

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 44 of 2011

Date of decision: 29.07.2011

Naimish K. Shah
206, Kalash I,
Near Jain Temple,
Navrangpura,
Ahmedabad – 380 008.

..... Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai – 400 051.

..... Respondent

Mr. Deepak Dhane, Advocate for the Appellant.

Dr. Poornima Advani, Advocate with Mr. Ajay Khaire, Mr. Angshuman Kaushik,
Advocates for the Respondent.

CORAM : P. K. Malhotra, Member
S.S.N. Moorthy, Member

Per : P. K. Malhotra, Member

The Short question that arises for our consideration in this appeal is whether the appellant has violated the provisions of Section 11C(2) & (3) of the Securities and Exchange Board of India Act, 1992 (the Act) by not furnishing the information called for by the Securities and Exchange Board of India (the Board) Facts of the case, in brief, are as under.

2. The Board received a communication from the Income Tax Department alongwith a note on survey action in the case of Tripex Overseas Limited, Ahmedabad (for short the company) which alleged certain violations on the part of the company relating to provisions of Securities Contract (Regulations) Act 1956, the Securities and Exchange Board of India Act, 1992 (the Act) and the regulations/guidelines issued thereunder. The Board conducted investigations into the scrip of the company for the period from April 1, 2006 to June 16, 2007.

It was noted by the Board that the appellant was the auditor of the company during the relevant period. The Board addressed a letter dated October 6, 2008 to the appellant informing him that the Board is investigating the alleged violation by the company and asked him to furnish certain clarification/information. The said letter reads as under:-

“Sub.: Tripex Overseas Ltd.

SEBI is investigating the alleged violation of the SEBI Rules, Regulations and guidelines by the captioned company. While scrutinizing the information received in the said matter we have come across certain irregularities relating to the accounts and financial statement of the company. Considering the irregularities, it portrays a misleading picture of the company and its financial statements and whether the financial statement presents a true and fair view of the affairs of the company. In this regard we would like to have certain clarification and information from you.

1. Please furnish a copy of audited financial statement with your comments on the same for the financial year 2005-06, 2006-07.
2. Please furnish a copy of the report under CARO 2003 for the above period with your comments on the same.
3. The company has reportedly claimed depreciation of Rs.2.94 Crores on assets that were not in its possession. Please provide depreciation chart for Income Tax and Companies Act for the said period showing addition and deletion of each item along with calculation of depreciation.
4. The company had made several corporate announcements including mergers and acquisition. Whether these materialized. Also provide your comments on the swap ratio arrived at for the purpose of merger.
5. It was observed that the company did not have required capacity to produce the reported quantity of sale.
6. Any other information that will be useful in the course of investigation.

Please furnish the above information positively by October 20, 2008.”

Since no reply was received by the Board, a reminder dated December 10, 2008 alongwith copy of the letter dated October 6, 2008 was sent to the appellant asking him to reply latest by December 15, 2008. In response to the letter dated October 10, 2008, the appellant sought time to file his reply by January 15, 2009. In the said letter the appellant also stated that he had not received the Board's letter dated October 6, 2008. However, no reply was furnished by the appellant within the time sought by him. Thereafter, the Board issued summons under Section 11C of the Act asking the appellant to provide the document/information

by January 29, 2009 and also asked him to appear in person on February 5, 2009.

In response to the said summons, the appellant, vide its letter dated February 2, 2009, responded to the six points as under:-

- “(1) Audited Financial Statements of Tripex Overseas Ltd. for the years 2005-06 and 2006-07 are not available with me. I have already given all the statements to party concern. From F.y.2007-08 and onwards I am not the Auditor of the Company, which please note.
- (2) A copy of Reports under Caro-2003 are not available with me.
- (3) I am not looking the Income Tax matters of the company so these Details are not available with me.
- (4) I am not knowing anything regarding acquisition and mergers. As it is the personal matter of the company, which please note.
- (5) I have nothing to say about Income-Tax matters.
- (6) There is no other information available with me which will be Useful in the course of investigation.”

The reply furnished by the appellant was not found satisfactory by the Board because documents called for were not made available. It issued another letter dated February 9, 2009, asking the appellant to appear in person on February 17, 2009. Vide its letter dated February 18, 2009, the appellant again sought time for personal appearance. However, he again failed to appear before the Board. The Board then issued notice dated December 22, 2009, under Rule 4(1) of the Securities and Exchange Board of India (Procedure for Holding Enquiry and Imposing Penalties by the Adjudicating Officer) Regulations, 1995. It is only in response to the said notice that, for the first time, the appellant submitted certain documents alongwith his letter dated January 11, 2010 which reads as under:-

- “1. I am submitting herewith Annual Financial Statements for F.Y. 2005-2006 with Comments. I have no records for F.Y. 2006-2007 So I believe that I have not Audited the Financial Statements for F.Y. 2006-2007 and hence not submitting To you.
2. A copy of Report under CARO 2003, for F.Y. 2005-2006 is submitting herewith.
3. The particulars regarding Depreciation is not available with me.
4. Regarding Corporate announcements including mergers and acquisition, I have Not any instructions or materials for that matter, so I am not in a position to Say anything in this matter.

