

TAKEOVER PANORAMA

A Monthly Newsletter by Corporate Professionals
Year IV-Vol.IV April 2010



INSIGHT

Legal Update <ul style="list-style-type: none"> - Adjudicating Officer Order in the matter of Hydro S & S Industries Limited - Adjudicating Officer Order in the matter of Blue Coast Hotels and Resorts Limited - Adjudicating Officer Order in the matter of Shalimar Productions Limited - Adjudicating Officer Order in the matter of Right Finstock Private Limited - Takeover Panel Order in the matter of GTN Engineering (India) Ltd. - Takeover Panel Order in the matter of Quadrant Enterprises Pvt. Ltd. - Takeover Panel Order in the matter of K K Ropeways Ltd. - Takeover Panel Order in the matter of Cybertech Systems And Software Limited - Consent Order in the matter of Hari Machines Limited 	3
Latest Open Offers	13
Hint of the Month	16
Regular Section <ul style="list-style-type: none"> - An analysis of Regulation 11 of SEBI (SAST) Regulations, 1997 	17
Case Study <ul style="list-style-type: none"> - An analysis of Open Offer made to the shareholders of Scenario Media Limited 	23
Market Update	26
Our Team	27

LEGAL UPDATE

Adjudicating Officer Order in the matter of Hydro S & S Industries Limited

Facts:

1. SEBI has conducted an investigation into the dealing in the scrips of Hydro S & S Industries Limited (HSSIL) during the period 2006-07. Investigations revealed that Rashmi Jha (Noticee), Machino Finance Pvt. Ltd., Machino Techno Sales Ltd., Shri Murli Dhar and Mrs. Kamla Jindal (Acquirers) has acquired shares in HSSIL during the period 2006-07 but did not comply with the requirements of SEBI (SAST) Regulations, 1997.

AO disposed of the matter where the Noticee is a general investor and there is no evidence to believe her as PAC with the other acquirer.

2. It is alleged that the Acquirers has crossed the threshold limit of 5%, 10% , 14% of the paid up capital of HSSIL on November 3, 2006, April 17, 2007 and July 20, 2007 respectively and did not make the required disclosure under Regulation 7(1).
3. Accordingly a show cause notice was issued to the Noticee. The Noticee vide letter dated January 4, 2010 made the following contentions:

Contentions:

1. She had purchased 28,331 shares of HSSIL as a general investor, which have already been sold and currently she is not holding any shares in the company.
2. She had no relations with the Jindal family and is just working in one of the group concern and is also not a PAC as per Regulation 2(1)(e) of the Regulations.
3. As a general investor, she has purchased and sold shares of many companies including those of HSSIL.

Issues:

Whether the Noticee has violated the provision of Regulation 7(1) read with Regulation 7(2) of the SEBI (SAST) Regulations, 1997?

Decision:

On the basis of facts and circumstances of the case, Adjudicating Officer held that:

1. As per the disclosure made by the Acquirers, it is implied that the Noticee was not acting in concert with them.
2. Noticee was not holding any shares of HSSIL prior to June 21, 2007.
3. She has purchased and sold the shares of other companies also as a general investor.
4. There is no evidence on record to believe that she has any relation with the Jindal family. Therefore on the following observations benefit of doubt is given to the Noticee and the matter is disposed off accordingly.

Adjudicating Officer Order in the matter of Blue Coast Hotels and Resorts Limited**Facts:**

1. SEBI conducted an investigation into the dealing in the scrips of Blue Coast Hotels and Resorts Limited (BCHRL/Company). Investigations revealed that persons belonging to the Promoter and Promoter Group of BCHRL have acquired shares or voting rights of the company during December 2007 without complying with regulation 7 and regulation 11 of SEBI (SAST) Regulations, 1997.

It was held that where the shares are transferred in favour of bank on account of invocation of pledge, then retransfer of shares from the bank to the pledgor on the repayment of loan amount would attract the provisions of SEBI Takeover Regulations.

2. Scope Credit and Financial Services Pvt. Ltd., Epitome holdings Pvt. Ltd., Liquid Holdings Pvt. Ltd., Seed Securities Services Pvt. Ltd. and React Investment and Financial Services Pvt. Ltd (Promoters of BCHRL) (together referred to as "Noticees") have taken a loan from the bank and pledged shares of BCHRL with the bank as security. Due to nonpayment of the loan the pledge was invoked by the bank and the ownership of the shares transferred in the name of bank. However, when the promoters repaid the loan to the banks, the shares were returned to the original promoters.

3. Pursuant to the above transfer of shares, the aggregate shareholding of Noticees along with the other promoters had increased from 29,86,040 shares/voting rights (45.47%) to 39,43,040 shares (60.17%) during September-December 2007.

Contentions:

1. The transaction is covered under Regulation 3(1)(f)(iv), which provides the exemption for the acquisition of shares by banks as pledges in the ordinary course of business
2. In case of pledge, transfer of security after the re payment of loans does not amount to fresh acquisition by the promoters.
3. The increase in the shareholding of promoters is pursuant to the redemption of shares with the banks, therefore, disclosure under Regulation 7 is not required.
4. There is no credit of money by banks to the account of promoters which means there is no transfer of ownership. Mere transfer of shares by bank to their demat account in the normal course of banking cannot be termed as acquisition
5. There is no change in management or control of the company.

