

# TAKEOVER PANORAMA

A Monthly Newsletter by Corporate Professionals

Year VII—Vol VIII  
August Edition

Latest Open Offers



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INSIGHT



Hint of the Month



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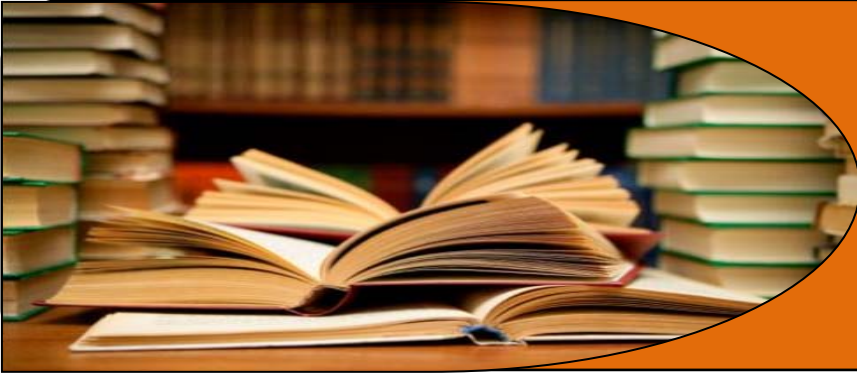
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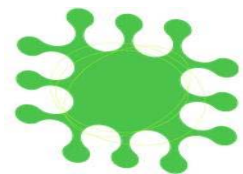


# LEGAL UPDATES

## SEBI order in the matter of M/s. Nakoda Limited

### FACTS:

1. SEBI conducted an investigation in the matter of M/s Nakoda Limited ("**Target Company**") listed on the Bombay Stock Exchange Limited ("BSE"). G.P. Shah Investment Private Limited, B.G. Jain Investment Private Limited, P.B. Jain Investment Private Limited, Varju Investment Private Limited, Nakoda Syntex Pvt. Ltd, Mr. Babulal G. Jain, B.G. Jain HUF, Ms. Pushpadevi B. Jain, Mr. Devendra B. Jain, Mr. Kartik B. Jain, Ms. Shilpa B. Jain and Ms. Neetu D. Jain (Noticees) belong to the promoter group of the target company.
2. **During the investigation SEBI noticed that:**
  - On June 23, 2010, the target company had allotted 2,70,00,000 warrants to two promoters viz; P. B. Jain Investments Private Limited and Nakoda Syntex Private Limited and 90,00,000 warrants to non- promoters.
  - On November 26, 2011, the target company allotted 20,00,000 GDRs with 6,00,00,000 underlying shares to non -promoters.
3. Pursuant to the issuance of GDR, the individual shareholding of P. B. Jain Investments Private Limited reduced from 11.57% to 6.08% and that of Nakoda Syntex Private Limited reduced from 1.92% to 1.01%.
4. On December 19, 2011, the target company allotted 5,40,00,000 equity shares to P.B.Jain Investments Private Limited and Nakoda Syntex Private Limited pursuant to conversion of the 2,70,00,000 warrants. Consequent to which the voting rights of P.B.Jain Investments Private Limited and Nakoda Syntex Private Limited individually increased from 11.57% to 24.98% and from 1.92% to 20.36% and the voting rights of the promoter group collectively increased from 50.23% to 62.92% that has resulted into triggering of Regulation 3(2) of SEBI (SAST) Regulations, 2011. However, the Noticees have failed to make public announcement to the shareholders of Target Company.



## CONTENTIONS OF APPELLANT

1. The allotment of warrants on June 23, 2010 and issuance of GDRs was a simultaneous and composite proposal in view of resolution dated June 10, 2010 passed by the shareholders of the target company in its AGM.
2. The warrants were as good as partly paid up shares.
3. Warrants had to be allotted within 15 days of the resolution dated June 10, 2010 as required under SEBI (SAST) Regulations, 1997. However, GDR issuance would take time as it was subject to necessary compliance and marketing the issue overseas.
4. The noticees had deemed to acquire the shares and voting rights in the target company on June 23, 2010, when they subscribed the warrants and not on December 19, 2011.
5. All actions except payment of balance 75% money happened prior to commencement of SEBI (SAST) Regulations, 2011. Hence, SEBI (SAST) Regulations, 2011 will not apply in this case.
6. BSE had asked the target company to furnish an undertaking that it would make the QIP/GDR issue before conversion of warrants, or otherwise it would comply with the SEBI (SAST) Regulations, 2011.

### ISSUE

Whether the above acquisition of shares on conversion of warrants would be governed by the provisions of SEBI (SAST) Regulations, 2011? If yes, whether the same would attract the provisions of Regulation 3(2) of SEBI (SAST) Regulations, 2011 requiring open offer to the shareholders of the Target Company?

### SEBI OBSERVATION:

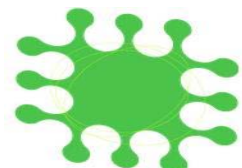
#### 1. Issuance of Warrants and GDRs were simultaneous & composite proposal

SEBI noted that in the meeting dated June 10, 2010, shareholders authorized BOD to decide on time and mode of issuance of warrants and GDRs. Thus, the resolution did not specifically contain simultaneous and composite proposal for issuance of warrants and GDRs.

#### 2. Warrants to be treated as Partly paid-up shares

In this respect, SEBI is of the view that:

- Holder of partly paid-up shares is also a member of the company whereas the holder of warrants is not.



- Holder of partly paid-up shares can exercise voting rights in proportionate to his holding however the holder of warrants cannot.
- Compulsory forfeiture of warrants in case of failure to pay the consideration. However in case of partly paid-up shares, forfeiture of part payment is not the compulsory consequence.

Therefore, the warrants cannot be treated as or equated with partly paid-up shares.

### **3. Time period for allotment of Warrants**

SEBI noted that neither the SEBI (SAST) Regulations, 1997 nor the Takeover SEBI (SAST) Regulations, 2011 prescribe the time for completion of allotment of warrants after passing of the special resolution. The timeline of 15 days in this regard has been prescribed in regulation 74(1) of the ICDR Regulations. In the instant case, the target company allotted 2,70,00,000 warrants to P.B.Jain Investments Private Limited and Nakoda Syntex Private Limited, the entities belonging to the promoter group of the target company on June 23,2010 i.e. within the timeline prescribed in said regulation 74(1).

### **4. Deemed Acquisition**

If the arguments of the noticees are accepted, the acquirer of warrants beyond specified threshold, in all cases, would be under obligation to make public announcement under regulation 11(1) of SEBI (SAST) Regulations, 1997 on the date of allotment of warrants although he may not exercise his option to acquire equity shares. If the arguments of the noticees that they had agreed to and deemed to acquire shares and voting rights on June 23, 2010, itself is accepted, the noticees would be obligated to make the public announcement under regulation 11(1) of SEBI (SAST) Regulations, 1997.

### **5. Applicability of SEBI (SAST) Regulations, 2011**

SEBI observed that Noticees were holding 50.23% in the Target company and there were no change in the shareholding pursuant to the allotment of warrants (June 23, 2010) and issuance of GDR (November 26, 2010). However, on Dec 19, 2011 pursuant to the conversion of warrants into equity shares, the holding of noticees has been increased from 50.23% to 62.92%. Further even if the shareholding underlying GDRs is also included in the total shareholding of the target company, then also the shareholding of noticees increased from 26.38% to 44.03%.



At the time of this acquisition, SEBI (SAST) Regulations, 2011 had come into force and are applicable. Therefore, they were under mandatory obligation to make the public announcement under regulation 3(2) of SEBI (SAST) Regulations, 2011, which they have failed to make.

## **6. Restriction of BSE**

SEBI observed that even after issuance of GDRs on November 26, 2010, the noticees had sufficient time in the financial year 2010-11 i.e. till March 31, 2011 to convert such number of warrants into equity shares of the target company so that the increase in their shareholding or voting rights in the target company did not breach the permissible creeping limit of 5% prescribed in regulation 11(1) of SEBI (SAST) Regulations, 1997. Alternatively, the noticees also had liberty to convert their entire 2,70,00,000 warrants without depending on decision of GDR holders to exchange their GDRs with equity shares in the financial year 2010-11 and make the mandatory public announcement under regulation 11(1) of the SEBI (SAST) Regulations, 1997.