5. I have no comments for capacity of production with sales figure for F.Y. 2005-2006.
6. I am submitting herewith Xerox copy of my PAN card.”

Further, during the course of inquiry and in his statement recorded on July 29, 2010, it is for the first time the appellant stated that he has not audited the financial statements of the company for the financial year 2006-07 onward.

3. The adjudicating officer, after considering the response received from the appellant and the material on record, came to the conclusion that the appellant did not comply with the summons issued to him by the investigating authority. He, therefore, found the appellant guilty of violating the provisions of Sections 11C(2) and (3) of the Act and by his order dated January 11, 2011 imposed a penalty of ₹ 5 lakhs under Section 15A(a) of the Act. It is against this order that the present appeal has been filed.

4. We have heard learned counsel for the parties who have taken us through the records. At the outset, learned counsel for the appellant objected to the affidavit in reply filed on behalf of the respondent on the ground that new allegations of connivance/knowledge of the auditor and its active participation in fabricating the financial results of the company have been made. According to him, such allegations are not part of the show cause notice and hence the affidavit-in-reply should not be taken on record. We have perused the affidavit-in-reply. It gives a gist of the background in which it became necessary to conduct an investigation into affairs of the company. With a view to facilitate the investigation conducted by the Board against the company, the appellant was asked to furnish the information. The affidavit narrates the background in which the summons were issued to the appellant calling for the information and asking for his personal appearance. It was made clear that affidavit-in-reply will be looked into only with regard to the violations alleged in the show cause notice and nothing beyond that.

5. There is no denying the fact that no information called for by the Board was provided by the appellant before the issue of show cause notice on

December 22, 2009. The appellant has contradicted his own statement in various communications. In his letter dated February 11, 2009, the appellant submitted that the financial statements of the company for the year 2005-06 and 2006-07 were not available with him. In his letter dated June 8, 2009, the appellant submitted that he had audited the accounts of the company for the financial year 2005-06 and 2006-07 but did not furnish the required documents. In his reply dated January 11, 2010, he submitted the audited accounts for the year 2005-06 but stated that “I believe that I have not audited the financial statements for FY 2006-07 and hence not submitting the same to you”. The adjudicating officer observed that in his earlier communication, he denied having audited financial statements for the year 2005-06 with him but later, on receipt of the summons, he submitted the same. The adjudicating officer further observed that the information regarding financial statements of the company, the CARO 2003 report and other details about the company were crucial to facilitate investigation into the activities of the company. Since the information was not forthcoming from the company, the same was called for from the appellant who was the auditor of the company at the relevant time. The company was suspected to be engaged in fraudulent practices on a large scale and the information in possession of the appellant was extremely important in determining the state of affairs within the company. The investigations were closed on September 9, 2009 and it is only thereafter and that too on receipt of summons for holding inquiry against the appellant that a part of information was furnished by him. The information furnished by the appellant was belated, incomplete and was received after conclusion of the investigation and only after the show cause notice was served on him. It needs to be appreciated that the Board, as a market regulator, cannot perform its duties in accordance with law if the market players do not cooperate with it. Non furnishing of information and documents in response to the summons issued by the Board is indeed a serious wrong and cannot be taken lightly. We, therefore, cannot find any fault with the action taken by the Board in the impugned order. We, therefore, answer the issue formulated above in the affirmative. Section 15A(a) of the Act provides that any person who is required

under the Act or any rules or regulations made thereunder to furnish any document, return or report to the Board fails to do so shall be liable to a penalty of ₹ 1 lakh for each day during which such failure continues or ₹ 1 crore, whichever is less. Information was first sought from the appellant on October 6, 2008 and only a part of it was furnished on January 11, 2010 and that too after the closure of the investigation and issuance of the show cause notice. We are, therefore, satisfied that the adjudicating officer was justified in imposing the penalty of ₹ 5 lakhs on the appellant.

For the reasons stated above, we do not find any merit in the appeal and the same is dismissed with no order as to costs.

Sd/-
P. K. Malhotra
Member

Sd/-
S. S. N. Moorthy
Member

29.07.2011
Prepared & Compared by
ptm