BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Order Reserved on: 6.2.2014
Date of Decision: 19.2.2014

Appeal No. 84 of 2012

M/s. Keynote Corporate Services Ltd.
4th Floor, Balmer Lawrie Building, 5,
J.N. Heredia Marg, Ballard Estate,
Mumbai – 400001. …Appellant

Versus

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

Mr. Somasekhar Sundaresan, Advocate with Mr. Ravichandra Hegde, Advocate for the Appellant.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Mihir Mody and Mr. Pratham V. Masurekar, Advocate for the Respondent.

CORAM : Justice J. P. Devadhar, Presiding Officer
A S Lamba, Member

Per : A S Lamba, Member

The present appeal has been filed by Keynote Corporate Services Ltd. (hereinafter referred to as Appellant) against Securities and Exchange board of India (hereinafter referred to as SEBI), for being held violative of provisions of SEBI (Disclosure and Investor Protection) Guidelines, 2000 (hereinafter referred to as DIP Guidelines) read with SEBI (Issue of Capital and Disclosures Requirements) Regulations, 2009 (hereinafter referred as ICDR Regulations) by SEBI and in matter of Initial Public Offering (hereinafter to as IPO) of Edserv Softsystems Ltd. (hereinafter referred to as ESL) in 2009.

2. Appellant was Book Running Lead Manager (hereinafter referred to as BRLM or Merhant Banker), alongwith Ashika Capital Limited ("Ashika") as co-Book Running Lead Manager for IPO of ESL during 2009 and Resondent have held that Appellant failed to maintain satisfactory standards in all aspect of offering, veracity and adequacy of disclosures in prospectus of ESL, in their role as BRLM, and thus failed to exercise due diligence, since details of Inter-Corporate Deposits (ICDs) availed by ESL and purchase orders issued to certain entities by ESL, availed by ESL between January 12, 2009 to January 23, 2009 were not incorporated by Appellant in prospectus dated February 17, 2009 and filed on February 20, 2009 and hence Appellant failed to comply with clauses 5.1 (5.1.1, 5.1.2), 5.3.3.2 (ii) under chapter 5 of SEBI (DIP) Guidelines, 2000 read with Regulation 111 of SEBI (ICDR) Regulations, 2009.

3. BRLM is required to exercise due diligence at all stages of issue of IPO and after issue of IPO for post issue activities and following submissions were made by BRLM when show cause notice was issued to BRLM by Respondent for non compliance with due diligence requirement for its role in IPO issue of ESL.

4. Appellant denied that it had failed to exercise due diligence and maintain satisfactory standard in all aspects of offering, veracity and adequacy of disclosures in offer document.

5. Appellant has always complied with Rules and Regulations as laid down by SEBI from time to time and has an impeccable track record.

6. Regarding use of proceeds of IPO, purpose of IPO as mentioned by ESL in its offer document is a statement of fact and Appellant was not aware that ICDs of Rs.4 crores taken by ESL during the period January 20- February 05, 2009, as mentioned, and said information was not made available to Appellant by ESL. It is observed that ESL has informed investigation team that ICDs have been repaid

out of public issue proceeds and hence expenses mentioned be treated as if payments have been made through IPO proceeds. This information was not provided to Appellant by ESL.

7. RHP of ESL was dated January 19, 2009 and Appellant is not aware of any ICDs taken by ESL between Jan 20- Feb 11, 2009 as said information was not made available to Appellant by ESL. The RHP was filed by ESL with Registrar of Companies Chennai, Tamil Nadu. Though ESL has submitted certain information to investigation team, said information was never made available to Appellant. ESL and its management were under obligation to update the information and submit same to Appellant to enable it to incorporate same in RHP.

8. Purchase orders dated January 12, 2009 and January 23, 2009 were never made available to Appellant by ESL. ESL was bound to update information in RHP/Prospectus and it seems that said information was withheld from Appellant by ESL and Appellant cannot be held responsible for same.

9. Prospectus of ESL is dated February 17, 2009. As per regulations/ practice RHP needs to be updated giving complete information about price discovered through Book Building process and filling blanks in RHP. ESL, during period from January 19, 2009 till date of RHP i.e. till February 17, 2009 (or for that matter even till date) has not submitted any information as regards ICD/ purchase orders, etc. to Appellant, which seems to have been submitted to Investigating Authority. Statements made in RHP/ Prospectus are based on declarations given by Managing Director of ESL and the RHP as well as Prospectus have been approved and signed by all members of Board of Directors of ESL.