Issue:

Whether SEBI (SAST) Regulations, 1997 are applicable on the return of shares to the original promoters by the bank in excess of the limit specified under regulation 11(1) of the said regulations, where such shares are earlier transfer in favour of bank on account of invocation of pledge? If yes, whether the above transfer of shares to the original promoters would attract the monetary penalty?

Decision:

Adjudicating officer held that the above acquisition of shares by the promoters would definitely attract the provision of SEBI (SAST) Regulations, 1997 and accordingly imposed the monetary penalty of Rs. 3,00,000 on each of the Noticee. Further, Adjudicating officer held that the proper course of action for the promoters, in the given circumstance would have been to make an application to the Takeover Panel before acquiring the shares retransferred by banks.

Adjudicating Officer Order in the matter of Shalimar Productions Limited

Facts:

1. SEBI has conducted an investigation into the dealing of scrips of Shalimar Production Limited (SPL) from May 7, 2004 to August 11, 2004. Investigations revealed that Mr. Pravin Raiyani (Noticee) had acquired more than 5% shares of SPL and has not made the required disclosure under Regulation 7(1) & 7(2) of SEBI (SAST) Regulations, 1997 and Regulation 13(1) of SEBI (PIT) Regulations, 1992.
2. Accordingly a show cause notice was issued to the Noticee. The Noticee replied to the show cause notice and has made the following submissions:

AO held that ignorance of law and bonafide intention is not a justifiable excuse and imposed the penalty of Rs.1,00,000 on the Noticee for the failure to comply with reg. 7 of SEBI Takeover Regulations and reg. 13 of SEBI Insider Trading Regulations.

Contentions:

1. He was a SEBI registered Sub-Broker and was affiliated with Apollo Sindhoori Cap. Investment Ltd. since 2004.
2. The client registration process by the broker was so slow and the Noticee did not want to miss the opportunity of good brokerage and advance payment. The Noticee had purchased on his own account and then transferred all deliveries to them.
3. He merely acted as a sub broker for Mr. T.C. Kothari but has no evidence proof of purchase.
4. He was not aware of the requirements of Regulation 7(1) & (2) of the SEBI (SAST) Regulations, 1997 and was also not guided by his principle broker about the same.
5. He had no malafide intention of price jacking or takeover.

Issue:

Whether the ignorance of law and bonafide intention is a justifiable excuse for not making the required disclosures under the Regulations?

Decision:

No. Considering the Supreme Court of India judgement in the matter of SEBI vs Shri Ram Mutual Fund wherein it was held that *“once the violation of statutory regulations is established, imposition of penalty becomes sine qua non of violation and the intention of parties committing such violation becomes totally*

irrelevant. Once the contravention is established then the penalty is to follow”, Adjudicating Officer held that the Noticee has violated the provisions of SEBI (SAST) Regulations, 1997 and SEBI (PIT) Regulations, 1992 and imposed the penalty of Rs 1,00,000 on the Noticee.

Adjudicating Officer Order in the matter of Right Finstock Private Limited

1. SEBI conducted an investigation into the alleged creation of artificial volume and circular trading into the scrips of M/s K C Bokadia Films Limited (KCBFL) during the period from June-August 2004. BSE on the basis of reference letter from SEBI had also conducted an investigation in the scrips of the Company.
2. During the investigation, it was observed that Right Finstock Pvt. Ltd. (Noticee) had bought 30,60,000 (23.18%) equity shares of KCBFL during March 2004.
3. However, neither the provisions of regulation 10 of SEBI (SAST) Regulations, 1997 with respect to the open offer to the shareholders of KCBFL nor the provisions with respect to the disclosure to be made to the stock exchange in terms of regulation 7(1) of SEBI (SAST) Regulations, 1997 and 13(1) of SEBI (Prohibition of Insider Trading) Regulations, 1992 have been complied with by the Noticee.
4. Further, the Noticee had also sold 10 lakhs equity shares representing 7.57% of KCBFL to Steel Udyog Limited in a single transaction and no disclosure under regulation 7(1A) and 13(3) have been made to the Stock Exchange.
5. Accordingly a show cause notice was issued to the notice and a reasonable opportunity of being heard was also given.

AO held that the fact that Noticee was not aware of disclosure requirements cannot be accepted and imposed the penalty of Rs.1,50,000 on the Noticee for the failure to comply with reg. 7 of SEBI Takeover Regulations and reg. 13 of SEBI Insider Trading Regulations.

Contention:

The Noticee contended that he was not aware of the SEBI regulations which make the disclosure mandatory on part of the persons operating in the capital market and therefore was ignorant about the same.

Issue:

Whether the imposition of penalty for the violation of the provisions of SEBI (SAST) Regulations, 1997 and SEBI (Prohibition of Insider Trading) Regulations, 1992 is justified where the Noticee is not aware of the disclosure requirement under the said Regulations?

Decision:

Considering the judgment in the matter of SEBI vs. Shri Ram Mutual Fund, wherein Hon'ble Supreme Court held that Once the violation of statutory regulations is established, imposition of penalty becomes sine qua of violation and the intention of the parties committing such violation becomes totally irrelevant and accordingly, Adjudicating Officer imposed the penalty of Rs 1,50,000 on the Noticee.

