

BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. PB/AO- 42/2010]

In respect of
KUNAL OVERSEAS LIMITED
(PAN. NOT AVAILABLE)

**UNDER SECTION 19 H (1) OF THE DEPOSITORIES ACT, 1996, READ WITH
RULE 5 OF DEPOSITORIES (PROCEDURE FOR HOLDING INQUIRY AND
IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 2005**

FACTS OF THE CASE IN BRIEF

1. On perusal of the monthly status report submitted by NSDL and CDSL vide their e-mail dated January 15, 2008, SEBI observed that M/s Kunal Overseas Limited (hereinafter referred to as "**KOL/Noticee**") had delayed dematerialization of securities. The details of the delay as on January 15, 2008 are as under:-

Name of the depository	No. of Requests pending for more than thirty days	No. of Shares involved
NSDL	790	7,46,900
CDSL	154	84,150

The aforesaid delay is alleged to be in violation of regulation 54 (5) of SEBI (Depositories and Participants) Regulations 1996, (hereinafter

referred as "**DP Regulations**") and liable for penalty under section 19D of the Depositories Act, 1996 (hereinafter referred to as the "**Depositories Act**").

APPOINTMENT OF ADJUDICATING OFFICER

2. Mr. V. S. Sundaresan was appointed as Adjudicating Officer under section 19H of Depositories Act read with rule 3 of Depositories (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 2005 (hereinafter referred to as "**Rules**") vide order dated March 11, 2008 to inquire into and adjudge the alleged violation of regulation 54 (5) of DP Regulations. Consequent to the transfer of Mr. V.S Sundaresan, I have been appointed as the Adjudicating Officer vide order dated December 24, 2009.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

3. Show Cause Notice No.EAD-5/VSS/SS/121254/2008 dated March 25, 2008 (hereinafter referred to as "**SCN**") was issued to the Noticee under rule 4(1) of the Rules to show cause as to why an inquiry should not be held against the Noticee and penalty be not imposed on the Noticee under section 19D of the Depositories Act for the alleged violation specified in the said SCN.
4. I find from the records that the SCN was issued through Registered A.D. at the last known address of the Noticee, at 307-A, Kailash Esplanade Bldg. Opp. Shreya Cinema, LBS Marg, Ghatkopar (W) Mumbai – 400 086 but the same was returned undelivered with remark "Left".
5. Subsequent to my appointment, a press notification was issued in the English national daily "Hindustan Times" on April 10, 2010 as well as in the

local newspaper “Sakal” published in Marathi on April 10, 2010 about the SCN requiring the Noticee or its authorized representative to collect the SCN from the office of Adjudicating Officer. It was also mentioned in the said notification that if the Noticee failed to reply to the SCN within 14 days from the date of publication, it shall be presumed that the Noticee does not have any reply to submit and the matter would be further proceeded ex-parte. The press notification was issued as a substitute service, for the Noticee. The copy of SCN was also uploaded on SEBI website i.e. www.sebi.gov.in. However, I find that Noticee neither collected SCN nor replied to the SCN.

6. In the interest of natural justice and in order to conduct an inquiry as per rule 4 (3) of the Rules, the Noticee was granted an opportunity of personal hearing on June 16, 2010 at SEBI, Head Office, Mumbai vide notice dated May 11, 2010. The said notice was sent by hand delivery to the aforesaid last known address of the Noticee. The notice was returned undelivered with remark “always closed”. The copy of hearing notice was also uploaded on SEBI website i.e. www.sebi.gov.in. A press notification was also issued in the English national daily “Hindustan Times” as well as in Hindi National Daily “Hindustan” on June 11, 2010 about the hearing notice requiring the Noticee to appear on June 16, 2010 at 10:30 A.M. The press notification was issued as a substitute service, for the Noticee. Pursuant to the uploading of hearing notice on SEBI website and advertisement in the newspapers, I note that the Noticee neither appeared on June 16, 2010 nor requested for adjournment of the hearing.
7. In view of the aforesaid steps taken, I am convinced that ample opportunities have been given to the Noticee to explain its case. As per rule 4(7) of the Rules, if any person fails, neglects or refuses to appear as required by sub-rule (3) before the Adjudicating Officer, he may proceed

with the inquiry in the absence of such person after recording the reasons therefor. Despite having been given ample opportunities, the Noticee had failed to avail of the same. I am, therefore, compelled to proceed with the matter *ex-parte* based on the material available on record.