10. Though liability of merchant banker continues after completion of issue process, it may be in relation to disclosures/contents of offer document and not in

relation to acts or deeds of ESL after the completion of issue. It may be noted that Ashika capital Ltd. was acting as co-BRLM in the issue with a post-issue responsibility and co-ordination cast upon them.

11. Show Cause Notice has not established any violations committed by Appellant.

12. Appellant submitted that it was pre-issue BRLM in IPO of ESL while post issue BRLM was Ashika Capital Ltd. Appellant further submitted that in IPO of ESL RHP was filed on January 20, 2009 and final Prospectus was filed with ROC, Chennai on February 20, 2009. In between these two dates, ESL received ICDs from entities mentioned in SCN and no communication was received by Appellant from ESL for updating statements made in RHP. Appellant stated that he has already submitted copies of undertaking given by Directors of ESL that statements made in prospectus were true. Appellant also submitted that when he handles IPO, he carries out random checks to verify authenticity of entities mentioned in the prospectus and has submitted documents in support of same. Appellant submitted that in IPO of ESL entities Rajesh Service Centre, Krishna Enterprises, Shiv Impexs and Mahadev Impexs were not mentioned in prospectus he has not dealt with them and thus did not verify their authenticity.

13. Vide letter dated November 11, 2011 Appellant submitted copies of inter-se allocation of responsibilities between two BRLMs in IPO of ESL, and stated that RHP was filed with ROC, Chennai on January 20, 2009. Appellant stated that while carrying out due diligence as Merchant Banker, he makes random checks in respect of disclosures in offer document particularly with reference to objects of issue and quotations, and on in respect of IPO of ESL such checks were made in respect of major quotations submitted by ESL and in support Appellant submitted copies of few quotations along with notings from concerned executive at its end, confirming veracity of offer document. As Merchant Banker Appellant keeps

track of Issuer Companies to know about progress of implementation of the project and same is verified through various submissions made by companies to stock exchanges and he also procures balance sheets of companies. Appellant stated that he had exercised due diligence and attached copies of certificates certifying that all amendments, suggestions or observation made by SEBI have been incorporated in offer document and also copies of fresh due diligence certificate at time of filing the Prospectus with the ROC, copy of fresh due diligence certificate immediately before opening of issue and also copy of fresh due diligence certificate after issue had opened but before it closed for subscription.

14. In SCN it was alleged that Appellant had failed to exercise due diligence and failed to maintain satisfactory standard in all the aspects of offering, veracity and adequacy of disclosure in the offer documents. These actions amount to violation of Clauses 5.1 (5.1.1. and 5.1.2), 5.3.3.2 under Chapter V of SEBI (DIP) Guidelines, 2000 read with Regulation 111 of SEBI (ICDR) Regulations, 2009. The texts of the provisions are as follows:

SEBI (DIP) Guidelines, 2000

"CHAPTER V

PRE- ISSUE OBLIGATIONS

5.1 The lead merchant banker shall exercise due diligence.

5.1.1 The standard of due diligence shall be such that the merchant banker shall satisfy himself about all the aspects of offering, veracity and adequacy of disclosure in the offer documents.

5.1.2 The liability of the merchant banker as referred to clause 5.1.1 shall continue even after the completion of issue process."

…..

"5.3.3.2 In addition to the due diligence certificate furnished along with the draft offer document, the Lead Merchant Banker shall also:

(ia) Where the second proviso to clause 6.3, or clause 6.39 are applicable, certify that the issuer company is complying with

conditions (a) and (b) laid down in 2nd proviso to clause 6.3 or with conditions (a), (b) and (c) laid down in clause 6.39, as the case may be; (ib)) certify that all amendments suggestion or observations made by Board have been incorporated in the offer document;

(ii) furnish a fresh "due diligence" certificate at the time of filing the prospectus with the Registrar of Companies as per the format specified at Schedule IV.

(iii) furnish a fresh certificate immediately before the opening of the issue that no corrective action on its part is needed as per the format specified at Schedule V.

(iv) furnish a fresh certificate after the issue has opened but before it closes for subscription as per the format specified at Schedule VI."

SEBI (ICDR) Regulations, 2009

"Repeal and Savings.

111. (1) On and from the commencement of these regulations, the Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 shall stand rescinded.