Takeover Panel Order in the matter of GTN Engineering (India) Limited**Facts:**

1. GTN Engineering (India) Limited ("Acquirer") and JEL Finance and Investment Limited (PAC) belongs to the promoter group of the GTN Industries Limited (Target Company) and are currently holding 1,65,585 equity shares representing 1.43% of the total paid up capital of the Target Company. The promoter group of the Target Company holds shares representing 61.45% of the paid up capital in the Target Company.
2. Due to the significant losses in the financial year 2008-2009, the company has opted for the Corporate Debt Restructuring (CDR) Scheme. In terms of the CDR package, the promoters of the Target Company are required to bring contribution of Rs.750 lakhs against which Target Company proposes to issue 60,00,000 equity shares of Rs 10 each at a premium of Rs 2.50 per share on preferential allotment to the acquirer. Pursuant to the proposed preferential allotment, the shareholding of the Acquirer and PAC would increase from 1.43% to 34.47% in the Target Company and that of the promoter group from 61.45% to 74.64%, thereby, resulting into triggering of Regulation 11(2) of SEBI (SAST) Regulations, 1997.
3. Therefore, the acquirers has filed the present application seeking exemption from the requirement of making the open offer on the following grounds:

SEBI granted the exemption from the applicability of Regulation 11(2) of SEBI Takeover Regulations where the increase in shareholding is pursuant to the Corporate Debt Restructuring (CDR) Scheme.

Grounds of exemption:

1. No change in control and management.
2. Acquirer and PAC belong to the promoter group of the Target Company.
3. Approval of shareholders has already been obtained.

Decision:

On the basis of above facts and circumstances of the case, SEBI granted the exemption to the acquirer and PAC from the applicability of Regulation 11(2) with respect to the proposed preferential allotment of equity shares subject to the acquirer complying with the other provisions of SEBI Takeover Regulations, Buy Back Regulations, Listing Agreement or any other law as may be applicable.

Takeover Panel Order in the matter of Quadrant Enterprises Pvt. Ltd.**Facts:**

1. Quadrant Enterprises Pvt. Ltd. (“acquirer”) is promoted by the Videocon group. The acquirer currently does not hold any shares in HFCL Infotel Limited (Target Company).
2. In terms of the CDR package, the acquirer proposes to acquire 32, 67, 05,000 shares representing 53.36% of the Target Company, at zero value as per scheme approved by the CDR cell. Pursuant to the above acquisition, the shareholding of acquirer would increase from Nil to 53.36% of the total equity capital of the Target Company, thereby, resulting into triggering of regulation 10 & 12 of SEBI (SAST) Regulations, 1997.
3. Further, Videocon group has agreed to settle the entire term loan as specified in the CDR package and will infuse funds into the Target Company through acquirer to meet its financial obligation.
4. Therefore, the acquirers has filed the present application seeking exemption from the requirement of making the open offer on the following grounds:

SEBI granted the exemption from the applicability of Regulation 10 & 12 of SEBI Takeover Regulations where the increase in shareholding is pursuant to the Corporate Debt Restructuring (CDR) Scheme.

Grounds of exemption:

1. The acquisition of shares/management control is pursuant to the scheme approved by the CDR cell vide letter dated August 13, 2009.
2. The CDR package will revive the Target Company and is in the interest of Target Company and its shareholders.
3. An amount of Rs. 644 crores is outstanding to be paid to the banks/institutions.
4. Target Company is a sick company and may go into liquidation if the funds, as envisaged by the CDR package, are not infused into it.
5. Post acquisition, the Target Company will be managed by the experienced professionals.

Decision:

On the basis of above facts and circumstances of the case, SEBI granted the exemption to the acquirer from the requirement of making open offer on the basis that the facts and statements given by the acquirers are true and the acquirer will comply with the other provisions of SEBI Takeover Regulations, Buy Back Regulations, Listing Agreement or any other law as may be applicable.

Takeover Panel Order in the matter of K K Ropeways Limited**Facts:**

1. Vikram Bakshi and Company Private Limited, Mrs. Madhurima Bakshi and Ms. Devika Bakshi (Acquires) presently holds 6,49,000 equity shares representing 14.90% of the voting rights in K.K. Ropeways Limited (Target Company).
2. Now the Acquirers proposes to acquire 25,73,200 equity shares constituting 59.10% voting rights in the Target Company at a price of Rs. 12 per share from the existing promoters of the Target Company.
3. Post acquisition, the shareholding of the Acquirers would increase from 14.90% to 74% with a change in control in the Target Company, thereby, triggering Regulation 10 & 12 of SEBI (SAST) Regulations, 1997.
4. Therefore, the acquirers has filed the present application seeking exemption from the applicability of Regulations 13, 14, 15, 16 and 18 of SEBI (SAST) Regulations, 1997 on the following grounds:

SEBI rejected the exemption application where the public shareholding is minimal and suggested that the necessary steps should be taken for delisting of the Target Company.

Grounds of Exemption:

1. There are only five public shareholders in the Target Company, holding 0.06% of the total share capital of the company.
2. All the 5 shareholders have given their consent in writing for the acquisition of control by the acquirers from the existing promoters of the Target Company.
3. The acquirers will make an individual offer to all the shareholders to buy their shares through registered post at their registered address.
4. Post acquisition, the acquirers intend to delist the shares of the Target Company from the stock exchanges.
5. The forfeiture of shares was solely the decision of then existing board of directors of the Target Company.

Decision:

As per the findings of the case, SEBI noted that after the proposed acquisition, the shareholding of the Acquirers would increase from 14.90% to 74% of the total equity of the Target Company. Further the Acquirers intend to delist the shares of the Target Company from the Stock Exchanges after the acquisition. Therefore, SEBI held that it is not a fit case for the grant of exemption. Rather than necessary steps should be taken for delisting of the Target Company.

Takeover Panel Order in the matter of Cybertech Systems And Software Limited

Facts:

1. The acquirers belong to the promoter group of Cybertech Systems And Software Limited (Target Company) and holds in aggregate 23.59% of the equity capital of the Target Company.
2. The Board of Directors of the Target Company at its meeting held on August 20, 2009 approved the buyback of 66,17,836 equity shares at a maximum price of Rs. 12 per share.

SEBI rejected the exemption where the increase in shareholding is pursuant to buyback by the Target Company and buyback price is less than the market price.

3. Pursuant to Buy Back, assuming the 100% response to Buy Back offer, the shareholding of the acquirers will increase from 23.59% to 31.46%, i.e. post buy back shareholding of acquirers would increase beyond 5%, resulting into triggering regulation 11(1) of the SEBI (SAST) Regulations, 1997 requiring the open offer be made to the shareholders of Target Company.
4. Therefore, the acquirers has filed the present application seeking exemption from the requirement of making the open offer on the following grounds:

Grounds of Exemption:

1. Increase in the shareholding is incidental to Buy Back.
2. No active acquisition by the promoters.
3. No change in control over Target Company.
4. The acquirers will not participate in Buy Back offer.
5. Minimum public shareholding would be maintained.
6. The acquirers do not propose to acquire a single share of the Target Company.

Decision:

SEBI held that share price of the Target Company as on the date prior to the date of exemption application was in a range of Rs. 15.05 to Rs.15.10 which is above the buyback price of Rs 12 per and currently quoted at Rs 18 which is again higher than the buyback price. Thus, the shareholders of the company have the options to tender the shares in open market at a higher price. Therefore as per SEBI, this is not a fit case for the exemption. In the meanwhile SEBI had received a letter dated March 5, 2010 informing that the company had withdraw the buyback approved earlier and thus the application is disposed off.

Consent Order in the matter of Hari Machines Limited

Hari Machines Limited (Applicant) has failed to comply with the disclosure requirement under Regulation 6(2), (4) and 8(3) of SEBI (SAST) Regulations, 1997 for the years 1998 to 2004 and 2006, 2008, 2009. Therefore, vide letter dated November 24, 2009, the applicant have voluntary filed the consent application for the settlement of enforcement action that may be initiated by SEBI and proposed to pay a sum of Rs 5,75,000 towards the consent terms as settlement charges. The terms as proposed by the

applicant were placed before High Power Advisory Committee (HPAC) and on the recommendation of HPAC, SEBI settle the above non compliance of the applicant.

LATEST OPEN OFFERS

Name of the Target Company	Name of the Acquirer & PAC	Details of the offer	Reason of the offer	Related parties
<p>Lancing Investment Limited</p> <p>Regd. Office Kolkata</p> <p>Paid up capital Rs. 20 lacs</p> <p>Listed At CSE</p>	<p>Ritman Concrete Pvt. Ltd. and Ritman Commercial Pvt. Ltd.</p>	<p>Offer to acquire 40,000 (20%) Equity Shares at a price of Rs. 15 per share payable in cash.</p>	<p>Regulation 10 & 12</p> <p>SPA to acquire 1,37,500 (68.75%) equity shares at a price of Rs 13.80 per share.</p>	<p>Merchant Banker VC Corporate Advisors Private Limited</p> <p>Registrar to the Offer Niche Technologies Pvt. Ltd.</p>
<p>Golden Legand Leasing & Finance Limited</p> <p>Regd. Office Mumbai</p> <p>Paid up capital Rs.50 lakhs</p> <p>Listed At BSE</p>	<p>Ullash Parikh</p>	<p>Offer to acquire 1,00,000 (20%) Equity Shares at a price of Rs. 21 per share payable in cash.</p>	<p>Regulation 10 & 12</p> <p>SPA to acquire 1,85,000 (37%) equity shares at a price of Rs 17 per share.</p>	<p>Merchant Banker Corporate Strategic Allianz Limited</p> <p>Registrar to the Offer Purva Sharegistry (India) Private Limited</p>
<p>Pipavav Shipyard Limited</p>	<p>SKIL Infrastructure Limited and SKIL Shipyard holdings</p>	<p>Offer to acquire 133,159,678 (20%) Equity</p>	<p>Regulation 11(1) & 12</p> <p>SPA to acquire</p>	<p>Merchant Banker JM Fiancial Consultants</p>

<p>Regd. Office Gujarat Paid up capital Rs. 665 Crore</p> <p>Listed At BSE & NSE</p>	Pvt. Ltd.	Shares at a price of Rs. 61.50 per share payable in cash.	129,360,538 (19.43%) equity shares at a price of Rs 50.75 per share.	Private Limited Registrar to the Offer Karvy Computershare Pvt. Ltd
<p>Bhilwara Spinners Limited</p> <p>Regd. Office Rajasthan</p> <p>Paid up capital Rs. 676.11 lacs</p> <p>Listed At BSE</p>	Ahinsa Infrastructure & Developers Limited	Offer to acquire 13,52,226 (20%) Equity Shares at a price of Rs. 18 per share payable in cash.	Regulation 10 & 12 SPA to acquire 31,13,100 (46.04%) equity shares at a price of Rs 18 per share.	Merchant Banker D & A Financial Services (P) Ltd. Registrar to the Offer Beetel Financial & Computer Services Pvt. Ltd
<p>DJS Stock and Shares Limited</p> <p>Regd. Office Mumbai</p> <p>Paid up capital Rs. 5.03 Crore</p> <p>Listed At BSE, CSX & SKSE</p>	B.K. Dyeing & Printing Mills Pvt. Ltd., Sriman Stock Managements Pvt. Ltd and Malar Share Shoppe Limited	Offer to acquire 10,06,080 (20%) Equity Shares at a price of Rs. 45 per share payable in cash.	Regulation 10 & 12 SPA to acquire 28,07,100 (55.80%) equity shares at a price of Rs 25 per share.	Merchant Banker Vivro Financial Services Private Limited Registrar to the Offer Purva Sharegistry (India) Private Limited
<p>Cronimet Alloys India Limited</p> <p>Regd. Office Andhra Pradesh</p> <p>Paid up capital Rs. 2093.65 lakhs</p> <p>Listed At BSE & NSE</p>	Atlanta Natural Resources Pte. Ltd. along with Mynah Industries Limited	Offer to acquire 24,57,059 (20%) Equity Shares at a price of Rs. 39.40 per share payable in cash.	Regulation 10 & 12 Indirect Acquisition of shares and control of the Target Company.	Merchant Banker Keynote Corporate Services Limited Registrar to the Offer Mondkar Computers Pvt. Limited

<p>Kaashyap Technologies Limited</p> <p>Regd. Office Chennai</p> <p>Paid up capital Rs. 65.72 Crore</p> <p>Listed At BSE & MSE</p>	<p>TAIB Securities Mauritius Limited</p>	<p>Offer to acquire 13,14,54,982(20%) Equity Shares at a price of Re. 0.73 per share payable in cash.</p>	<p>Regulation 10</p> <p>Conversion of GDR into equity shares representing 32.37% of the paid up capital of the Target Company</p>	<p>Merchant Banker</p> <p>Birla Capital and Financial Services Limited</p> <p>Registrar to the Offer</p> <p>Bigshare Services Private Limited</p>
<p>Sanjay Leasing Limited</p> <p>Regd. Office Mumbai</p> <p>Paid up capital Rs. 48 lakhs</p> <p>Listed At BSE</p>	<p>Ketan Kothari, Mohinidevi Kothari, Devkumari Kothari, Kalavati Kothari, Rakesh Kothari, and Ashish Kothari</p>	<p>Offer to acquire 1,60,000 (33.33%) Equity Shares at a price of Rs. 33 per share payable in cash.</p>	<p>Regulation 10 & 12</p> <p>SPA to acquire 96,600 (20.13%) equity shares at a price of Rs 33 per share.</p>	<p>Merchant Banker</p> <p>Chartered Capital And Investment Limited</p> <p>Registrar to the Offer</p> <p>Chartered Capital And Investment Limited</p>
<p>MSK Projects (India) Limited</p> <p>Regd. Office Vadodra</p> <p>Paid up capital Rs. 22.82 crore</p> <p>Listed At BSE, VSE and NSE</p>	<p>Welspun Infratech Limited along with Welspun Gujarat Stahl Rohren Limited</p>	<p>Offer to acquire 80,00,000 (20%) Equity Shares at a price of Rs. 130.50 per share payable in cash.</p>	<p>Regulation 10 & 12</p> <p>SPA to acquire 52,79,438 (23.13%) equity shares at a price of Rs 130.50 per share and preferential allotment of 1,77,78,888 (42.95%) equity shares.</p>	<p>Merchant Banker</p> <p>Collins Stewart India Private Limited</p> <p>Registrar to the Offer</p> <p>Link Intime India Pvt. Ltd.</p>

<p>Women Networks Limited</p> <p>Regd. Office New Delhi</p> <p>Paid up capital Rs. 301.48 lacs</p> <p>Listed At BSE & DSE</p>	<p>Rajesh Kumar Pagaria and Sri Anand Vinayak Coalfields Limited</p>	<p>Offer to acquire 11,62,960 (20%) Equity Shares at a price of Rs. 21.50 per share payable in cash.</p>	<p>Regulation 10 & 12</p> <p>Preferential allotment of 28,00,000 Equity Shares and SPA to acquire 3,86,800 (12.83%) equity shares of Target Company.</p>	<p>Merchant Banker D & A Financial Services Pvt. Ltd.</p> <p>Registrar to the Offer Beetel Financial & Computer Services Pvt. Ltd.</p>
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HINT OF THE MONTH

The inter se transfer shares amongst the Acquirer and PACs is exempt from the applicability of regulation 10, 11 and 12 of SEBI (SAST) Regulations, 1997 provided that such transfer takes place after three years from the date of closure of the public offer made by them under the said regulations.

As substantiated from reg. 3(1)(e)(iv) of SEBI (SAST) Regulations, 1997

REGULAR SECTION

An analysis of Regulation 11 of SEBI (SAST) Regulations, 1997

SEBI (SAST) Regulations, 1997 provides the triggering events on which the acquirer is required to give an open offer to the shareholders of the Target Company. The triggering event may be signing of Share Purchase Agreement or actual acquisition of shares from the market or passing of resolution for allotment of shares on preferential basis and so on. Thus as soon as the intention of the acquirer to acquire the shares of Target Company beyond the threshold limits mentioned above, is expressed unequivocally, the acquirer is required to give an open offer to the shareholders of the Target except where the acquisition is exempted under regulation 3 of these regulations. One of the triggering events is contemplated under regulation 11 of SEBI (SAST) Regulations, 1997, an analysis of which is detailed below:

Regulation 11(1) provides that *“No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than fifty five per cent (55%) of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5% of the voting rights, with post acquisition shareholding or voting rights not exceeding fifty five per cent., in any financial year ending on 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.”*

Analysis of Regulation 11(1)

This regulation is meant for allowable acquisitions (both direct & indirect) only for those who already hold more than 15% shares or voting rights but less than 55% shares or voting rights in a company. This regulation allows the persons either by themselves or through persons acting in concert (PAC) with them who are holding more than 15% but less than 55% shares or voting rights in the company to acquire further upto 5% shares or voting rights in the financial year ending 31st March. The allowable acquisition of 5% is popularly known as ‘**Creeping Acquisition**’. Thus, the acquirer is permitted to acquire additional shares and consolidate his holdings within the aforesaid limits.