CONSIDERATION OF ISSUES AND FINDINGS

8. I have carefully perused the documents available on record. The issues that arise for consideration in the present case are :

- a) Whether the Noticee had violated regulation 54 (5) of DP Regulations?
- b) Does the violation, if any, on the part of the Noticee attract monetary penalty under section 19D of the Depositories Act?
- c) If so, what would be the monetary penalty that can be imposed taking into consideration the factors mentioned in section 19 I of the Depositories Act?

9. Before moving forward, it will be appropriate to refer to the relevant provisions of the DP Regulations, which reads as under:

“manner of surrender of certificate of securities

54(1)

(2)

(3)

(4)

(5) *within 15 days of receipt of the certificate of security from the participant the issuer shall confirm to the depository that*

securities comprised in the said certificate have been listed on the stock exchange or exchanges where the earlier issued securities are listed and shall also after due verification immediately mutilate and cancel the certificate of security and substitute in its record the name of the depository as the registered owner and shall send a certificate to this effect to the depository and to every stock exchange where the security is listed.

10. It is observed from the provisions of regulation 54(5) of DP Regulations that, the issuer company shall, within 15 days of the receipt of certificate of security from the participant, confirm to the depository that securities comprised in the said certificate have been listed on the stock exchange/s where the earlier issued securities are listed and shall also after due verification, immediately mutilate and cancel the certificate and substitute in its records the name of the depository as its registered owner and shall send a certificate to this effect to the depository and to every stock exchange where the security is listed.
11. In the instant case, it is alleged that the Noticee had not complied with regulation 54(5) of DP Regulations. The details of delay in dematerialization of securities as on January 15, 2008 are given below:

Name of the depository	No. of Requests pending for more than thirty days	No. of Shares involved
NSDL	790	7,46,900
CDSL	154	84,150

12. From the facts earlier mentioned, it is clear that despite granting sufficient opportunities to appear in person and present the case, the Noticee did not avail the same and submit any proof of having cleared aforesaid pending demat requests.

13. As no information about resolving of pending demat requests was forthcoming from the Noticee, there was no choice but to seek the information from other sources. Therefore, information was sought directly from NSDL and CDSL. NSDL vide e-mail dated June 22, 2010 provided the following information with regard to the Noticee:

Coloumn No.1		Coloumn No.2		Coloumn No.3	
Pending as on 15-Jan-2008		No of Pending cases in coloumn no. 1 processed		Pending as on June 18-2010	
No. of Requests Pending for than thirty days	No. of Shares involved	No. of Requests	No. of Shares involved	No. of Requests Pending for more than thirty days	No. of Shares involved
790	7,46,900	34	27,050	760	7,22,900

From the above table, I find the following:

- As on January 15, 2008, 790 demat requests were pending in the NSDL system for more than thirty days and a total of 7,46,900 shares of the said ISIN were requested for dematerialization through these requests.
- Out of the total of 790 demat requests, 34 requests for 27,050 shares were processed which were pending for more than 30 days. The details of demat request received, demat request processed vis-à-vis no. of days of delay are as follows:

Sr. No.	Demat Request No.(DRN)	DP ID	Client ID	Date of Demat Request Received	Quantity Requested	Date of Demat Request Processed	No.of days of delay
1	382755	IN300484	10284191	23-Feb-2001	1800	14-Dec-2009	3216
2	35986	IN300247	10009077	9-Apr-2002	150	22-Dec-2009	2814
3	92318	IN300982	10179935	19-Jun-2002	3500	3-Nov-2009	2694
4	215531	IN300845	10115544	8-Jul-2002	1500	13-Nov-2009	2685
5	6502	IN302381	10015401	13-Jul-2002	800	24-Mar-2010	2811
6	6501	IN302381	10015401	13-Jul-2002	800	24-Mar-2010	2811
7	6500	IN302381	10015401	13-Jul-2002	800	24-Mar-2010	2811
8	6499	IN302381	10015401	13-Jul-2002	800	24-Mar-2010	2811
9	6469	IN302381	10015401	13-Jul-2002	1050	24-Mar-2010	2811
10	6468	IN302381	10015401	13-Jul-2002	800	24-Mar-2010	2811
11	6460	IN302381	10015401	13-Jul-2002	800	24-Mar-2010	2811
12	71469	IN300636	10024269	13-Jul-2002	200	8-Mar-2010	2795
13	6448	IN302381	10015401	16-Jul-2002	750	24-Mar-2010	2808
14	6447	IN302381	10015401	16-Jul-2002	800	24-Mar-2010	2808
15	6446	IN302381	10015401	16-Jul-2002	800	24-Mar-2010	2808
16	6437	IN302381	10015401	16-Jul-2002	800	24-Mar-2010	2808
17	6436	IN302381	10015401	16-Jul-2002	800	24-Mar-2010	2808
18	6435	IN302381	10015401	16-Jul-2002	800	24-Mar-2010	2808
19	6434	IN302381	10015401	16-Jul-2002	800	24-Mar-2010	2808
20	6433	IN302381	10015401	16-Jul-2002	800	24-Mar-2010	2808
21	6432	IN302381	10015401	16-Jul-2002	800	24-Mar-2010	2808
22	6431	IN302381	10015401	16-Jul-2002	800	24-Mar-2010	2808
23	144183	IN300974	10205867	18-Jul-2002	1500	2-Jun-2010	2876
24	1181786	IN300888	13913125	1-Aug-2002	500	17-Mar-2010	2785
25	226076	IN300327	10277684	12-Aug-2002	200	22-Dec-2009	2689
26	147715	IN300974	10000801	28-Aug-2002	1500	8-Mar-2010	2749
27	64204	IN300548	10085883	1-Nov-2002	150	9-Feb-2009	2292
28	1324584	IN300888	13913125	21-Oct-2003	500	17-Mar-2010	2339
29	19365	IN302201	10071166	18-Dec-2003	300	29-Mar-2010	2293
30	20177	IN301217	40017244	16-Jan-2004	100	11-Dec-2009	2156
31	230377	IN300907	10354089	22-Mar-2004	100	29-Mar-2010	2198
32	964623	IN300020	11121090	24-Sep-2005	300	31-Dec-2009	1559
33	272998	IN300907	10408842	30-Sep-2005	800	18-Mar-2010	1630
34	97563	IN300548	10067983	11-Oct-2005	150	21-May-2009	1318

- As on June 18, 2010, 760 demat requests are pending in the NSDL system for more than thirty days and a total of 7,22,900 shares of the said ISIN are requested for dematerialization through these requests.

14. CDSL vide e-mail dated June 24, 2010 provided the following information with regard to the Noticee:

Column No. 1		Column No. 2		Column No. 3	
Pending as on 15-Jan-2008		No of Pending cases in coloumn no. 1 resolved		Pending as on June 16 -2010	
No. of Requests Pending for more than thirty days	No. of Shares involved	No. of Requests	No. of Shares involved	No. of Requests pending for more than thirty days	No. of Shares involved
154	84,150	4	1750	155	83,100

From the above table, I find the following:

- As on January 15, 2008, 154 demat requests were pending in the CDSL system for more than thirty days and a total of 84,150 shares of the said ISIN were requested for dematerialization through these requests.
- Out of the total of 154 demat requests, 4 requests for 1,750 shares were processed which were pending for more than 30 days. The details of demat request received, demat request processed vis-à-vis no. of days of delay are as follows:

Sr. No.	Demat Request No.(DRN)	DP ID	Client ID	Date of Demat Request Received	Quantity Requested	Date of Demat Request Processed	No. of days delay
1	1472000	12023201	00013526	1/27/2004	150	7/23/2009	2004
2	2041204	12023303	00008505	12/6/2004	100	9/10/2008	1374
3	3671064	13019900	00045551	10/17/2006	100	11/26/2008	771
4	4112728	12019111	00002209	7/30/2007	1400	12/19/2008	508

- As on June 16, 2010, 155 demat requests are pending in the CDSL system for more than thirty days and a total of 83,100 shares of the

said ISIN were requested for dematerialization through these requests.