(2) Notwithstanding such rescission:

(a) anything done or any action taken or purported to have been done or taken including observation made in respect of any draft offer document, any enquiry or investigation commenced or show cause notice issued in respect of the said Guidelines shall be deemed to have been done or taken under the corresponding provisions of these regulations;…"

15. SCN has stated that ESL had taken ICDs for a total of ` 4 crores from 5 entities during period from January 20 to February 05, 2009 and that immediately after receipt of proceeds of IPO, the ICDs were re-paid with interest from proceeds of issue on February 27, 2009. IR has alleged that approx. Rs.4.75 crores have been siphoned off from the company based on the following:

i) contradictory statements provided by ESL

ii) replies of other entities

iii) suspicious routing of funds by ESL

iv) no invoice of the work/supplies or proof of completion of work/supplies and

v) the financial positions, track record and lack of experience of the suppliers.

Further, IR has also alleged that entities namely Rajesh Service Centre, Krishna Enterprises, Mahadev Impexs and Shiv Impexs had aided and abetted ESL in siphoning off the funds. In view of the same, it has been alleged that Appellant had failed to exercise due diligence as BRLM to the issue.

16. Appellant has submitted that it was pre-issue BRLM in the IPO of ESL and that post-issue BRLM was Ashika Capital Ltd. However, it is noted from inter-se allocation of Responsibilities between Lead Managers as mentioned in Prospectus that Appellant has been referred to as 'Book Running Lead Manager' and Ashika Capital Ltd. as 'Co-Book Running Lead Manger' to the issue and that Appellant also had post-issue responsibilities in IPO of ESL. Thus, Appellant contention that it was only pre-issue BRLM in IPO of ESL is not correct.

17. It is noted that Appellant was the BRLM in IPO of ESL. RHP in IPO was filed on January 20, 2009 and final Prospectus was filed with the ROC, Chennai on February 20, 2009. In between these two dates, i.e. from January 20, 2009 to February 05, 2009 certain ICDs were taken by ESL and money was paid to entities. However, in Prospectus dated February 17, 2009 and filed on February 20, 2009, it has been stated that

"Bridge Loan We have not entered into any bridge loan facility that will be repaid from the Net Proceeds."

It is observed from material made available on record that this statement was factually incorrect in view of ICDs/ loans taken by ESL between January 20, 2009 and February 05, 2009. Thus, adequate disclosures regarding the ICDs taken by ESL were not made in Prospectus and this points towards inadequate due diligence on the part of Appellant.

18. According to Clauses 5.3.3.2 and 5.3.3.2 (ii) under Chapter V of SEBI (DIP) Guidelines, Appellant, as the BRLM for issue was under obligation to issue fresh due diligence certificates in prescribed formats at various stages in addition to the due diligence certificate furnished along with the draft offer document:

i) at time of filing offer document with Registrar of Companies,

ii) immediately before opening of issue and

iii) after issue has opened but before it closes for subscription.,

19. In present case, ICDs were taken from January 20, 2009 and the RHP was also filed with ROC, Chennai on January 20, 2009. Thus, the due diligence certificate dated January 20, 2009 filed by Appellant at time of filing RHP with ROC, Chennai has not been taken into account for present proceedings. In format of due diligence certificate to be given by BRLM immediately before opening of the issue the BRLM has to certify that:

> "This is to certify that all the material disclosures in respect of the issuer as on the date of opening of the issue have been made through the offer document filed with the ROC on ….. and subsequent amendments/ advertisements (if applicable) dated …....."

20. Subsequently in format of due diligence certificate to be given by BRLM after opening of issue but before closure of subscription the BRLM has to further certify that :

> "This is to certify that all the material disclosures in respect of the issuer as on date have been made through the offer document filed with ROC on …… and subsequent amendments/ advertisements (if applicable) dated ……..."

21. It is evident from formats of two additional fresh due diligence certificates stated above that BRLM has to certify that offer document is suitably updated and

that offer document contains all the material disclosures in respect of issuer as on said date at two stages.

22. It has been noted that due diligence certificates dated February 04, 2009 and February 06, 2009 filed by Appellant stated that:

> "This is to certify that Red Herring Prospectus in respect of proposed public issue of Edserv Softsystems Limited, filed with Registrar of Companies, Chennai, Tamil Nadu on January 20, 2009 was suitably updated under intimation to the Board and that the said offer document contains all the material disclosures in respect of the issuer company as on the said date."