However, it is to be noted that the creeping acquisition limit is subject to the condition that the post acquisition shareholding of the acquirer does not exceed beyond 55% of the paid capital of the Target Company.

Further, where the acquirer who along with the PACs holds equal to or more than 15% but less than 55% shares and desires to acquire more than 5% shares in any financial year, can do so by making an open offer to the shareholders of the Target Company.

Regulation 11(2) provides that *No acquirer, who together with persons acting in concert with him holds, fifty-five per cent (55%) or more but less than seventy-five per cent (75%) of the shares or voting rights in a target company, shall acquire either by himself or through or with persons acting in concert with him any additional shares entitling him to exercise voting rights or voting rights therein, unless he makes a public announcement to acquire shares in accordance with these Regulations.*

Provided that in a case where the target company had obtained listing of its shares by making an offer of at least ten per cent (10%) of issue size to the public in terms of clause (b) of sub-rule (2) of rule 19 of the Securities Contracts (Regulation) Rules, 1957, or in terms of any relaxation granted from strict enforcement of the said rule, this sub-regulation shall apply as if for the words and figures 'seventy-five per cent (75%)', the words and figures 'ninety per cent (90%)' were substituted.

Analysis of Regulation 11(2)

Regulation 11(2) provides that the acquirer who along with the PACs holds more than 55% but less than 75% shares or voting rights in a company cannot acquire a single share unless a public offer is given as per the provisions of regulations. Thus, the object of the regulation is restrict the acquirer from further acquiring the shares beyond the limit of 55% unless an exit opportunity is given to the shareholders of the Target Company.

However, vide notification dated October 30, 2008, a proviso has been inserted in regulation 11(2) of the SEBI (SAST) Regulations, 1997 which allowed the acquisition of another 5% shares by shareholders who already hold 55% or more but less than 75% shares or voting rights of a Listed Company subject to certain conditions which are further clarified by circular dated August 06, 2009 and amended by the amendment dated November 06, 2009. The legal text of proviso is reproduced below:

Provided further that such acquirer may, notwithstanding the acquisition made under regulation 10 or sub-regulation (1) of regulation 11, without making a public announcement under these Regulations, acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him upto five per cent. (5%) voting rights in the target company subject to the following:-

(i) the acquisition is made through open market purchase in normal segment on the stock exchange but not through bulk deal /block deal/ negotiated deal/ preferential allotment; or the increase in the Shareholding or voting rights of the acquirer is pursuant to a buy back of shares by the target company;

(ii) the post acquisition shareholding of the acquirer together with persons acting in concert with him shall not increase beyond seventy five per cent.(75%). ”

Analysis of second proviso to Regulation 11(2)

A. Routes allowed

The acquisition is allowed only through Open market purchases in the normal segment & NOT through

- Bulk Deal
- Block Deal
- Negotiated deal or
- Through preferential allotment

OR

Pursuant to the buy back by the Company.

B. Minimum 55% shareholding:

The creeping acquisition is allowed only to the acquirer **who together with the PACs with him holds 55% or more** shares in the Target Company.

C. Not at par with regulation 11(1)

The creeping acquisition as allowed under second proviso to sub-regulation (2) of regulation 11 **is not at par** with the creeping acquisition allowed under regulation 11(1) of the SEBI (SAST) Regulations, 1997.

The creeping acquisition as prescribed under regulation 11(1) is allowed in each financial year i.e. an acquirer who is holding 15% or more shares can go on acquiring the further shares upto 5% in each financial year till the time his holding does not exceed beyond 55%.

However, the creeping acquisition as prescribed under second proviso to sub-regulation (2) of regulation 11 is not allowed in each financial year.

D. One time acquisition

Creeping acquisition as prescribed under second proviso to sub-regulation (2) of regulation 11 is a **one time acquisition**.

The creeping acquisition limit of 5% as prescribed under the said proviso is allowed once during the entire life time of the Target Company and can be made in one or more trenches without any restriction on the time frame.

E. No netting off allowed

The limit of 5% shall be calculated by aggregating all the purchases without netting the sales;

For example: where an acquirer holding 56% shares have acquired further 4% shares in the company during the financial year 2009-10 and sold of 2% shares in the same financial year, then he can further acquired only 1% shares without making the public announcement regardless of the fact that he has sold of 2% shares in the financial year 2009-10.

F. Maximum 75% shareholding

Irrespective of the level of minimum public shareholding to be maintained in terms of clause 40A of the listing agreement, the total shareholding of the acquirer along with the PACs consequent to the creeping acquisition as allowed under second proviso to sub-regulation (2) of regulation 11 should not increased beyond 75%.

