

ADJUDICATION ORDER NO. BS/AO- 60/2008

ORDER UNDER SECTION 23 I OF SECURITIES CONTRACTS (REGULATION) ACT, 1956 READ WITH RULE 4 OF SECURITIES CONTRACTS (REGULATION) (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 2005 IN THE MATTER OF ADJUDICATION PROCEEDINGS AGAINST INDIAN OIL CORPORATION LIMITED.

1. Securities and Exchange Board of India (hereinafter referred to as 'SEBI') vide order dated September 05, 2007 initiated adjudication proceedings against the Indian Oil Corporation Limited (hereinafter referred to as "the noticee") and I was appointed as the Adjudicating Officer to inquire into and adjudge under Section 23I read with Section 23E of the Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as SCRA) the violation of Section 21 of SCRA alleged to have been committed by the noticee on account its failure to comply with provisions of the listing agreement with the Stock Exchanges.

FACTS OF THE CASE

2. SEBI vide circular SEBI/CFD/DIL/CG/1/2004/12/10 dated October 29, 2004 had directed the stock exchanges to amend the listing agreement by replacing the existing Clause 49 with the revised Clause 49. The listed companies were required to comply with the requirements of the revised Clause 49 and also to submit a quarterly compliance report to the Stock Exchanges within 15 days from the end of every quarter in terms of the said circular.
3. The noticee is a company and its shares are listed on Bombay Stock Exchange Limited and National Stock Exchange of India Limited. It was noted from the quarterly compliance report submitted by the noticee to the stock exchanges that the noticee failed to comply with the requirements of Clause 49 1 (A) of listing agreement with regard to the

appointment of requisite number of independent directors on the Board of the noticee in respect of the quarters ended March 2006, June 2006, September 2006, December 2006 and March 2007. In view of the alleged failure on the part of the noticee to comply with the provisions of Clause 49 1(A) of the listing agreement, adjudication proceedings were initiated in terms of provisions of Section 23 I of the SCRA.

NOTICE AND REPLY

4. A Show Cause Notice (hereinafter referred to as 'SCN') A&E/BS/CG 3/2007 dated September 28, 2007 was issued to the noticee in terms of the provisions of Rule 4 of Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 2005 (hereinafter referred to as the Rules), requiring the noticee to show cause as to why an inquiry should not be held for the violation alleged to have been committed by the noticee.
5. The noticee vide its letter dated October 16, 2007 replied to the show cause notice and made submissions. Considering the submissions made by the noticee, it was decided to conduct an inquiry in the matter. In this regard, the noticee was advised to attend the hearing on October 23, 2008. Shri. Raju Ranganathan Company Secretary attended the hearing on behalf of the noticee and made the submissions. Further, additional reply dated October 23, 2008 was also filed by the noticee and the same is taken on record.

CONSIDERATION OF EVIDENCE

6. I have taken into consideration the facts and circumstances of the case, the written submissions advanced on behalf of the noticee, the material available on record including the documents relied upon by the noticee.

7. The noticee is alleged to have violated Clause 49 1(A) of the listing agreement with the Stock Exchanges in respect of the appointment of requisite number of independent directors in the Board of Directors of the noticee. The text of the said clause states the following -

LISTING AGREEMENT

49 - Corporate Governance

The company agrees to comply with the following provisions:

I. Board of Directors

(A) Composition of Board

- (i) The Board of directors of the company shall have an optimum combination of executive and non-executive directors with not less than fifty per cent of the board of directors comprising of non-executive directors.***
- (ii) Where the Chairman of the Board is a non-executive director, at least one-third of the Board should comprise of independent directors and in case he is an executive director, at least half of the Board should comprise of independent directors.***
- (iii) For the purpose of the sub-clause (ii), the expression 'independent director' shall mean a non-executive director of the company who:***
 - a. apart from receiving director's remuneration, does not have any material pecuniary relationships or transactions with the company, its promoters, its directors, its senior management or its holding company, its subsidiaries and associates which may affect independence of the director;***
 - b. is not related to promoters or persons occupying management positions at the board level or at one level below the board;***
 - c. has not been an executive of the company in the immediately preceding three financial years;***

- d. *is not a partner or an executive or was not partner or an executive during the preceding three years, of any of the following:*
 - (i) *the statutory audit firm or the internal audit firm that is associated with the company, and*
 - (ii) *the legal firm(s) and consulting firm(s) that have a material association with the company.*
- e. *is not a material supplier, service provider or customer or a lessor or lessee of the company, which may affect independence of the director; and*
- f. *is not a substantial shareholder of the company i.e. owning two per cent or more of the block of voting shares.*

Explanation - For the purposes of the sub-clause (iii):

- a. *“Associate” shall mean a company which is an “associate” as defined in Accounting Standard (AS) 23, “Accounting for Investments in Associates in Consolidated Financial Statements”, issued by the Institute of Chartered Accountants of India.*
- b. *“Senior management” shall mean personnel of the company who are members of its core management team excluding Board of Directors. Normally, this would comprise all members of management one level below the executive directors, including all functional heads.*
- c. *“Relative” shall mean “relative” as defined in section 2(41) and section 6 read with Schedule IA of the Companies Act, 1956.*
- (iv) *Nominee directors appointed by an institution which has invested in or lent to the company shall be deemed to be independent directors.*

Explanation: “ ‘Institution’ for this purpose means a public financial institution as defined in section 4A of the Companies Act, 1956 or a ‘corresponding new bank’ as defined in section 2(d) of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 or the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 both Acts.”

8. As per clause 49 1 (A) of the listing agreement, the Board of Directors of the company shall have an optimum combination of executive and non-executive directors with not less than fifty percent of the Board of Directors comprising of non-executive directors. It is further provided that where the chairman of the board is a non-executive director, at least one-third of the Board should comprise of independent directors and in case he is an executive director, at least half of the Board should comprise of independent directors.

9. On verification of the quarterly compliance reports submitted by the noticee, it was noted that the noticee did not adhere to the requirements of Clause 49 1 (A) of listing agreement for the quarters ended March 2006, June 2006, September 2006, December 2006 and March 2007.

10. In this regard, the noticee has made the following submissions in respect of the show cause notice issued to it-
 - a. The company is a government Company under Section 617 of the Companies Act, 1956 wherein the President of India holds 80.35% of its share capital.
 - b. As per Article -94(a),(b) &(c) of the Articles of Association of Indian Oil, the President has the right to nominate all the Directors including Independent Directors on the Board of the Company.
 - c. In accordance with the Articles of Association of the company, any appointment of Board of Directors of the Company is to be made only by the President of India acting through Ministry of Petroleum and Natural Gas (MoP&NG).

- d. The Administrative Ministry MOP&NG is fully seized of the matter of appointment of requisite number of independent directors of the company and has initiated process for selecting independent directors and their consequent nomination.
- e. All endeavours are being made by the Company and its management to pursue the matter with Govt. Of India for expeditious appointment of requisite number of Independent Directors for Compliance of Clause 49 1(A).
- f. The power to nominate Directors including Independent Directors vests with the Govt. Of India through the Administrative Ministry MoP&NG after seeking prior approval of the Appointment Comiitee of cabinet. Therefore neither the company nor its Board of Directors have the power to make the appointment of Independent Directors on the Board of the company. The Company has been vigorously following-up with its administrative Ministry Mop&NG and the Chairman Indian Oil has been highlighting the need for compliance in this regard during deliberations at the highest level in the Administrative Ministry.
- g. It is submitted that the non-compliance of Clause 49 1(A) of the Listing Agreement by the Company is not deliberate and is beyond the control and powers of the company. Keeping in view the constraints of the Company in its inability to comply with the provisions of Clause 49I(A) of the Listing Agreement due to reasons beyond its control, the inquiry may not be further proceeded with. All endeavours are being made by the company and its management to pursue the matter with the Government of India for expeditious appointment of requisite number of Independent Directors for Compliance of Clause 49 I(A).

FINDINGS

11. The noticee is stated to be a Government Company under Section 617 of the Companies Act in which 80.35% of its equity is held by the President of India. On analysis of Article of Association of the noticee, it is noted that the power to appoint the directors of the noticee vests with the President of India.
12. It is noted from the submissions of the noticee that after coming into force of revised Clause 49 1 (A) of the listing agreement pursuant to Circular dated October 29, 2004 issued by SEBI, the noticee has requested the Ministry of Petroleum and Natural Gas, Government of India to appoint Independent Directors on the Board of the Company . Further, the noticee has been continuously following up the matter of appointment of Independent Directors on the Board of the noticee with the Ministry of Petroleum and Natural Gas, Government of India and requested the Ministry of Petroleum and Natural Gas to take necessary action for appointment of requisite number of Independent Directors on the Board of the noticee.
13. In view of the peculiar facts and circumstances and on the basis of evidence available on record, it is concluded that the failure on part of the noticee to adhere to the required number of independent directors on its Board in terms of the provisions of the listing agreement provided under SCRA was not deliberate or intentional. In this regard it is pertinent to note from the submissions of the noticee that it has been diligently submitting the quarterly corporate governance reports to the Stock Exchanges.
14. In view of the facts and circumstances of the case as detailed in the preceding paragraphs, it is concluded that the failure on the part of the noticee to adhere to the provisions of Clause 49 1 (A) of the listing agreement of SCRA during the impugned period was not on account of any deliberate commission or omission on the part of the noticee.

Further, the noticee has been following up with the Ministry of Petroleum and Natural Gas for the appointment of requisite number of the Independent Directors so that it can comply with Clause 49 1 (A) of the listing agreement and the Corporate Governance norms. Considering the facts and circumstances of the case, I find no reason to continue the inquiry against the noticee in terms of Rule 4 of Securities Contracts (Regulation) (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 2005. Accordingly, the adjudication proceedings against the noticee are disposed of.

PLACE : MUMBAI

BIJU. S

DATE : OCTOBER 31, 2008

ADJUDICATING OFFICER