23. In present case, at both stages, while filing two due diligence certificates stated above, Appellant had failed to ensure that adequate, accurate/ complete and all relevant material disclosures were made in offer document and failed to update offer document regarding changes in material facts (ICDs amounting to Rs. 4 cores taken by ESL and Purchase Orders placed). Appellant as BRLM in IPO of ESL as per MOU between Appellant and ESL had obligation of ensuring that offer document contains true and correct disclosures and does not contain any statement or information that is false or misleading, or contain any material omission and Appellant had failed to carry out its obligation in this matter.

24. According to the ICDR Regulations due diligence has been explained as follows:

> "Due diligence.
>
> 64.
>
> (1) The lead merchant bankers shall exercise due diligence and satisfy himself about all the aspects of the issue including the veracity and adequacy of disclosure in the offer documents.…."

25. In view of above, it was incumbent upon Appellant that as BRLM to satisfy itself that all disclosures made in Prospectus were correct, adequate, etc. In the present case BRLM failed to verify adequacy of disclosures in offer document

and failed to update offer document regarding ICDs amounting to Rs. 4 crores availed by ESL in spite of its due diligence certificates dated February 04, 2009 and February 06, 2009. Further, Prospectus of ESL in page no. 106 states that:

> "The Book Running Lead manager, Keynote Corporate Services Ltd. have certified that the disclosures made in the offer document are generally adequate and are in conformity with SEBI (DIP) guidelines as for the time being in force. This requirement is to facilitate investors to take an informed decision for making an investment in the proposed issue"

In spite of above-mentioned statement in Prospectus, Appellant had failed to ensure that adequate disclosures were made in Prospectus of ESL and thus failed to facilitate investors to take an informed decision for making an investment in IPO of ESL. Appellant's plea that the information regarding ICDs was withheld from Appellant by ESL cannot be accepted. BRLM, in carrying out its functions is generally expected to act in an independent and professional manner and should not rely only on issuer company to provide them with updates, if any. Due diligence on part of Merchant Banker does not mean passively reporting whatever is reported to it but to find out everything that is worth finding out. It is about making an active effort to find out material developments that would affect interest of investors. It is on faith that intermediary has conducted due diligence with utmost sincerity that investing public goes forward and decides to invest in a particular company. In present case Appellant had failed to exercise due diligence in carrying out its duties as BRLM in IPO of ESL.

26. Reference is drawn to the interpretation made by the Hon'ble Supreme Court in the matter of Chander Kanta Bansal V. Rajinder Singh Anand [(2008) 5 SCC 117] as under :

> "The words "due diligence" have not been defined in the Code of Civil Procedure, 1908. According to Oxford Dictionary (Edn. 2006), the word

> "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort."

27. In this regard, Memorandum of Understanding between Appellant and ESL dated May 12, 2008 was perused and Clause 4.8 of the same states that:

> " The BRLM shall have the right to call for any reports, documents or information necessary from the Company to enable them to verify that the statements made in the Draft Red Herring Prospectus or the final Prospectus are true and correct and not misleading, and do not contain any omissions required to make them true and correct and not misleading."

28. Thus, it was incumbent upon Appellant to ask for any documents from ESL to verify correctness of statements/ disclosures made in offer document. Had Appellant exercised its right as per MOU to call for at least bank account statement of ESL for period of one month before filing the two due diligence certificates discussed in paras 22 and 23 it would have come to light of BRLM that ESL had taken ICDs amounting to Rs.4 crores. It was responsibility of Appellant to carry out fresh due diligence at both stages before filing RHP with ROC as per Clauses 5.3.3.2 and 5.3.3.2 (ii) under Chapter V of SEBI (DIP) Guidelines. In order to provide correct, appropriate, relevant and all material disclosures to investors it was incumbent upon Appellant to carry out due diligence and Appellant should have exercised its right to call for documents instead of awaiting information from ESL to verify veracity of the disclosures made in offer document. Moreover, Appellant could also have sought copies of Purchase Orders placed by ESL above a certain value for period of at least one month before filing of the two due diligence certificates mentioned in paras 20 and 22. Thus, Appellant's stand that ESL did not update Appellant regarding ICDs as well as the Purchase Orders and that it was duty of ESL to inform Appellant regarding any changes in disclosures in offer document is not

convincing. In view of same, Appellant's contentions at paras 4-13 are not accepted.

29. The entire case of Respondent against Appellant is that Appellant as BRLM/ Merchant Banker to ESL in matter of issue of IPO during 2009 when it failed in its duty of satisfying itself about all aspects of the issue, including veracity and adequacy of disclosures in the offer document i.e. prospectus, since there was requirement of bringing out Inter-Corporate Deposits (ICDs) availed by ESL and placing of orders for equipment during the period after filing of final RHP and issue of prospectus but due to non-receipt of such information by Appellant from ESL, such information was not included in prospectus and thus Appellant failed in its duty of carrying out "due diligence" which affected veracity and adequacy of disclosures in the offer document, as obtaining ICDs and placing of order for equipment was important/material and absence of same from offer documents affected veracity and adequacy of disclosures and also prejudiced judgement of investors, regarding their decision to subscribe in IPO of ESL.

30. Appellant on its part has admitted that obtaining of ICDs and subsequent placement of orders by ESL was a material fact and should have formed part of all documents relating to issue of IPO but since ESL availed of ICDs and placed orders behind his back i.e. without informing him, as placing any document before him or that he could appraise himself of occurrence of same; hence there was no infirmity in his carrying on due diligence and he should not be held violative of DIP Guidelines, 2000 and Regulation 111 of SEBI (ICDR) Regulations, 2009 and punished by imposing penalty on him.

31. Appellant has also stated that when he handles IPO - he has handled 125 IPOs so far –, he carries out random checks to verify authenticity of entries mentioned in prospectus and undertook to submit documents in support of this.

This is a general statement and Appellant has nowhere stated as to what were the documents called by him to verify veracity and adequacy of disclosures in IPO of ESL. Appellant has, however, submitted that he had relied on "Declaration" (available at page 135 of Memorandum of Appeal) from Board of Directors of ESL, which stated that "All the statements in this offer document are true and correct". Appellant also states that he had also relied on certificate dated February 12, 2009 issued by Raj and Ravi Chartered Accountant (available at page 428 of MOA) which stated that no Debt/Short Term Debt/long term debt existed. However, a closer look at this certificate, makes it apparent that this certificate is statement of capitalization and brings out if any debt whether long term/short term has been capitalised. This certificate is for a totally different purpose and may be correct for what it is stated in it, but it is not for stating what Debt/Short Term Debt/Long Term Debt exists in the company i.e. ESL as on 12th February, 2009.

32. Since it has already been stated that statement of Appellant that he carries out random checks to verify authenticity of entries mentioned in prospectus and undertook to submit documents in support of same, but from only two document-submitted by Appellant nothing material can be inferred, since first is a declaration from Board of Directors that all statements in offer document are correct and another a certificate from Chartered Accountant, which is misleading, since it deals with capitilization of debt and not existence of debt. Reliance of such documents, which is effect do not convey anything material or are misleading, infact, strengthens the case of Respondent that Appellant has done nothing to carry out due diligence and has been a passive actor, waiting for documents/information to come to him, whereas he should have been active in looking into various aspects of functioning of ESL, scrutiny of functioning of ESL, scrutiny of all relevant documents- including bank statements and order

book position etc, before certifying correctness of various statements in prospectus and issue of due diligence certificate at various stages of IPO.

33. There is, perhaps, no need to go into any further to look into this appeal and various alibis offered by Appellant in not carrying out his due diligence since he has totally failed in his duties as BRLM/ Merchant Banker, in IPO of ESL. As a matter of fact he is responsible for adequacy and veracity of all disclosures in all documents pertaining to issue of IPO, since as BRLM/Merchant Banker solemn duties are cast on him and for justifying the same he has to play a pro-active role by looking into authenticity of various matters/disclosures/statements, etc. contained in prospectus; but Appellant does not appear to have even moved a little finger to carry out onerous duty cast on him as BRLM of the issue. BRLM has to bring out documents pertaining to IPO so that investors can take judicious and informed decisions on subscription to IPO and thus he is responsible for failing investor's trust in prospectus of ESL for IPO and for doing considerable higher damage to securities market.