For Example: Where the promoters of a company, which is required to maintain a minimum public shareholding of 10% in terms of clause 40A of the Listing Agreement, are holding 85% shares, then they cannot acquire another 5% shares in terms of second proviso to sub-regulation (2) of regulation 11 without making the public announcement as the said proviso has restricted the maximum shareholding to 75% irrespective of the fact that the company is allowed to maintain the promoter shareholding at 90%.

Further, it is to be noted that the acquisition in accordance with second proviso to regulation 11(2) is available irrespective of the acquisition made under regulation 10 or regulation 11(1) of SEBI (SAST) Regulations, 1997.

***Regulation 11(2A)** provides that *Where an acquirer who (together with persons acting in concert with him) holds fifty five per cent (55%) or more but less than seventy five per cent (75%) of the shares or voting rights in a target company, is desirous of consolidating his holding while ensuring that the public shareholding in the target company does not fall below the minimum level permitted by the Listing Agreement, he may do so by making a public announcement in accordance with these regulations:**

Provided that in a case where the target company had obtained listing of its shares by making an offer of at least ten per cent (10%) of issue size to the public in terms of clause (b) of sub-rule (2) of rule 19 of the Securities Contracts (Regulation) Rules, 1957, or in terms of any relaxation granted from strict enforcement of the said rule, this sub-regulation shall apply as if for the words and figures 'seventy five per cent (75%)', the words and figures 'ninety per cent (90%)' were substituted.

Analysis of Regulation 11(2A)

Regulation 11(2A) provides that where an acquirer who together with PAC holds 55% or more but less than 75% shares in the Target Company and desirous of consolidating his shareholding, then he can do so by giving a Public Announcement as per the Regulations provided that the public shareholding does not fall below the minimum level as prescribed in the Listing Agreement.

Further regulation 21 (3) of the SEBI (SAST) Regulations, 1997 provides that where the public offer is made under sub-regulation (2A) of regulation, the minimum size of the public offer shall be the lesser of the following—

- (a) Twenty per cent of the voting capital of the company; or

(b) Such other lesser percentage of the voting capital of the company as would, assuming full subscription to the offer, enable the acquirer, together with the persons acting in concert with him, to increase his holding to the maximum level possible, which is consistent with the target company meeting the requirements of minimum public shareholding laid down in the Listing Agreement.

Regulation 11(3) provides that *Notwithstanding anything contained in regulations 10, 11 and 12, in case of disinvestment of a Public Sector Undertaking, an acquirer who together with persons acting in concert with him, has made a public announcement, shall not be required to make another public announcement at the subsequent stage of further acquisition of shares or voting rights or control of the Public Sector Undertaking provided:—*

- i. *both the acquirer and the seller are the same at all the stages of acquisition, and*
- ii. *disclosures regarding all the stages of acquisition, if any, are made in the letter of offer issued in terms of regulation 18 and in the first public announcement.*

Analysis:

In case of Public sector Undertaking, the acquirer who had once made public offer to acquire shares offered at the time of divestment is relieved from making public offer again at further stages of acquisitions subject to compliance of the following:

- The seller & the buyer are same at all stages of acquisitions &
- The acquirer had made disclosures regarding all the stages of acquisitions, if any, in the letter of offer issued in the first public announcement.

Explanation.—For the purposes of regulation 10 and regulation 11, acquisition shall mean and include,—

- a. direct acquisition in a listed company to which the regulations apply;
- b. indirect acquisition by virtue of acquisition of companies, whether listed or unlisted, whether in India or abroad.

In the matter of **Eaton Corporation (18/07/2001) –SAT**, the Tribunal held that SEBI (SAST) Regulations, 1997 takes care of direct and indirect acquisition, and, thus, indirect acquisition of shares/control, including acquisitions through chain of subsidiaries would attract provisions of SEBI (SAST) Regulations, 1997.

CASE STUDY

An analysis of Takeover offer for Scenario Media Limited

About Scenario Media Limited (Target Company)

Incorporated on February 17, 1982, the Target Company is engaged in the business of production, projection, exhibition and representation of cinematograph films, TV, motion picture, publishing magazines, newspapers, processing, marketing, advertising through media or any other mode of communication. The shares of the Target Company are listed on Bombay Stock Exchange (BSE).

About Scenario Communication Limited (Acquirer)

Scenario Communication Limited (formerly known as Jai Baba Communication Services Private Limited) is presently engaged in the business of providing financial consultancy services. The company has sold its film production business to Scenario Media Limited.

First Public Announcement

On May 28, 2005, Scenario Communication Ltd. (Acquirer) made a Public Announcement under Regulation 10 & 12 of the SEBI (SAST) Regulations, 1997 to acquire 2,40,000 fully paid up equity shares representing 10.71% of the post preferential voting capital of Scenario Media Limited (Target Company) pursuant to the preferential allotment of 20,00,000 equity shares representing 89.29% of the fully paid up capital of the Target Company. The draft letter of offer in respect of the Public Announcement was filed on June 10, 2005.

SEBI observation on the First Public Announcement

While vetting the draft letter of offer, SEBI found that the voting capital of Target Company has increased from 2,40,000 to 22,40,000 equity shares and the shareholding of acquirer increased from NIL to 89.29% of the enhanced capital of the Target Company. Further, the shareholding of the then existing promoter group of the Target Company decreased from 19.73% to 2.11% and of the public shareholders from 80.27% to 8.60%. Accordingly, SEBI sought the details from the Merchant Banker i.e. M/s Aryaman Financial Services Limited on the following points:

- Applicability of clause 40A of the Listing Agreement on the above preferential allotment;
- Whether the equity shares allotted by said preferential allotment are eligible for listing; and
- Observation made by the BSE with respect to above mentioned preferential allotment without obtaining the In-Principal approval from the BSE.