15. It would be relevant to note that had even a nominal delay been involved in complying with the mandate laid down in the DP Regulations or sufficient justification for the same been given by the Noticee, a lenient view could have been taken for the belated compliance of Regulation 54(5) of DP Regulations. However as this is a case where a period of several years have already lapsed and till date the Noticee has hardly taken any steps in resolving the demat requests which were pending for more than thirty days as on January 15, 2008, necessary cognizance of the non adherence of the mandate laid down in the Regulations is very much necessitated. Moreover, the Noticee did not bother to reply to the SCN and appear in person before me.
16. Any evasion of the regulatory provisions issued by the regulator in the interests of the investors or non adherence to the same for any reason whatsoever is bound to affect the interests of such investors. Although such a loss cannot be specifically computed in monetary terms, the fact remains that all regulatory provisions have a specific purpose behind their enactment. The very purpose of enacting any legislation is due adherence to the procedures laid down there under to ensure the sound and smooth functioning of the capital market. If no cognizance were to be taken of any breach of these provisions and no liability fixed there upon, the entire purpose of incorporating the provisions in the said enactments would become redundant.
17. In view of the foregoing, I find that the Noticee had failed to discharge its obligation to complete the process of dematerialization of securities within the stipulated time period under the DP Regulations. The violation of the provisions of regulation 54(5) of DP Regulations, therefore, stands established.

18. The Hon'ble Supreme Court of India in the matter of *SEBI Vs. Shri Ram Mutual Fund [2006] 68 SCL 216(SC)* 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”.

19. As the violation of the statutory obligations under regulation 54(5) of DP Regulations has been established, I hold that the Noticee is liable for monetary penalty under section 19D of the Depositories Act, which reads as under:-

“Penalty for delay in dematerialization or issue of certificate of securities

If any issuer or its agent or any person, who is registered as an intermediary under the provisions of section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) fails to dematerialize or issue the certificate of securities on opting out of a depository by the investors, within the time specified under this Act or regulations or by-laws made thereunder or abets in delaying the process of dematerialization or issue the certificate of securities on opting out of a depository of securities, such issuer or its agent or intermediary 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.”

20. While determining the quantum of penalty under section 19D of the Depositories Act, it is important to consider the factors stipulated in section 19 I of the Depositories Act, which reads as under:-

“19 –I. Factors to be taken into account by the adjudicating officer

While adjudging quantum of penalty under section 19H, 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.”*

21. From the material available on record, it is not possible to ascertain the disproportionate gain or unfair advantage to the Noticee which may have accrued due to the aforesaid failure. Though it may not be possible to ascertain the monetary loss to the investors on account of failure of the Noticee to discharge its obligation towards the investors to meet the requests for dematerialization, the delay and non-attendance in dematerialization of securities being prejudicial to the interest of investors has to be viewed seriously. Incidences of this nature definitely compromise the securities market regulatory framework to the detriment of investors at large. Delay and non attendance of each demat request constitutes a separate violation. Therefore, it is noted that the lapse is repetitive in nature and I am of the view that penalty needs to be imposed taking into account each incidence of delay and non-attendance of demat requests. By virtue of the failure on the part of the Noticee to dematerialize the shares of the shareholders on time, the fact remains that it had deprived the shareholders of the liquidity of their investments and loss of opportunity to deal with their dematerialized shares.
22. I find that the Noticee has failed to file any reply to the said SCN and has not refuted the charges. The Hon'ble Securities Appellate Tribunal in the matter of Classic Credit Ltd. ...v/s... SEBI [2007] 76 SCL 51 (SAT - MUM.) inter-alia held – *“the appellants did not file any reply to the second show-cause notice. This being so, it has to be presumed that the charges alleged against them in the show-cause notice were admitted by them”*. The order passed by Hon'ble SAT is relied upon in this case for guidance. Therefore, I presumed that the Noticee has admitted the charges alleged in the said SCN.

ORDER

23. After taking into consideration all the facts and circumstances of the case, I hereby impose a monetary penalty of Rs. 8,00,000 /- (Rupees Eight Lakh only) on the Noticee which will be commensurate with the violation committed by it.
24. The Noticee shall pay the said amount of penalty by way of demand draft 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 should be forwarded to Mr. Prasanta Mahapatra , Deputy General Manager, MIRSD-4, Securities and Exchange Board of India, SEBI Bhavan, Plot No.C4-A, "G" Block, Bandra Kurla Complex, Bandra (East), Mumbai-400 051.
25. In terms of Rule 6 of the Adjudication Rules, copies of this order are sent to the Noticee and also to the Securities and Exchange Board of India.

Date: **June 24, 2010**

Place: **Mumbai**

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ADJUDICATING OFFICER