34. Appellant's pleadings in Memorandum of Appeal that the is highly experienced, and is a regular speaker on subject of capital markets at various forums and that he had carried out due diligence at every stage, of issue of IPO and tht he had fulfilled all requirements of his responsibilities as BRLM/Merchant Banker and some material disclosures were not in issue documents, since these were done at his back and not brought to his notice by ESL, come to nothing, when he himself is not serious or vigilant and is awaiting relevant information coming to him and he then taking action on same, this Tribunal has no hesitation is stating that Appellant has filed in his duty to carry out due diligence, at any stage of IPO of ESL and had failed not only the investors in this issue but has done considerable harm to security markets, at large.

35. Dealing with another pleading of Appellant that he is responsible for pre-issue BRLM in IPO of ESL and that post issue BRLM was Ashika Capital Ltd. but inter-se allocation of responsibilities between Lead Managers, as mentioned in prospectus, show that Appellant has been referred to as Book Running Lead Manger and Ashika Capital ltd. as Co-Book Running Lead Manager to the issue and Appellant had post-issue responsibilities in IPO of ESL. Thus this contention of Appellant that it was only pre-issue BRLM in IPO of ESL, is not correct.

36. The case law submitted by learned counsel appearing for Appellant of JM Mutual Fund and JM Capital Management Pvt. Ltd. in Appeal no.39/04 and 39A/04 dated 22.11.2004 before SAT due diligence has been taken as “such a measure of prudence, activity or assiduity, as is properly to be expected, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative acts of the special case- as defined in Black’s Law Dictionary.

37. In the matter of Imperial Corporate Finance and Services Pvt. Ltd. vs. SEBI in Appeal no.56/2003 dated 30.7.2004 submitted by Appellant’s counsel, it was held by this Tribunal that “we do not find any justification for holding the Appellant guilty of violating any Regulations or provisions of the Act,” and in this was in context of Appellant, being the lead manager to rights issue of Gammon (India) Ltd was alleged that Appelalnt did not take a immediate action when it received information of a Director of Gammon (India) Ltd to have a case pending against it, when it was not mentioned in issue document and that the same was sent to Director concerned for an explanation by Appellant. However, complainant sent another letter to Appellant stating that Director had a criminal case pending against it, and to which Director admitted to have the criminal case pending against him.

38. In this case, it was held that Merchant Banker i.e. Appellant had no information of a criminal case pending against director, but when this was brought to its notice, Appellant sent the same to concerned director for reply and since action was taken by Appellant promptly no lack of due diligence can be attributed to Appellant.

39. In the case of SEBI vs. Indiabulls Securities Ltd., submitted by learned counsel for Appellant in adjudication no.SD/AO/88/2010 dated July 29, 2010 due diligence was taken by SEBI from an order of Hon'ble Supreme Court as "due diligence in law, means doing everything reasonable not everything possible. Due diligence means reasonable diligence it means such diligence as a prudent man would exercise in conduct of his own affairs."

40. The above case laws cited by learned counsel for Appellant brings out clearly that in exercise of due diligence, a reasonable person will take all measures or activities that are properly to be expected and ordinarily exercised by a reasonable and prudent man, under particular circumstances, not measured by any absolute standards, but depending on relative facts of the special case.

41. The above case laws do not help Appellant in any manner since it had not exercised any steps/measures to satisfy himself of veracity of various disclosures, in their adequacy, in offer documents of Edserv Soft Systems Ltd., and not only relied totally on documents/furnished to him by others, even when these documents were meant to convey different facts than what they were taken to be conveying, a professional person having wide knowledge and experience in bringing out 125 IPOs during its existence, is expected to show better professionalism than was shown by Appellant. In the circumstances, this Tribunal expects better standards of performance from professionals, who charge reasonably good fee from clients and who bring out documents (prospectus in this case), which are relied on by investors, at large, to take informed decisions

regarding investments in scrips/IPO and this standard of professionalism should be higher than a reasonable man with ordinary prudence will demonstrate in the matter of due diligence but in present case no mark of professionalism can be seen from Appellant, who was merely a certificate issue machine on dates when it was due, without undertaking any due diligence whatsoever.

42. Case law cited by Respondent are discussed below:

In case of World Link Finance Limited vs. SEBI in appeal no.36 of 2007 decided on April 24, 2007 by SAT, Appellant was not held to not have exercised due diligence when it certified that promoters held 5,33,800 shares but should have known at the time of issue of prospectus that this was not the case since promoters shares were non-transferrable for five years but did not have non transferrable stamp.

43. In another case law referred by Respondent HSBC Securities and Capital Markets vs. SEBI decided by SAT in appeal no.99 of 2007 dated February 20, 2008, where it was held that “it is the responsibility of the merchant banker to ensure that the contents of the letter of offer are true, fair and adequate. The learned senior counsel for the appellant argued that non-disclosure in the present case of the fact that certain shares were unlisted did not impact the shareholders’ decision as to whether or not to tender shares in the open offer. The fact that trading of shares of company in question, had been suspended in the Bombay Stock Exchange since July 1998 and that shares of this company were infrequently traded on the other stock exchanges had not been disclosed in the letter of offer. It had also been disclosed that as against the open offer price of Rs 1.32 per share, the acquirer had purchased shares of the target company from the sellers at 32 paise per share and the book value of the shares worked out to Rs 1.07 per share as on 31 March, 2000. These disclosures would have been adequate for the shareholders to arrive at a decision. In other words, according to

the appellant, the adequacy of the disclosures was not impaired by the non-disclosure regarding listing of the shares and therefore, such non-disclosure need not be viewed seriously. The learned counsel for the respondent pointed out that the charge against the appellant was not one of non-disclosure but of making a wrong and categorical assertion about the listing of the shares. According to him, the listing status of the company's shares is very much a relevant factor for any shareholder to decide whether to off-load or retain the shares. He also argued that apart from being adequate, the disclosures in an open offer have to be absolutely true and fair and that the appellant had not ensured that. We are of the view that it is neither necessary nor indeed feasible to go into the mechanics of how the shareholders would take a decision on tendering their shares. However, we agree with the learned counsel for the Board that ensuring the truth and correctness of the letter of offer is a fundamental responsibility of the merchant banker which he has to discharge by exercising due diligence. In fact, an incorrect or wrong information in a letter of offer or other similar documents issued for the benefit of investors in general could lead to serious consequences including loss of credibility for the market operators and for the regulatory system. This kind of failure has to be taken very seriously by the market regulator. In this case, there is no material before us to show that the appellant had taken any proactive step at all to find out the correct information or to independently verify the information available. No specific query in this respect was made from the right sources of such information namely the target company and the stock exchanges though it was known that information about the listing of the shares of the target company in each stock exchange was specifically required to be disclosed in the letter of offer. Instead, the appellant made a presumption that all shares were listed in the four stock exchanges of Chennai, Mumbai, Delhi and Ahmedabad and left it to others to point out if that was not the fact. This is certainly no way to exercise due diligence and we cannot but agree with the Whole Time Member of the Board

that the appellant had violated regulation 24(4) of the Takeover Code and clauses 1, 2 and 7 of the code of conduct for merchant bankers."44. From the foregoing, it is no doubt that Appellant had failed to exercise due diligence which resulted in lack in veracity and inadequacy of disclosures in the offer document, which did not provide investors with a reliable document did mis-lead investors to invest in shares of ESL and hence such non-disclosure had the potential to disturb securities market equilibrium and hence Respondent has rightly held Appellant to failed to comply with clauses 5.1 (5.1.1 and 5.1.2), 5.3.3.2(ii) under chapter V of SEBI (DIP) Guidelines, 2000 read with Regulation 111 of SEBI (ICDR) Regulations, 2009.

45. Regarding quantum of penalty provisions of section 15J of SEBI Act were applied by Respondents and are of the view that investigation report has not quantified profit/loss for the nature of violations committed by Appellant and no quantifiable figures are made available on record to assess the disproportionate gain or unfair advantage and amount of loss caused to an investor or group of investors, and hence penalty of Rs.10,00,000/- has been imposed considering failure to comply with SEBI (DIP) Guidelines read with SEBI (ICDR) Regulations, 2009.

46. From the above paragraph, it is seen that loss caused to an investor or to a group of investors cannot be quantified but it is certain that investors, as a whole, incurred huge losses as a result of IPO, yet, though Appellant is not wholly responsible for the losses to investors, since there are others who played their role in causing loss to investors, the responsibility of Appellant was major, since he plays the coordinating role in bringing out IPO and is conceived to be the one who certifies veracity and adequacy of all disclosures and had the responsibility of bringing out all relevant fact and to ensure that no material information/fact is withheld is under obligation and has authority to call for all relevant information

from company seeking IPO and is expected to carry out due diligence to bring our truth and adequacy of information in IPO at all stages. The penalty is, therefore, upheld and appeal against the impugned order is dismissed. No costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
A S Lamba
Member

19.2.2014
Prepared and compared by
RHN