

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

[Authority delegated by the Central Government vide notification no. GSR 1316(E) dated 18-10-2017 under section 458 of the Companies Act, 2013 read with rule 2(1)(b) of the Companies (Registered Valuers and Valuation) Rules, 2017]

IBBI/Valuation/RVO/03/2022

29th September, 2022

ORDER

This Order disposes of the Show Cause Notice (SCN) No. RVO-12011/1/2022-IBBI/3848 dated 11th July 2022 issued to Estate Managers and Appraisers Foundation, Registered Valuer Organisation (RVO ESMA) under Rule 17 of the Companies (Registered Valuers & Valuation) Rules, 2017 (Valuer Rules) issued to Mr. Rana Ghosh, Managing Director and registered with the Insolvency and Bankruptcy Board of India (IBBI) as a Registered Valuer Organization with registration number IBBI/RVO/2017/001.

1. Background

- 1.1 The IBBI has been delegated by the Central Government as the “Authority” to perform the functions under the Valuers Rules. The IBBI granted recognition to Estate Managers and Appraisers Foundation, Registered Valuer Organisation (RVO ESMA) under the Valuer Rules read with section 247 and section 458 of the Companies Act, 2013 in all the three asset classes with registration number IBBI/RVO/2017/001 on 27th December, 2017.
- 1.2 Upon consideration of the material available on record, the Authorised Officer of IBBI was of the *prima facie* opinion that sufficient cause existed to take actions under rule 15 read with rule 17 of the Valuer Rules and accordingly issued SCN No. RVO-12011/1/2022-IBBI/3848 dated 11.07.2022 to RVO ESMA, addressed to Mr. Rana Ghosh, Managing Director/ Chief Executive Officer of RVO ESMA, seeking written reply within 14 days of its receipt.
- 1.3 On behalf of RVO ESMA, Mr. Rana Ghosh submitted his reply to the SCN vide his e-mail dated 28.07.2022 and availed an opportunity of final e-hearing on 27.09.2022 before the Whole Time Member of IBBI to whom the matter was referred to. The Chairperson of the RVO ESMA, Mr. Subrato Dutt on behalf of the RVO was present and made the submissions.

2. Alleged contraventions and submissions of the RVO

Contraventions alleged in the SCN and the RVO ESMA’s submissions thereof are summarized below:

2.1 Contravention

Independent Director Accepting Fees:

- 2.1.1 It is observed that RVO ESMA has paid the remuneration to the independent directors in the form of faculty fees. In view of such practice, the independent directors have pecuniary relationship which is against the letter and spirit of the provisions of section 149(6) of the Companies Act, 2013 and clause 4(5) of the Part-I under Annexure- III of the Valuer Rules.
- 2.1.2 Clause 4(5) of Part-I under Annexure- III of the Valuer Rules provides that 'An independent director shall be an individual who fulfils the requirement under section 149(6) of the Companies Act, 2013.
- 2.1.3 Section 149(6)(c) which provides a negative command that an independent director should not have any pecuniary relationship with the company except for his remuneration. Section 149(9) of the Companies Act, 2013 states that independent director may receive remuneration by way of fee provided under section 197(5), reimbursement of expenses for participation in the Board and other meetings and profit related commission subject to resolution of the shareholders duly passed at a general meeting. The remuneration in the form of faculty fees is not in consonance with these provisions in case of RVO ESMA.

2.2 Submissions made by the RVO

- 2.2.1 The RVO submitted that the independent directors were not receiving remuneration in the form of faculty fees. On the contrary, they were receiving the 'honorarium' as commonly paid in the education domain for providing the expertise in a certain specific area as per their knowledge and also for their services which was in a volunteer capacity, as and when they were called upon as necessary to perform. Since, they are all "resource personS" of the RVO ESMA and their performances really cannot be compensated, a nominal amount was paid to them for sake of honour as decided by the RVO without having any demand from the resource persons whereas in case of 'remuneration', there are specific terms and conditions for making such payments on a regular basis.
- 2.2.2 It was also submitted that there was no pecuniary relationship existing between the independent directors with the RVO ESMA, as has been alleged, as RVO ESMA enjoys exemption to compliance of section 149 of the Companies Act according to the Government Notification No. GSR466 (E) dated 05.06.2015 being a section 8 Company. In this context, it was also mentioned that a company where section 149 of the Companies Act, 2013 is applicable, the independent directors of the said company are entitled to fees as per section 197(5) of the Companies Act, 2013 including the sitting fees or for any other purpose whatsoever as may be decided by the Board of the Company, and their pecuniary relationship with the Company remains unaffected.

2.3 Findings

- 2.3.1 The relevant Sections of the Companies Act provides as follows:

"149. Company to have Board of Directors.—

(6) An independent director in relation to a company, means a director other than a

managing director or a whole-time director or a nominee director,—

...

(c) who has or had no pecuniary relationship, other than remuneration as such director or having transaction not exceeding ten per cent. of his total income or such amount as may be prescribed, with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;

...

(9) Notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option and may receive remuneration by way of fee provided under sub-section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members.”

- 2.3.2 Accordingly, it is observed that section 149 of the Companies Act, 2013 mandates that an independent director should not have any pecuniary relationship with the company other than remuneration as such director or transaction not exceeding ten percent of his total income to ensure fairness and impartiality in their dealings. In this context the Authority notes that three of the independent directors of the RVO ESMA were regular faculties in the institution and were receiving separate faculty fees other than their remuneration. It has been alleged that the payment of faculty fees to the independent directors creates a pecuniary interest in the Company affecting their impartiality.

As per section 197(5) of the Companies Act 2013:

“197. Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits.—

(5) A director may receive remuneration by way of fee for attending meetings of the Board or Committee thereof or for any other purpose whatsoever as may be decided by the Board: Provided that the amount of such fees shall not exceed the amount as may be prescribed: Provided further that different fees for different classes of companies and fees in respect of independent director may be such as may be prescribed.”

- 2.3.3 As such, the Authority notes that as per the section 149(9) read with 197(5) of the Companies Act, the independent director may receive fees for any other purpose as may be decided by the Board of the Company. In view of the above, it is observed that the faculty fees paid to the three independent directors are nominal in nature and as the Board of the RVO ESMA had resolved to allow for payment of faculty fees for the resource person which includes the independent directors, the Authority finds that by way of payment of nominal honorarium, there is no serious ramification in terms of violation of good governance practices.

3.1 Contravention

Payment of rent for hiring equipment

3.1.1 The IESMA (society) was given recognition by IBBI as an RVO on 27.12.2017 with a requirement, under Rule 12(3) of the Valuer Rules, to convert it as a Section 8 company within two years, from the commencement of the Rules. The very intent of formation of an RVO as a section 8 company is to be a non-profit organisation with the sole objective of dealing with matters relating to regulation of valuers. However, it is noted that RVO ESMA is paying rent on equipment to IESMA, a society, thereby, routing the earnings from the RVO ESMA to the said Society. Such routing of its earning to the Society hampers the sole object of the RVO. Such act of RVO ESMA is in violation of rule 12(1) of the Valuer Rules.

3.2 Submissions made by the RVO

3.2.1 The RVO ESMA submitted that it has been registered as per the Rule 12 (3) of the Valuer Rules and it has also been recognized by the IBBI on 30.09.2019. Therefore, it is amply clear that it was not a conversion of IESMA (Society), thereby the existence of said IESMA (Society) remains unchanged. In view of that it is not admitted that the RVO is alleged to routing its earning to the IESMA (Society) without having any cogent reason.

3.2.2 In this context, the RVO submits that this was clarified to the IA by a mail dated 23.11.2021 that all the equipment, infrastructure facilities etc. being taken by RVO from the IESMA (Society) was on a rental basis at a much cheaper rate than the prevailing market rate since the said infrastructure facilities including equipment etc. were readily available for immediate use because of the fact that the same were procured/ purchased by the said IESMA (Society) after the conditional grant of the recognition as the RVO by the IBBI initially on 27.12.2017. Thereafter, the same being continued even after the formation of the said section 8 company to make the best use and utilisation of the resources as advised by the Company's Chartered Accountant together with the fact that all the said items including the accommodation are necessary to run the RVO smoothly. It is pertinent to mention that as directed by the IA, the RVO also submitted their explanations regarding the use of the infrastructure facilities, equipment etc. of the said IESMA (Society) by sending a mail dated 21.11.2021.

3.3 Findings

3.3.1 It is noted that the RVO ESMA, by renting equipment from IESMA (Society), is routing its earning to the IESMA (Society) in violation of the rule 12(1) of the Valuer Rules which allows the sole object of RVO is for dealing with matters relating to regulation of valuers. Rule 12(1) of the Valuer Rules it reads as follows:

“12. Eligibility for registered valuers organisations.—(1) An organisation that meets requirements under sub-rule (2) may be recognised as a registered valuers organisation for valuation of a specific asset class or asset classes if—

(i) it has been registered under section 25 of the Companies Act, 1956 (1 of 1956) or section 8 of the Companies Act, 2013 (18 of 2013) with the sole object of dealing with matters relating to regulation of valuers of an asset class or asset classes and has in its bye

laws the requirements specified in Annexure-III;”

3.3.2 In view of the aforesaid facts, the Authority finds that even though the sole object of RVO is in regards to matters relating to regulation of valuers, however, as per the clause 5 of the Model Bye-Laws under Part-II of the Valuers Rules (Model Bye-Laws) functions which are incidental thereto can also be performed by the RVO. It is observed that the items and equipment taken on rent by RVO ESMA are said to be of essential nature which are required for the effective discharge of duties as an RVO. It is further noted that these equipments are taken on annual rent for an amount of Rs. 4,28,100/- which as per RVO’s contention is much below the market rate as RVO has submitted that the arrangement is cheaper than availing the facility at the prevailing market rates. Therefore, the Authority is of the considered opinion that contravention of rule 12(1) of the Valuer Rules could not be made out as the rental equipment are essential to the functioning of the RVO and are procured at a reasonable rate from the IESMA (Society).

4.1 Contravention

Composition of Committees of the RVO:

4.1.1 The administrative works including processing of complaints, conduct of inspections/disciplinary proceedings are being done by the directors of RVO ESMA themselves. The directors are also members of various Committees like Monitoring Committee, Grievance Redressal Committee, Disciplinary Committee, etc. The directors of RVO performing the operational activities of the RVO leads to conflict of interest. The composition of Governing Board, monitoring committee, grievance redressal committee, disciplinary committee and appellate panel are listed below:

4.1.2 Composition of Governing Board of RVO ESMA:

| Sl no. | Name of Director | Type of director |
|---------------|--------------------------|-----------------------------------|
| 1 | Mr. Subrato Dutt | Chairperson, Independent Director |
| 2 | Mr. Amitabh De | Shareholder Director |
| 3 | Mr. Rana Ghosh | Shareholder Director |
| 4 | Dr. Visvarup Chakravarti | Shareholder Director |
| 5 | Ms. Susmita De | Shareholder Director |
| 6 | Mr. Debashis Kundu | Independent Director |
| 7 | Mr. Tapan Kumar | Independent Director |
| 8 | Mr. Ashok Kumar Baishya | Independent Director |
| 9 | Mr. Soumitra De | Independent Director |
| 10 | Mr. Subhadip Dey | Independent Director |

4.1.3 Composition of Monitoring Committee:

| Sl no. | Name | Designation in Committee |
|---------------|-----------------------------|---------------------------------|
| 1 | Mr. Tapan Kumar Majumdar | Chairman (Independent Director) |
| 2 | Mr. Amitabh De | Member (Shareholder Director) |

| | | |
|---|----------------|-------------------------------|
| 3 | Mr. Rana Ghosh | Member (Shareholder Director) |
|---|----------------|-------------------------------|

4.1.4 Composition of Grievance Redressal Committee:

| Sl no. | Name | Designation in Committee |
|--------|-----------------------|------------------------------------|
| 1 | Mr. Debashis Kundu | Chairman (Independent Director) |
| 2 | Mr. Raj Kumar | Member |
| 3 | Mr.Someslal Mukherjee | Member |

4.1.5 Composition of Disciplinary Committee:

| Sl no. | Name | Designation in Committee |
|--------|------------------|-------------------------------|
| 1 | Ms. Susmita De | Member (Shareholder Director) |
| 2 | Mr. S. N. Mishra | IBBI Representative |
| 3 | Mr. Subrato Dutt | Chairman (Independent) |

4.1.6 Composition of Appellate Panel:

| Sl no. | Name | Designation in Committee |
|--------|----------------------------|---------------------------------|
| 1 | Mr. Ashok Kumar Baishya | Chairman (Independent Director) |
| 2 | Ms. Susmita De | Member (Shareholder Director) |
| 3 | Mr. Alokendu Mukherjee | Member (Judicial) |
| 4 | Mr. Soumitra De | Member (Independent Director) |
| 5 | Mr. Suresh Kumar Dullo | IBBI Representative |

4.1.7 Such act of RVO ESMA is in violation of Rule 12(1), Clause 4(5) of the Part-I under Annexure-III and Clause 6(2)(a) and (f) of the Model Bye-Laws of the Valuer Rules.

4.2 Submissions made by the RVO

4.2.1 The RVO submitted that after the registration as section 8 Company, they intimated about the formation of the different committees of the RVO and after being satisfied the recognition has been granted in favour of this RVO and till date the said committees are functioning very smoothly and best of their ability and also for the best interest of its members as well as the RVO under the management of the chairmanship with the independent directors as provided in the clause 8(2) of the Model Bye-Laws of the Valuers Rule.

4.2.2 The RVO also submits that, the question of conflict of interest does not arise, as alleged or at all, since the directors are engaged in the administrative work as well as the operational activities of this RVO since primarily there is no bar as such as per the Valuers Rules.

Further, the practical problem that arises out of financial constraint of the Company need to be addressed. But the fact remains that the administrative as well as the operational works of the company are being done by the Directors with utmost care and sincerity. However, it is a matter of record that there were no complaints ever been received so far against this RVO regarding its administration. Under the aforesaid facts and circumstances, the allegation of conflict of interest has been made based on surmises and conjecture without any cogent reason. In this connection, the RVO also clarifies that Ms. Susmita De is not a member of the Appellate Panel.

4.3 Findings

- 4.3.1 The matter of contention is with respect of conflict of interest when the directors of the RVO ESMA were performing administrative functions as well as the operational activities. In this regard Clause 6(2)(a) and (f) of the Model Bye-Laws has been referred to which sets high standards of professional and ethical conduct and provides as follows:

“6.(1) The Organisation shall maintain high ethical and professional standards in the regulation of its members.

(2) The Organisation shall –

(a) ensure compliance with the Companies Act, 2013 and rules, regulations and guidelines issued thereunder governing the conduct of registered valuers organisation and registered valuers;

...(f) continuously improve upon its internal regulations and guidelines to ensure that high standards of professional and ethical conduct are maintained by its members; and...”

- 4.3.2 Further, reference to the clause 4(5) of the Part-I under Annexure-III which states as follows:

“4. Composition of the Governing Board.

...5. An independent director shall be an individual –

...

(d) who fulfils the requirements under sub-section (6) of section 149 of the Companies Act, 2013.”

- 4.3.3 In this context, the Authority observed that no specific instance of conflict of interest has been referred to and only a general observation that directors undertaking administrative function even while performing operational activities could cause conflict of interest has been contended. A bare perusal of the provisions of the Valuer Rules makes its apparent that there is no such specific bar on the Directors from discharging operational duties and especially when considered in the present circumstances of the RVO, where they are facing financial constraints. In view of the foregoing, the Authority finds that the RVO should ensure high standards of professional conduct and compliance of the Valuers Rules while discharging its duties.

Order

- 5 In view of the above, the Authority, in exercise of powers conferred vide notification of

Central Government no. GSR 1316(E) dated 18.10.2017 under Section 458 of the Companies Act, 2013 and in pursuance of rule 15 and rule 17 of the Companies (Registered Valuers and Valuation) Rules, 2017, disposes of the SCN advising caution to Estate Managers and Appraisers Foundation, RVO and to be careful and vigilant while performing its duties.

- 6 In accordance with provisions of Rule 17(8) of the Rules, the directions of this order shall come into force with immediate effect as per directions contained in para 5.
- 7 Accordingly, the show cause notice is disposed of.

Dated: 29th September, 2022
Place: New Delhi

-Sd-
(Sudhakar Shukla)
Whole Time Member, IBBI