BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. Order/BS/2022-23/20864]

UNDER SECTION 15-I OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992, READ WITH RULE 4 OF SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995

In respect of:

KIFS Commodities Private Limited

In the matter of

KIFS Commodities Private Limited

(now amalgamated with KIFS Trade Capital Private Ltd.)

BACKGROUND:

1. Securities and Exchange Board of India (hereinafter referred to as **SEBI**) conducted a joint inspection, with MCX and NCDEX, of KIFS Commodities Private Ltd. (hereinafter referred to as **"Noticee"**). Pursuant to the said inspection, it was observed that several provisions of the securities laws were violated by the Noticee, which warrant enforcement action against it. Therefore, SEBI initiated adjudication proceedings against the Noticee vide Show Cause Notice dated April 07, 2022, as required by SEBI (Procedure For Holding Inquiry And Imposing Penalties) Rules, 1995 for alleged violation of the provisions of the below mentioned SEBI circulars:

    i. Clause 12(e) of the SEBI Circular SEBI/MIRSD/SE/Cir-19/2009 dated December 03,2009 (hereinafter referred to as "**2009 Circular**");

ii. Clause 2.6 of Annexure of the SEBI Circular SEBI/HO/MIRSD/MIRSD2/CIR/P/2016/95 dated September 26, 2016 (hereinafter referred to as **"2016 Circular"**) read with Clause 2(d) of the SEBI Circular CIR/HO/MIRSD/MIRSD2/CIR/P/2017/64 dated June 22, 2017 (hereinafter referred to as **"2017 Circular"**);

iii. Clause 3.2 of Annexure of the 2016 Circular;

iv. Clause 8.1 of Annexure of the 2016 Circular.

APPOINTMENT OF ADJUDICATING OFFICER

2. SEBI, vide communique dated August 06, 2021 appointed undersigned as the Adjudicating Officer under Section 19 of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act, 1992'**) r/w Section 15-I of the SEBI Act, 1992 and Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter referred to as '**Adjudication Rules'**) to inquire into and adjudge under section 15HB of the SEBI Act,1992, and for the alleged violation of the provisions of the below mentioned SEBI circulars:

i. Clause 12(e) of the SEBI Circular SEBI/MIRSD/SE/CIR-19/2009 dated December 03,2009 (hereinafter referred to as "**2009 Circular"**);

ii. Clause 2.6 of Annexure of the SEBI Circular SEBI/HO/MIRSD/MIRSD2/CIR/P/2016/95 dated September 26, 2016 (hereinafter referred to as **"2016 Circular"**) r/w Clause 2(d) of the SEBI Circular CIR/HO/MIRSD/MIRSD2/CIR/P/2017/64 dated June 22, 2017 (hereinafter referred to as **"2017 Circular"**);

iii. Clause 3.2 of Annexure of the 2016 Circular;

iv. Clause 8.1 of Annexure of the 2016 Circular.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

3. A Show Cause Notice No. SEBI/HO/EFD-2/BS/PG/15526/2022/1 (hereinafter referred to as **"SCN"**) dated April 07, 2022 was issued to the Noticee under Rule 4(1) of the Adjudication Rules calling upon them to show cause as to why an inquiry should not be held against them in terms of Rule 4 of Adjudication Rules read with Section 15-I of the SEBI Act, 1992 and why penalty, if any should not be imposed under Section 15HB of the SEBI Act, 1992 for the violations alleged to have been committed by the Noticee.

4. From the documents available on records, it is noted that the SCN issued to Noticee, was sent on their last known address through Speed Post and Email. However, the SCN remained undelivered on the Noticee. Subsequently, the SCN was delivered and acknowledged by KIFS Trade Capital Private Ltd., a related entity of the Noticee. The SCN, inter-alia alleged the following:

    i. On inspection of Accounts of the Noticee, it was observed that in 8 out of 400 sample instances, accounts were not settled on monthly/quarterly basis as per preference given by the clients. Moreover it was also observed that the gap of two settlements was more than 90 days in 90 out of 400 instances.

    ii. It was also observed that the Noticee had not settled the accounts of the Inactive Clients and same credit balance of the clients remained outstanding for at least two consecutive quarters which in turn means that client remained inactive but account is still not settled.

iii. The Inspection team also found discrepancies in respect of funding of Clients. It was observed that 2 out of 25 sample clients were granted exposure beyond T+2+5 days for amount ranging from Rs. 2.71 Lakh to 34.54 Lakhs. The total funding exposure was found to be Rs. 37,26,374/- and thus the Noticee has granted further exposure to its clients despite running debit balances beyond fifth trading day, as reckoned from the date of pay in.

