

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Decision : 02/11/2017

Appeal No.423 of 2016

Capvision Investment Advisors
5th Floor, Commerce House,
Building – 7, Race Course Road,
Indore (M.P.)

... Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C4-A,
G-Block, Bandra-Kurla Complex,
Bandra (East),
Mumbai – 400 051.

... Respondent

Mr. Vedchetan Patil, Advocate for the Appellant.

Mr. Gaurav Joshi, Senior Advocate a/w Mr. Soham Shethia, Advocate
i/b Juris Corp for the Respondent.

CORAM : Justice J.P. Devadhar, Presiding Officer
Jog Singh, Member
Dr. C.K.G. Nair, Member

Per : Justice J.P. Devadhar (Oral)

1. This appeal is filed to challenge the order passed by the Adjudicating Officer (“AO” for short) of Securities and Exchange Board of India (for short, “SEBI”) on 6th October, 2016. By the said order, penalty of Rs.75 lacs is imposed on the appellant under Section 15HB of

the SEBI Act, 1992 for providing investment advisory services in violation of SEBI (Investment Advisers) Regulations, 2013 ("2013 Regulations" for short).

2. Facts relevant in the present appeal are as follows:-

(a) 2013 Regulations notified on 21/1/2013 came into force with effect from 21/4/2013. Regulation 3 in Chapter II of 2013 Regulations reads thus:-

“
CHAPTER II
REGISTRATION OF INVESTMENT ADVISERS

Application for grant of certificate.

3. (1) On and from the commencement of these regulations, no person shall act as an investment adviser or hold itself out as an investment adviser unless he has obtained a certificate of registration from the Board under these regulations:

Provided that a person acting as an investment adviser immediately before the commencement of these regulations may continue to do so for a period of six months from such commencement or, if it has made an application for a certificate under sub regulation (2) within the said period of six months, till the disposal of such application.

(2) An application for grant of certificate of registration shall be made in Form A as specified in the First Schedule to these regulations and shall be accompanied by a nonrefundable application fee to be paid in the manner specified in Second Schedule.”

(b) On 14/10/2013, the appellant-firm was established inter alia for the purpose of carrying on investment advisory business.

(c) While carrying on the investment advisory business, appellant initiated the process for seeking registration in January, 2014, however, appellant claims that due to unavoidable

circumstances the application for registration was in fact made on 17/4/2014.

- (d) By letter dated 22/4/2014 SEBI while seeking certain information directed the appellant to stop all investment advisory related activities till the appellant gets registration from SEBI and also called upon the appellant to submit auditor & banker's certificate for the same.
- (e) By a letter dated 22/5/2014 appellant was informed that the appellant is found to be eligible for registration and accordingly on 11/6/2014 the appellant was issued an Investment Advisory Registration Certificate.
- (f) Thereafter, on 12/8/2015, show-cause notice was issued to the appellant calling upon the appellant to show cause as to why action should not be initiated against the appellant for violating the 2013 Regulations and also for non-compliance of the directions given by SEBI on 22/4/2014.
- (g) By its reply dated 24/8/2015 the appellant denied the allegation made in the show-cause notice and inter alia submitted that since SEBI has considered the appellant to be an existing company, the appellant had assumed that the application for registration was made within a period of six months as contemplated under the proviso of Regulation 3(1) of the 2013 Regulations and hence appellant cannot be said to have committed any violations.
- (h) After considering the reply filed by the appellant and after giving an opportunity of hearing, the AO has passed the

impugned order on 6th October, 2016 imposing penalty of Rs.75 lacs on the appellant under Section 15HB of SEBI Act.

(i) Challenging the aforesaid order, the present appeal is filed.

3. Mr. Vedchetan Patil, learned counsel appearing on behalf of appellant submitted firstly, that once the Assistant Director of SEBI, Indore by her letter dated 22/4/2014 accepted that the appellant was an existing investment adviser under the 2013 Regulations, the investment advisory business carried on by the appellant could not be said to be in violation of Regulation 3(1) of the 2013 Regulations. Secondly, it is submitted that as per the proviso to Regulation 3(1), an existing investment adviser who has applied for registration within 6 months is entitled to act as investment adviser till the disposal of the application for registration. In the present case, registration certificate was granted on 11/6/2014 and therefore no penalty could be imposed for the period prior to 11/6/2014 or for the period after 11/6/2014. Thirdly, it is submitted that the findings recorded in the impugned order that the appellant had suppressed its account with ICICI Bank in the application for registration is incorrect because, the appellant had in fact disclosed its bank account with ICICI Bank. It is further submitted that in the e-mail sent to SEBI on 26/9/2016 it was erroneously stated that the appellant had received Rs.63 lac from the clients for rendering investment advisory services. On the basis of an affidavit in rejoinder which is unaffirmed, it is submitted that the amounts received by the appellant up to the date of registration would be approximately Rs.20 to Rs.21 lac as per the bank statements and alternatively, the amount received up to the date of registration would be Rs.39 lac as per the list of invoices maintained by the appellant. Accordingly, it is submitted

that the penalty of Rs.75 lacs imposed on the appellant on the basis of an erroneous e-mail sent by the appellant on 26/9/2016 deserves to be quashed and set aside.

4. We see no merit in the above contentions.

5. As per the 2013 Regulations which came into force with effect from 21/4/2013, no person could act as an investment adviser unless he has obtained a certificate of registration from SEBI. Admittedly, appellant firm was established on 14/10/2013 i.e. after the 2013 Regulations came into force and therefore, the appellant could not have commenced investment advisory business without obtaining registration from SEBI. It is not in dispute that the appellant on being established, commenced the investment advisory business without obtaining registration from SEBI, hence the appellant is clearly guilty of violating Regulation 3(1) of the 2013 Regulations.

6. Argument of the appellant that the Asst. Director of SEBI at Indore, by her letter dated 22/4/2014 had accepted that the appellant was an existing company and hence while carrying on the investment advisory business the appellant was entitled to apply for registration within six months from the commencement of the 2013 Regulations is totally dishonest to say the least. Under the 2013 Regulations, an entity carrying on investment advisory business on the date of commencement of the Regulations was entitled to carry on investment advisory business for a period of six months from the date of the commencement of the 2013 Regulations and if an application for registration was made within six months, then that entity was entitled to carry on the investment advisory business till the disposal of the application for registration. As the 2013 Regulations came into force with effect from

21/4/2013, only those entities carrying on investment advisory business on 21/4/2013 could carry on that business till 21/10/2013 and if applied for registration on or before 21/10/2013, then those entities could carry on investment advisory business till the disposal of the application for registration.

7. In the present case, since the appellant firm established on 14/10/2013 carried on investment advisory business without obtaining registration from SEBI and applied for registration only on 17/4/2014, i.e. after the last date for making an application for registration (i.e. 21/10/2013), the Asstt. Director of SEBI at Indore by her letter dated 22/4/2014 had called upon the appellant an entity existing prior to 21/10/2013 to explain the delay in failing to apply for registration on or before 21/10/2013.

8. By no stretch of imagination the appellant firm established on 14/10/2013 could be said to be an entity existing on 21/4/2013 when the 2013 Regulations came into force. In the letter dated 22/4/2014 the Asstt. Director of SEBI at Indore has neither held that the appellant established on 14/10/2013 was liable to be treated as an entity existing on 21/4/2013 when the 2013 Regulations came into force nor the Asstt. Director of SEBI has any power to introduce such deeming fiction. Therefore, fact that the Asstt. Director of SEBI had stated that the appellant was an entity existing prior to 21/10/2013 cannot be construed to mean that the Asstt. Director of SEBI has held that the appellant was an entity existing on 21/4/2013 when the 2013 Regulations came into force.

9. Thus, in the facts of present case, it is abundantly clear that the appellant which came into existence after the 2013 Regulations came into force commenced investment advisory business without obtaining registration from SEBI in gross violation of the 2013 Regulations. Further, the appellant has falsely claimed that the Asstt. Director of SEBI at Indore has held that the appellant was an entity existing on 21/4/2013 when the 2013 Regulations came into force.

10. Apart from the above, although the Asstt. Director of SEBI on 22/4/2014 called upon the appellant to stop all activities relating to investment advisory and submit banker's certificate, the appellant submitted a declaration to SEBI only in relation to its current account with HDFC Bank. However, the appellant failed to disclose its account with ICICI Bank which was admittedly operated even after the SEBI letter dated 22/4/2014. Although it is contended that the appellant had disclosed its account with ICICI Bank, neither before the AO nor before this Tribunal any document is produced to show that the account of the appellant with ICICI Bank was disclosed to SEBI.

11. In any event, what is more surprising is that in spite of the letter of SEBI dated 22/4/2014 to stop providing investment advice with immediate effect, the appellant disregarded that directions and continued to provide investment advice to the clients and as per the e-mail sent by appellant on 26/9/2016, the appellant had received payment to the tune of Rs.63 lacs up to the date of obtaining registration on 11/6/2014.

12. During the course of arguments, Counsel for the appellant on the basis of an unaffirmed affidavit in rejoinder submitted that the statement contained in the e-mail of the appellant dated 26/9/2016 that the appellant had received

Rs.63 lac up to 11/6/2014 is incorrect and as per bank statements annexed to unaffirmed affidavit in rejoinder the appellant would have received approximately Rs.20 or Rs.21 lac and alternatively, as per the list of invoices the appellant would have received Rs.39 lac.

13. Above arguments advanced on behalf of the appellant are wholly unsustainable, because, in the memo of Appeal (see page 18) the appellant clearly admitted to have received Rs.59 lac during the period from 3/12/2013 to 31/5/2014. Even after making above statement on oath in the memo of Appeal, the appellant is now seeking to change its stand and contend that the appellant had received between Rs.20 lac to Rs.39 lac from the investment advisory business before obtaining registration from SEBI. No explanation is given for the change in the stand. In our opinion, the appellant who is changing its stand every now and then is totally untrustworthy and the present appeal is filed in gross abuse of the process of law.

14. Thus, the appellant who is guilty of commencing investment advisory business without obtaining registration from SEBI after the 2013 Regulations came into force, who is guilty of falsely claiming that SEBI had accepted the appellant to be an entity existing on 21/4/2013 and who is guilty of making one statement before AO, another statement in the memo of Appeal and third statement at the time of argument does not deserve any sympathy.

15. In these circumstances, we uphold the decision of AO that the appellant committed gross violation of provisions of 2013 Regulations and that the appellant in breach of trust continued to provide investment advisory services to clients in spite of specific direction given by SEBI to stop the said business. Apart from the quantum of amount received by appellant by carrying on

the investment advisory business unauthorisedly, in the facts of present case, the appellant who has made false and misleading statements in the memo of appeal regarding the quantum of amount received from the investment advisory business prior to grant of registration deserves maximum penalty. Therefore, in the facts of present case, imposition of penalty of Rs.75 lac as against the penalty of Rs. One Crore imposable under Section 15HB of SEBI Act cannot be faulted.

16. For all the aforesaid reasons, we dismiss the appeal with costs quantified at Rs.1 lac which the appellant is directed to pay to SEBI within 4 weeks from today.

17. Appeal is disposed of accordingly.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
Dr. C.K.G. Nair
Member

02/11/2017
prepared & compared by-dg