospectus and Allotment of Securities) Rules, 2014, and section 27(2) of the SEBI Act.

26. In view of the foregoing, the natural consequence of not adhering to the norms governing the issue of securities to the public and making repayments as directed under section 73(2) of the Companies Act, 1956, is to direct the Company and its directors to refund the monies collected, with interest to such investors. Further, in view of the violations committed by DPL and its directors, to safeguard the interests of the investors who had subscribed to such RPS issued by DPL, to safeguard their investments, and to further ensure orderly development of securities market, it also becomes necessary for SEBI to issue appropriate directions against the Noticees.

27. I also note that, vide the *interim order* dated, DPL was directed to provide a full inventory of all its assets and properties. Similarly, the directors of DPL were also directed to provide an inventory of assets and properties belonging to them. The above inventories were required to be filed within 21 days of the receipt of the order. However, I find that no such inventory has been provided either by DPL or its directors despite the notifications of issuance of the *interim order* through newspaper publications as mentioned above.

28. In view of the aforesaid observations and findings, I, in exercise of the powers conferred under section 19 of the Securities and Exchange Board of India Act, 1992 read with sections 11, 11(4), 11A and 11B thereof, hereby issue the following directions:

    (a) The Noticees namely, Digstar Projects Limited, Shri Laltu Piyada, Shri MD Nasibul Haque and Shri Gautam Naskar shall (jointly and severally) forthwith refund the money collected by the Company through the offer and issuance of Redeemable Preference Shares (*which have been found to be issued in contravention of the public issue norms stipulated under the Companies Act, 1956*), to the investors including the money collected from investors, pending allotment of Redeemable Preference Shares, if any, with interest at the rate of 15% per annum from the date when the repayments became due (*in terms of Section 73(2) of the Companies Act, 1956*) till the date of actual refund or the value as promised and accrued till the date of refund, whichever is higher.
    (b) The repayments and interest payments to investors shall be effected only through Bank Demand Draft or Pay Order both of which should be crossed as “Non-Transferable”.
    (c) The Noticees shall issue a public notice, in all editions of two National Dailies (one English and one Hindi) and in one vernacular daily with wide circulation, detailing the modalities for refund, including details of contact persons including names, addresses and contact details, within fifteen days of receipt of this order.

(d) The Noticees are permitted to sell the assets of the company and deposit the proceeds in an Escrow Account opened with a nationalized bank. Such proceeds shall be utilized for the sole purpose of making refund/repayment to the investors till the full refund/repayment as directed above is made.

(e) Noticees shall file a report of such completion with SEBI, within a period of three months from the date of this order, certified by two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this Order, a peer reviewed Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India ("ICAI").

(f) Within fifteen days form the date of receipt of this order, the Noticees shall provide a full inventory of their assets and properties and details of all bank accounts, demat accounts and holdings of shares/securities, if held in physical form certified by a peer reviewed Chartered Accountant.

(g) In case of failure of the Noticees to refund the monies as directed in this Order or on failure to comply with the directions, SEBI, on expiry of three months from the date of this Order -

   i. may recover such amounts in accordance with section 28A of the SEBI Act including such other provisions contained in securities laws.
   ii. may initiate appropriate action against the Noticees, including adjudication proceedings, in accordance with law.
   iii. may make a reference to the State Government/ Local Police to register a civil/ criminal case against the Noticees, for offences of fraud, cheating, criminal breach of trust and misappropriation of public funds; and

(h) The Noticees are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, from the date of this Order, till the expiry of 4 (four) years from the date of completion of refunds to investors as directed above.

(i) Shri Laltu Piyada, Shri MD Nasibul Haque and Shri Gautam Naskar are also restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, from the date of this Order, till the expiry of 4 years from the date of completion of refunds to investors as directed above.

(j) The above directions shall come into force with immediate effect.

29. This Order is without prejudice to any action, including adjudication and prosecution proceedings that may be taken by SEBI in respect of the above violations committed by DPL and its directors.

30. Copy of this Order shall be forwarded to the recognized stock exchanges and depositories for information and necessary action.

31. A copy of this Order shall also be forwarded to the Ministry of Corporate Affairs/ concerned Registrar of Companies, for their information and necessary action with respect to the directions/ restraint imposed above against the Company and the individuals.

Sd/-

DATE: July 28th, 2017
PLACE: Mumbai

MADHABI PURI BUCH
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA