**Before**

**Amir M. Khan Afridi- Director/ Head of Department**

**In the matter of Show Cause Notice issued to Thal Industries Corporation Limited**

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| Dates of Hearing | November 23, 2020; December 09, 2020; May 27, 2021 |

**Order-Redacted Version**

Order dated July 18, 2022 was passed by Director/Head of Department (Adjudication-I) in the matter of Thal Industries Limited. Relevant details are given as hereunder:

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| **Nature** | **Details** |
| 1. Date of Action | Show cause notice dated April 17, 2019 |
| 1. Name of Company | Thal Industries Corporation Limited |
| 1. Name of Individual\* | The proceedings were initiated against the board of directors of the Company |
| 1. Nature of Offence | Sections 176, 183, 205 and 207 of the Companies Act, 2017 (**the Act**) read with Section 479 thereof  Facts of the case are that review of the financial statements of the Company for the year ended September 30, 2017 and subsequent information provided by the Company in response to Commission’s queries, transpired that certain transactions with associated companies namely Almoiz Industries Limited (**Almoiz**) and Naubahar Bottling Company (Pvt) Limited (**Naubahar**) took place during the year ended September 30, 2017. The said transactions with related parties were approved by the board of directors (**the Board**) in its meeting held on December 26, 2017. Review of the minutes also transpired that interested directors did not disclose nature of their interest in the said associated companies.  Meeting of the Board of the Company held on December 26, 2017 was attended by all the seven directors of the Company out of which six (6) directors had common directorship in the case of Almoiz and three directors had common directorship in the case of Naubahar, hence, they had interest in the aforesaid meeting of the Board. In terms of Section 207 of the Act, the six interested directors were not qualified to: participate in the aforesaid meeting of the Board; and vote to approve the aforesaid transactions with Almoiz, being related party. Due to disqualification of the six interested directors, quorum of the Board meeting cannot be formed, in terms of Section 176 of the Act. Therefore, in terms of Section 183 of the Act, the Company was required to obtain approval of its members in general meeting for approval of the transactions with Almoiz.  Further, upon review of the minutes of the Board’s aforesaid meeting, the interested directors had not disclose their interest to the Board, contrary to the requirements of Section 205 of the Act. |
| 1. Action Taken | Key findings were reported in the following manner:  I have gone through the facts of the case, and considered the written submissions made through various letters by the Respondents, their Representative and the arguments made during the hearings, in light of the aforesaid legal provisions and the record placed before me and state as under:   1. Transactions with associated companies:   The Company, under Note 36 to financial statements for year ended September 30, 2017 (**FY2017**), has disclosed the aforesaid transactions as related party transactions with associated companies namely Almoiz and Naubahar. The Company vide its letters dated August 06, 2018 and May 22, 2019 as well as vide the Authorized Representative’s letter dated December 04, 2020 has admitted and acknowledged that the transactions with related parties, Almoiz and Naubahar, were carried out by the Company during FY2017.  Hence execution of the aforesaid transactions, being related party transactions, with associated companies as stated under para 1 of the SCN is an undisputed fact.   1. Basis of associate relationship with Almoiz and Naubahar: 2. The Company vide letter dated August 06, 2018 has admitted and acknowledged that except Mr. \*\*\*\*\*, all the other six directors/ Respondents had shareholding in Almoiz at the time of the Board’s meeting in which the said related parties transactions were approved and that six (6) of them had directorships in Almoiz as well. Thus, by virtue of six common directors, the Company and Almoiz are associated companies. The same is stated in para 2 of the SCN, is an undisputed fact and duly admitted and acknowledged by the Respondents’ Representative vide letter December 04, 2020.   (b) The Company vide letter dated August 06, 2018 has acknowledged that three (3) of the Respondents, i.e. Mr. \*\*\*\*\*, Ms. \*\*\*\*\* and Mr. \*\*\*\*\*, have shareholding in Naubahar and are common directors of the Company and Naubahar. By virtue of the aforementioned three common directors as stated in para 2 of the SCN, the Company and Naubahar are associated companies. Same is an undisputed fact as acknowledged by the Respondents’ authorized representative vide letter December 04, 2020.   1. Disclosure of interest of directors under Section 205 of the Act:   The Company in its meeting held on December 26, 2017 approved the aforementioned transactions with associated companies. Section 205 of the Act provides for disclosure of nature of direct as well as indirect interest in any contract or arrangement entered or to be entered at the meeting of the board. The stated interest of respective directors is derived from the shareholding as well as directorship in Almoiz and Naubahar as already explained in sub-para (ii) above. Therefore, in context of the subject Company, the common directors of Almoiz and Naubahar, were required to disclose their interest in the meeting of the board of directors held on December 26, 2017 w.r.t the transactions with Almoiz and Naubahar, in terms of the requirements of Section 205 of the Act. Minutes of the Board meeting provided by the Company did not state any such disclosure by the subject directors of the Company. It is important to state that sub-section (2) of Section 205 of the Act provides manner of disclosure in meeting of the board when a director becomes interested. Sub-section (3) of Section 205 of the Act clearly provides what is regarded as concerned or interested in any contract.  The Respondents have not provided any such disclosure in the manner provided under the aforesaid requirements of Section 205 of the Act and the same is the subject matter of the proceedings initiated through the SCN. It is also noted that considering sub-section (3) of Section 205 is explicit and self-explanatory, the assertion that there is a need to define interest separately for the purpose of disclosure or deduce that interest of Respondents was not personal and material thereof is neither intended nor relevant to subject SCN.   1. Interest under Section 205 of the Act:   It has been stated that the directors were already aware of the common directorship of the respective Respondents in Almoiz and Naubahar and therefore disclosures were not required or that such implied knowledge was suffice. Considering the requirements of sub-sections (4) and (5) of Section 205 of the Act, the law explicitly provides that such disclosure of interest is not indefinite rather renewable every year and shall take into effect only if it is active disclosure and not an implied disclosure/ knowledge i.e. either given at the meeting of the board or brought up and read by concerned director.   1. Applicability of Act:   Considering that the subject matter of disclosure was regarding the transactions approved by the Board in its meeting held on December 26, 2017, i.e. after the promulgation of the Act, hence Section 205 of the Act was applicable. Therefore, the question of retrospective application of the Act stated to be intended by the Commission in context of the SCN is misconstrued by the Respondents. Moreover, the assertion of bifurcating the compliance of stated Section with respect to occurrence of transactions before or after the promulgation of Act is not relevant.   1. Interested director not to participate or vote in terms of Section 207 of the Act:   The Respondents have not disputed the fact that the Respondents were present in the meeting held on December 26, 2017. Moreover, minutes of the Board’s stated meeting did not disclose that the interested directors sought recuse from discussion and voting, when the matter of transactions with associated companies, Almoiz and Naubahar, were being considered and approved. In view of requirements of sub-section (1) of Section 207 of the Act, directors of a company are prohibited to participate in discussion and vote on any contract/ arrangement entered or to be entered where such director is directly or indirectly concerned. For listed companies, the requirements are further stringent as to the presence of a director having material personal interest is prohibited to be present in such meeting of the board while considering the said matter.  Hence, it is stated that the Respondents namely; (i) Mr. \*\*\*\*\*, (ii) Ms. \*\*\*\*\*, (iii) Mr. \*\*\*\*\*, (iv) Mr. \*\*\*\*\*, (v) Ms. \*\*\*\*\*, and (vi) Mr. \*\*\*\*\* had interest in Almoiz due to directorship and shareholding therein, therefore, they had material interested in transactions by the Company with Almoiz and by not disclosing the said material interest to the Board and by participating in the consideration and approval of the transaction with Almoiz; these six Respondents, being directors of the Company have contravened the provisions of Sections 205 and 207 of the Act.  It is also stated that in the matter of Naubahar; (i) Mr. \*\*\*\*\*, (ii) Ms. \*\*\*\*\*, and (iii) Mr. \*\*\*\*\*, had interest in Naubahar due to directorship and shareholding therein, therefore, they had material interest in transactions by the Company with Naubahar and by not disclosing the said material interest to the Board and by participating in the consideration and approval of the transaction with Naubahar, these three Respondents, being directors of the Company have contravened the provision of Section 205 and Section 207 of the Act.   1. Insufficient Quorum and matter to be placed before general meeting:   Minutes of meeting of the Board held on December 26, 2017 disclose that matter of transactions with associated companies, Almoiz and Naubahar, was collectively placed before the Respondents to consider and approve. Considering six out of seven directors were interested in transactions with Almoiz; Hence, the said six Respondents were required to refrain from participation and voting in the meeting of the Board considering the nature of the said transactions, and therefore, the quorum of meeting in terms of Section 176 of the Act was not followed.  It was, however, noted that in case of Naubahar only three directors were interested however the minutes do not bifurcate the transactions being approved and present the cumulative balance for consideration and approval. Nevertheless, considering the submission of the Respondents that these are transactions with different companies and assertion by the Respondents of complete quorum in terms of Section 176 in matter of transaction with Naubahar is plausible argument.  Therefore, based on the information provided by the Respondents inclusive of stated minutes, the presence of six interested directors participating and approving the transactions with Almoiz is contravention of sub-section (1) of Section 207 of the Act. Moreover, since presence and voting for approving the transactions with Almoiz, associated company, by six interested directors was void in terms of sub-Section (1) of Section 207 of the Act, therefore, presence of one director (the independent director) in the stated meeting was not sufficient, in terms of sub-Section (1) of Section 176 of the Act, to form quorum for Board meeting. In stated circumstances, the next recourse available for the Respondents was to place the said transactions with Almoiz before the shareholders in general meeting, in terms of sub-Section (2) of Section 207 of the Act. It is rightly viewed by the Respondent that Section 183 requires that board exercises its powers for managing the business of the company for such powers that are not otherwise restricted for purpose of seeking approval of shareholders by the Act, articles or special resolution. Considering that in view of insufficient quorum as stated above, appropriate forum for considering and approving the stated transactions with Almoiz was to seek approval of shareholder in general meeting. The Respondents, however, by approving the transaction with Almoiz in Board meeting held on December 26, 2017 have exercised powers in contravention to the requirements of sub-section (1) of Section 183 of the Act.  In view of the foregoing, I hereby conclude that:   1. With respect to the transaction executed by the Company with Almoiz, an associated company/ related party; by not: 2. disclosing their respective interests in Almoiz, in the form of directorship and shareholding therein, which I consider is material and by participating in the proceedings of the Board meeting relating to the consideration and approval of the transaction by the Company with Almoiz; the six (6) directors of the Company namely; (i) Mr. \*\*\*\*\*, (ii) Ms. \*\*\*\*\*, (iii) Mr. \*\*\*\*\*, (iv) Mr. \*\*\*\*\*, (v) Ms. \*\*\*\*\*, and (vi) Mr. \*\*\*\*\* had contravened the provisions of Sections 205 and 207 of the Act and, therefore, are liable to be penalized; and 3. obtaining approval by way of Special Resolution, in the absence of quorum for the Board meeting dated December 26, 2017, for the aforesaid transaction with Almoiz, all the Respondents, being directors of the Company, had contravened the provisions of Sections 176 and 183 of the Act and are liable to be penalized. 4. Hence, taking cognizance of the aforesaid established contraventions/ non-compliances, I in exercise of the powers conferred under Section 176, 205, 207 and 183 of the Act, hereby impose an aggregate penalty of **Rs. 165,000 (Rupees One Lac Sixty Five Thousand)** on the Respondents. 5. With respect to the transaction executed by the Company with Naubahar, an associated company/ related party, it is stated that by not: 6. disclosing their respective interest in Naubahar in the form of directorship and shareholding therein, which I, consider is material, and by participating in the proceedings of the Board meeting relating to the consideration and approval of the transaction by the Company with Naubahar; three (3) directors of the Company namely; (i) Mr. \*\*\*\*\*, (ii) Ms. \*\*\*\*\*, (iii) Mr. \*\*\*\*\*, had contravened the provisions of Sections 205 and 207 of the Act and therefore, are liable to be penalized. 7. Hence, taking cognizance of the aforesaid established contraventions/ non-compliances; I, in exercise of the powers conferred under Section 205 and 207 of the Act, hereby impose aggregate penalty of **Rs. 30,000 (Rupees Thirty Thousand)** on the Respondents.   Nothing in this Order may be deemed to prejudice the operation of any provision of the Ordinance or the Act providing for imposition of penalties in respect of any default, omission or violation of the Ordinance or the Act. |
| 1. Penalty Imposed | **Rs. 195,000/- (Rupees One Hundred and Ninety five Thousand only**) |
| 1. Current Status of Order | The Respondents have filed an appeal before the Appellate Bench of the Commission. |