iv. During inspection the number of bank accounts and Demat accounts required to be reported to exchange were also verified for the month of March, October and December 2019 and it was observed that there had been incorrect reporting of weekly enhanced data to stock exchange by the Noticee. The below mentioned Table shows mismatch between the client fund balances reported:

Date	Client name	Pan	Reported Balance Rs	Actual Trading Balance (w/o Margin)	Differences
Oct 31, 2019	KHANDAWALA ENTERPRISE PVT LTD	AACCK4330	72,932.5		72,932.5
Oct 31, 2019	KHANDALA FINSTOCK PVT LTD	AAACK6129R	1,51,22,861	2,14,06,06,598	62,83,737

5. In reply to SCN, the Noticee submitted the letter dated June 28, 2022 received by SEBI. Vide the said letter, the Noticee submitted as under:-

   a) That the Noticee has been merged with KIFS Trade Capital Private Limited on 06.09.2019 and has therefore ceased to exist from the said date. So effectively the Noticee was non-existent on April 07, 2022 i.e. the date on which the SCN was issued and in light of same, the proceeding may be dropped and aborted without going into the merit of case.

   b) Further the Noticee draws attention towards order of Hon'ble SAT in appeal No. 612 of 2019 filed by Glint Infra Projects Private Limited and relying on the same the Noticee claims that from the date of Amalgamation Noticee ceases to exist , therefore the proceeding ought to be dropped and aborted.

   c) That non settlement of 4 active clients in 8 instances in respect of same 3 clients viz, 0K500, K100 and MUM700 were already settled on the respective dates by transferring funds to their bank accounts, but due to technical issues in their back – office software the retention reports were not generated.

   d) For 0K500 viz. Khandwala Tradelink Company, as per company policy, the settlement was carried out at the end of every quarter, as on June 30, 2018 the client had Nil balance and hence account was deemed to be settled and due to technical issues in their back office software, the retention reports were not generated and sent to client.

   e) That for K100 viz. Khandwala Enterprise Private Limited the Settlement was done on December 31, 2019 where Rs. 4709326.46 Lakh was transferred to client's account, but due to technical issues in their back – office software the retention reports were not generated.

   f) That for MUM700 viz. Ritesh Anand Ashar, for June 2018 quarter, the settlement was done on June 29, 2018 and June 30, 2018 where Rs. 20

Lakh and Rs. 463116/- was transferred to Client's account. However without knowledge, the client deposited Rs. 17,77,000/- through cheque in Noticee's account for further trading and exposure but unfortunately the cheque got cleared on the same date of the settlement but due to technical issues in their back – office software the retention reports were not generated.

g) With respect to non –settlement of client code V01, Vivek Lakshminath Mehrotra for the quarters ended Sept-18, Dec-18, March -19 and June -19, Noticee submitted that the client was not traceable, hence his funds amounting to Rs. 880329/- has been transferred to a separate bank account on March 28, 2020 in accordance with MCX Guidelines issued in February 2020.

h) That the Noticee claims that they have regularly carried out settlements of clients on quarterly basis on the preference of the clients and the gap between two settlements arose only due to either bank holiday or weekend. It can be observed that the gap is not more than 4 days between two settlements. The Noticee also submits that delay in settlement was purely unintentional.

i) With respect to inactive client, their bank details had changed. After a lot of follow up with the clients Noticee could get their correct bank details and accordingly the funds were transferred through NEFT to their respective new bank accounts.

CONSIDERATION OF ISSUES AND FINDINGS

6. I have taken into consideration the facts and circumstances of the case and the materials available on record. The representatives of the Noticee has taken a preliminary objection, that the Noticee has been merged with another entity viz., KIFS Trade Capital Private Ltd., w.e.f. September 6, 2019, and therefore, is not in existence as on date. I intend to deal with this preliminary issue at the outset.

7. Under the Companies Act, 2013, 'Merger' is envisaged as a combination of two or more entities into one. The Hon'ble Supreme Court in a catena of cases have dealt with the legal implications and consequences of amalgamation and merger of a company into another company or entity.
8. In *Singer India Ltd. v. Chander Mohan Chadha* [(2004) Supp. (3) SCR 535], the apex court has held that when two companies amalgamate and merge into one, the transferor company loses its identity as it ceases to have its business. However, their respective rights and liabilities are determined under the scheme of amalgamation.
9. In *Saraswati Industrial Syndicate Ltd. v. CIT* [AIR 1991 SC 70], the Hon'ble Supreme Court has held that the amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which is to carry on the business of the amalgamated undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. The true effect and character of the amalgamation largely depends on the terms of the scheme of merger.
10. Therefore, as can be deciphered from the above legal authorities, a company loses its existence upon being merged into another entity. However, the aftermath of the corporate restructuring process would depend upon the scheme of the amalgamation, as approved by the competent authority under the law. Therefore, the scheme of amalgamation (hereinafter referred to as the Scheme) was sought from KIFS Trade Capital Private Ltd.
11. On perusal of the of the clauses of the said Scheme, it can be seen that the liability of the Noticee has been transferred to the KIFS Trade Capital Private Ltd. pursuant to Clauses 3.9(b), 3.9(e), 5.2(g) and 5.2(m). the relevant Clauses are reproduced below:

    3.9 "Undertaking" means and includes the whole undertaking and entire business of the Transferor Company as a going concern, including, without limitation: (a)…..

(b)- all permissions, approvals, consents, subsidies, privileges, income tax benefits and exemptions, accumulated tax losses, unabsorbed depreciation, minimum alternate tax credits, indirect tax benefits and exemptions, all other rights, benefits and liabilities related thereto including licenses, powers and facilities of every kind, nature and description whatsoever, provisions and benefits of all agreements, contracts and arrangements and all other interests in connection with or relating to the Transferor Company;

……………

(e)- all liabilities, lien or security thereon, whether in Indian rupees or foreign currency and whether or not provided for in the books of account or disclosed in the balance sheet of the Transferor Company;

5.2 Without prejudice to the generality of Clause 5.1 above, upon the coming into effect of the Scheme and with effect from the Appointed Date:-

……..

(g)- All permissions, approvals, consents, subsidies, incentives, privileges, income tax benefits and exemptions, indirect tax benefits and exemptions, all other rights, benefits and liabilities related thereto, licenses, powers and facilities of every kind, nature and description whatsoever, provisions and benefits of all agreements, contracts and arrangements and all other interests in connection with or relating to the Transferor Company enjoyed or conferred upon or held or availed of by the Transferor Company and all rights and benefits that have accrued or which may accrue to the Transferor Company, whether on, before or after the Appointed Date, if any, shall, under the provisions of Sections 230 to 232 of the 2013 Act, and all other provisions of applicable law, if any, without any further act, instrument or deed, cost or charge and without any notice or other intimation to any third party for the transfer of the same be and stand transferred to and vested in and/or be deemed to be transferred to and vested in the Transferee

Company as a part of the transfer of the Undertaking as a going concern, so as to become, as and from the Appointed Date, the permissions, approvals, consents, subsidies, privileges, income tax benefits and exemptions, indirect tax benefits and exemptions, all other rights, benefits and liabilities related thereto, licenses, powers and facilities of every kind, nature and description whatsoever, provisions and benefits of all agreements, contracts and arrangements, of the Transferee Company and shall remain valid, effective and enforceable on the same terms and conditions. It is further clarified that they shall be deemed to have originally been given by, issued to or executed in favour of the Transferee Company, and the Transferee Company shall be bound by the terms thereof and the obligations and duties there under, and the rights and benefits under the same shall be available to the Transferee Company.

(m)- All statutory rights and obligations of Transferor Company would vest on/accrue to Transferee Company. Hence, obligation of the Transferor Company, prior to the Effective Date, to issue or receive any statutory declaration or any other Forms by whatever name called, under the State VAT Acts or the Central Sales Tax Act or Central and/or State Goods and Services Tax Act or any other act for the time being in force, would be deemed to have been fulfilled if they are issued or received by Transferee Company and if any Form relatable to the period prior to the said Effective Date is received in the name of the Transferor Company, it would be deemed to have been received by the Transferee Company in fulfilment of its obligations.

12. It can be deciphered from the above reproduced clauses that all statutory rights and obligations of the Noticee have been accrued on KIFS Trade Capital Private Ltd, which is the successor of the Noticee. Moreover, in its recent decision in *Principal Commissioner of Income Tax v. Mahagun Realtors (P) Ltd.* [SLP (C) No. 4063 of 2020], the Hon'ble Supreme Court has held that in case of an amalgamation, the business-including the rights, assets and liabilities of the transferor company do not cease, but continue as that of the transferee company.

13. On the basis of the aforesaid legal authorities and the facts placed before me, I find that though the Noticee company has been amalgamated with KIFS Trade Capital Private Ltd. the liability of the successor company would continue in terms of the provisions of the scheme. Therefore, I do not find any merit in the preliminary objection raised by the Noitcee and proceed to consider the allegations in a the SCN.

Non-Settlement of Client Accounts

14. On inspection of record of the Noticee, three different sets of discrepancies were noticed with respect to the settlement of the accounts of the clients, as mandated under Clause 12(e) of the SEBI Circular No. SEBI/MIRSD/SE/Cir-19/2009 dated December 2009.

15. Firstly, it was observed that in 8 out of 400 sample instances, accounts were not settled on monthly/quarterly basis as per preference given by the clients. Secondly, it was also observed that the gap of two settlements was more than 90 days in 90 out of 400 instances. Thirdly, it was observed that the Noticee had not settled the accounts of the Inactive Clients and same credit balance of the clients remained outstanding for at least consecutive quarters, which in turn means that client remained inactive but account is still not settled.

16. With respect to the 8 instances wherein the accounts of the clients were not settled on monthly/quarterly basis, as per the preference given by the clients, the Noticee has submitted that the accounts of the clients were settled on the respective dates by transferring funds to their bank accounts. The Noticee also produced the client ledger in support of the said claim. It was further submitted by the Noticee that though the funds were settled, due to some technical issues in their bank-office software, the retention reports were not generated. However, the Noticee has not satisfactorily explained the nature of the software

glitch that led to the discrepancy. Nevertheless, on perusal of the ledger and the accompanying bank statements, submitted by the Noticee, I am satisfied that the accounts of the clients were settled but the retention statements were neither generated nor sent to the clients.

17. Also, with respect to the 90 instances where the gap of two settlements was more than 90 days, the Noticee has submitted that the the clients were having debit balance as on the date of settlement and hence, according to the exchange guidelines, the accounts were deemed settled. Furthermore, the Noticee has submitted that wherever there was delay in settlement, the gap between two settlements is not more than 4 days. I have perused the ledger and bank documents submitted along with the reply and is satisfied that the delay, if any, was not substantial.

18. Therefore, I drop the aforesaid charges alleged in the SCN, as against the Noticee.

Funding of the Clients

19. During the course of the inspection, it was observed that 2 out of 25 sample clients were granted exposure beyond T+2+5 days for amount ranging from Rs. 2.71 Lakh to 34.54 Lakhs. The total funding exposure was found to be Rs. 37,26,374/- and thus the Noticee has granted further exposure to its clients despite running debit balances beyond fifty trading day, as reckoned from the date of pay in, in violation of SEBI Circular No. SEBI/HO/MIRSD/MIRSD2/CIR/P/2016/95 dated September 26, 2016, and SEBI/HO/MIRSD/MIRSD2/CIR/P/2016/138 dated December 20, 2016, which were clarified vide SEBI Circular No. CIR/HO/MIRSD/MIRSD2/CIR/P/2017/64 dated June 22, 2017.

20. With respect to the above allegation, the Noticee has replied that it was the internal practice of the Noticee that the MTM debit is always posted in the client ledger and due to which the ledger balance goes in debit. It was also contended by the Noticee that the respective clients held securities worth much more than the debit amount.

21. The Clause 2.6 of the 2016 Circular categorically provides that "Stock brokers shall not grant further exposure to the clients when debit balances arise out of client's failure to pay the required amount and such debit balances continues beyond the fifth trading day, as reckoned from date of pay-in. The only exception provided for enabling additional exposure is through the margin trading facility, propounded by SEBI.

22. The justification provided by the Noticee do not satisfy the conditions mandated under the Ciruclar. The provisions of the circular do not allow any deviation from the restriction for funding beyond the prescribed threshold period, on the basis of the securities standing to the credit of the clients, with the broker. Furthermore, the reply of the Noticee clearly points out that it has failed to align its internal practices in tune with the SEBI circulars, which have the force of the law. Therefore, in light of the above, I hold that the Noticee has granted further exposure to its clients despite running debit balances beyond fifty trading day, as reckoned from the date of pay in, in violation of SEBI Circular No. SEBI/HO/MIRSD/MIRSD2/CIR/P/2016/95 dated September 26, 2016, and SEBI/HO/MIRSD/MIRSD2/CIR/P/2016/138 dated December 20, 2016, which were clarified vide SEBI Circular No. CIR/HO/MIRSD/MIRSD2/CIR/P/2017/64 dated June 22, 2017.

Incorrect Reporting of Weekly Enhanced Supervision Data

23. During inspection, the number of bank accounts and demat accounts required to be reported to exchange were also verified, for the month of March, October and December, 2019. Pursuant to the inspection, it was observed that there had been incorrect reporting of weekly enhanced data to stock exchange by the Noticee, in violation of Clause 3.2 of the SEBI Circular No. SEBI/HO/MIRSD/MIRSD2/CIR/P/2016/95 dated September 26, 2016.
24. With respect to the aforesaid allegation, the Noticee submitted that they had allotted certain sub-codes, apart from the client code, for the

clients, in order to monitor their arbitrage trading activities. According to the Noticee, due to some technical issue in back office at that time, balance of those sub-codes were not considered properly, in the monthly enhanced supervision report submitted to the exchange.

25. The provisions of the 2016 Circular do not permit any sub categorisation of the client codes. The Clause 3.1 of the circular clearly provides that the enhance reporting requirements under the Clause 3.2 are meant to devise a proper mechanism to generate alerts on any misuse of clients' funds by stock brokers. On perusal of the reply submitted by the Noticee, it is evident that the classification mechanism adopted by the Noticee is not in consonance with the objective of the circular. Furthermore, the notice itself has admitted that mismatch has arisen because of its lack of due diligence. Therefore, there are sufficient materials on record to conclude that the Noticee has resorted to incorrect reporting of weekly enhanced data to stock exchange, in violation of Clause 3.2 of the SEBI Circular No. SEBI/HO/MIRSD/MIRSD2/CIR/P/2016/95 dated September 26, 2016.

26. In view of the same, I am convinced that it is a fit case for imposition of monetary penalty on the Noticee under the provisions of section 15HB of the SEBI Act, 1992 and in terms of the Hon'ble Supreme Court of India in the matter of *Chairman, SEBI Vs Shriram Mutual Fund* {[2006]5 SCC 361}in which Hon'ble Supreme Court has held that "In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant..............."

The provisions of Section 15 HB of the SEBI Act, 1992 read as under:

Penalty for contravention where no separate penalty has been provided. 15HB.

Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees.]

27. While determining the quantum of penalty under sections 15 HB of the SEBI Act, 1992, it is important to consider the factors stipulated in section 15J of SEBI Act, which reads as under:-

    15J - Factors to be taken into account by the adjudicating officer
    While adjudging 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, 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."

28. I find that the Noticee, being a registered intermediary is required to comply with the various Circulars and Regulations as laid down by the SEBI, with objective of promoting prudential norms for protecting the investors in the securities market. The very purpose of the said provisions is to deter wrong doing and promote ethical conduct in the securities market. I note that the Noticee has remedied the lapses in certain cases, post-inspection by SEBI, however, such non-compliance, unearthed during time of of inspection deserves and attracts penalty. Nevertheless, I am inclined to take a lenient view in the matter considering the conduct of the noticee.

ORDER

29. In exercise of the powers conferred under Section15 I of the SEBI Act, 1992, and Rule 5 of Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995, I, impose a penalty of Rs. 2,00, 000 (Rupees Two Lakhs Only) on Noticee in terms of the provisions of Section 15HB of SEBI Act, 1992. In the facts and circumstances of the case. I am of the view that the said penalty is commensurate with the violations committed by Noticee.

30. The Noticee shall remit / pay the said amount of penalty within 45 days of Receipt of this order either by way of Demand Draft in favour of "SEBI -Penalties Remittable to Government of India", payable at Mumbai, OR through online payment facility available on the website of SEBI, i.e. www.sebi.gov.in on the following path, by clicking on the payment link: ENFORCEMENT Orders> Orders of AO> PAY NOW

31. The Noticees shall forward said Demand Draft or the details / confirmation of penalty so paid to the "The Division Chief, Division of Regulatory Action-3, Enforcement Department (EFD1 – DRA 3), Securities and Exchange Board of India, SEBI Bhavan, Plot No. C –4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai –400 051". Noticees shall provide the following details while forwarding DD/ payment information:

a) Name and PAN of the entity
b) Name of the case / matter
c) Purpose of Payment – Payment of penalty under AO proceedings
d) Bank Name and Account Number
e) Transaction Number

32. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this Order, recovery proceedings may be initiated

under Section 28A of the Securities and Exchange Board of India Act, 1992 for realization of the said amount of penalty along with interest thereon, inter alia, by attachment and sale of movable and immovable properties

33. In terms of the provisions of Rule 6 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995, a copy of this order is being sent to KIFS Commodities Private Limited (now amalgamated with KIFS Trade Capital Private Limited) and also, to the Securities and Exchange Board of India, Mumbai.

Place: Mumbai **BIJU S**

Date: October 31, 2022 **ADJUDICATING OFFICER**

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