Reply submitted by the Merchant Banker

The Merchant Banker submitted that the Acquirer undertakes to disinvest through an offer for sale or by fresh issue of the share capital to the public which shall open within a period of 6 months from the date of closure of the offer, such number of shares, so as to satisfy the listing requirement. Further, the Target Company is also waiting for the “in-principle” approval from BSE for the listing of said equity shares issued on preferential basis.

However, after the exchange of various communications, SEBI issued a show cause notice to the acquirer, asking as to –

- 1) Why the acquirer should not be directed to withdraw the public offer made by Public Announcement dated 28.05.05 in terms of the regulation 27 (1) (d) of the SEBI (SAST) Regulations, 1997?
- 2) Why the acquirer should not be directed under regulation 44 and regulation 45 of the SEBI (SAST) Regulations, 1997 and sections 11 and 11B of the SEBI Act, 1992:
 - a) to disinvest shares acquired by the acquirer in excess of limit of 75%;
 - b) to transfer the proceeds of such disinvestment or any unjust enrichment on account of above acquisition to the Investor Protection and Education Fund of SEBI; and
 - c) not to exercise voting rights attached to the shares acquired in violation of provisions of listing agreement and SEBI (SAST) Regulations, 1997, till completion of the process of disinvestment in accordance with regulation 44(a) of SEBI (SAST) Regulations, 1997.

Reply to the show cause notice

In reply to the show cause notice, the acquirer submitted that the target company has undertaken to take corrective actions to ensure the compliance with clause 40A of Listing Agreement.

In the meantime, on the request of the acquirer, Keynote Corporate Services Limited agreed to provide the merchant banking services to the acquirer.

Corrective Measure taken

In order to comply with the minimum public shareholding requirement, the Target Company, vide its letter dated December 26, 2007 to BSE, undertook to take following corrective measures:

- I. Reclassify the present authorized capital of 50,00,000 equity shares of Rs 10 each into two kinds:
 - i. 35,00,000 equity shares of Rs 10 each, and
 - ii. 15,00,000 redeemable preference shares of Rs 10 each
- II. Reclassify the 14,75,000 shares out of 20,00,000 equity shares allotted on preferential basis into 14,75,000 redeemable preference shares of Rs 10 each and the remaining into 5,25,000 equity shares of Rs 10 each.

The target company has received the approval from BSE, vide their letter dated 17.03.08, to bring down the equity holding of the acquirer to 68.63%. Consequent to the said corrective steps, the obligation of the acquirer to make public offer under SEBI (SAST) Regulations, 1997 will continue. Since the public offer would be in the interests of the public shareholders, the withdrawal of Public Announcement need not be insisted upon.

Further, since consequent to the said corrective steps, there will no requirement of disinvestment, and therefore with no divestment, there has been no unjust enrichment and hence any situation for transfer of any proceeds of such disinvestment to the Investor Protection and Education Fund of SEBI may not arise.

SEBI directions

In view of the submissions made by the acquirer from time to time, the Whole Time Member of SEBI vide its order dated January 14, 2009 directed the acquirer to make the revised public announcement to the shareholders of the Target Company within 2 weeks from the date of the listing granted by the BSE. The acquirer shall determine the price under regulation 20 of the SEBI (SAST) Regulations, 1997 and for the said purpose; it would factor in the two weeks traded price prior to taking the date of revised Public Announcement. Further, the acquirer was also directed to pay the interest @ 10% for the delay in making the payment to the shareholders from March 26, 2005 till the date of actual payment of consideration.

The second offer

Accordingly, on January 29, 2010, the acquirer has made the public announcement to the shareholders of Target Company to acquire 1,53,000 Equity Shares representing 20% of the equity share capital at a price of Rs 140.80 per share (including interest of Rs 4.84 per share) payable in cash.

MARKET UPDATE

Biocon acquired 49% stake of CIMAB SA

Biocon SA, the wholly owned subsidiary of Biocon Ltd., has purchased 49% stake of CIMAB SA in Biocon Biopharmaceuticals. Biocon Biopharmaceuticals Pvt. Ltd. (BBPL) is Biocon's 51:49 JV with CIMAB SA. After this acquisition Biocon Biopharmaceuticals will be the wholly owned subsidiary of Biocon Ltd.

Reliance Big buys 50% in UK game co

Anil Ambani owned Reliance Big Entertainment has purchased 50% stake of the UK's games and publishing company Codemasters for an undisclosed amount. Codemasters has franchises in the Ashes cricket series, Formula 1 and Dirt2 racing games and military simulations. The investment will help the Reliance access many games in which the local interest is increasing.

AT&T acquires 8% stake in Tech Mahindra

AT&T, US telecom provider has acquired 8.07% from the promoters of Tech Mahindra in lieu of giving business to the company. An agreement signed between the two firms in May 2005 gave AT&T the option to purchase shares in Tech Mahindra if it met certain revenue targets. AT&T becomes eligible to exercise these options because it met the revenue milestones.

Hind Construction will buy 66% stake in Swiss Realty

Mumbai based Hind Construction will acquire 66% stake in a service contractor in Swiss Real estate market, Karl Steiner AG (KSAG). The acquisition will cost the company about 35 million Swiss Franc (Rs. 150 crore). KSAG specializes in turnkey development of new buildings and refurbishments, and provides services in all facets of real estate construction.

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