Therefore after considering the facts and circumstances of the case and considering the various decisions of Hon'ble SAT, SEBI had issued the direction to Noticees to make a combined public announcement in accordance with Regulation 3(2) of SEBI (SAST) Regulations, 2011 to acquire shares of the target company, within a period of 45 days from the date of this order alongwith interest at the rate of 10% per annum from March 13, 2012 to the date of payment of consideration, to the shareholders who were holding shares in the target company on the date of violation.



## *Adjudicating/WTM orders*

Target Company	Notices	Regulations	Penalty Imposed/ Decision Taken
<b>Raj Packaging Industries Limited</b>	Shri Madanchand Prasanchand	Regulation 29(1) & 29(2) read with Regulation 29(3) of the SAST Regulations and Regulations 13(1) & 13(3) read with 13(5) of the PIT Regulations?	1,00,000
<b>Karuturi Global Limited</b>	Mr. K.S. Ramakrishna, Ms. Anitha Karuturi, Mr. Sunil Hemdev, Mr. Vivek Caroli and Mr. C.D. Vijay	Regulation 11(1) of SEBI (SAST) Regulations, 1997	Rs.15,00,000/-
<b>Karuturi Global Limited</b>	M/s Rhea Holdings Pvt. Ltd.	Regulation 7(1) read with Regulation 7(2) of the SEBI (SAST) Regulations, 1997 and Regulations 13(1), 13(3) read with Regulation 13(5) of SEBI (PIT) Regulations, 1992.	3,00,000
<b>Karuturi Global Limited</b>	M/s Simply Class Fashions Pvt. Ltd.	Regulation 7(1) read with Regulation 7(2) of the SEBI (SAST) Regulations, 1997 and Regulations 13(1), 13(3) read with Regulation 13(5) of SEBI (PIT) Regulations, 1992.	2,00,000



## *HINT OF THE MONTH*

Payment considerations by the acquirer under the open offer can be made by cash and / or by issue of equity shares and/or secured debt instruments (investment grade) and / or convertible debt instruments (convertible to equity shares) of acquirer (or PACs, if any) if such equity shares and secured debt instruments are listed.

The chosen mode of payment is required to be disclosed in the open offer document meant for shareholders of the target company.

**{As substantiated from FAQ of SEBI on SEBI Takeover Regulations, 2011}**





## Latest Open Offers

### Target Company

M/s Igarashi Motors India Limited

### Registered Office

Chennai

### Net worth of TC

Not Available

### Listed At

BSE, NSE and MSE

### Industry of TC

Auto Parts & Equipment

### Acquirer and PACs

M/s Agile Electric Sub Assembly Private Limited (Acquirer) Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd., BFIP (Cayman) VI-ESC FDI Three Limited and Padmanaban Mukund (PACs)

**Triggering Event:** Indirect Acquisition of Shares and direct acquisition of optionally convertible redeemable debentures.

**Details of the offer:** Offer to acquire upto 7,954,036 (26%) Equity Shares at a price of Rs 65 per fully paid up equity share.

**Triggering Event:** Voluntary offer.

**Details of the offer:** Offer to acquire 37,19,200 (30%) Equity Shares subject to a minimum level of acceptance of 32,23,300 (26%) equity shares at a price of Re. 70/- per share for the fully paid up equity share.

### Target Company

M/s Kalindee Rail Nirman (Engineers) Limited

### Registered Office

New Delhi

### Net worth of TC

Rs.15,257.40 lacs  
(31.03.2013)

### Listed At

BSE, NSE, CSE and DSE

### Industry of TC

Construction & Engineering

### Acquirers

M/s Jupiter Metal Private Limited



**Target Company**

M/s Kalindee Rail Nirman  
(Engineers) Limited

**Registered Office**

New Delhi

**Net worth of TC**

Rs.15,257.40 lacs  
(31.03.2013)

**Listed At**

BSE, NSE, CSE and DSE

**Industry of TC**

Construction & Engineering

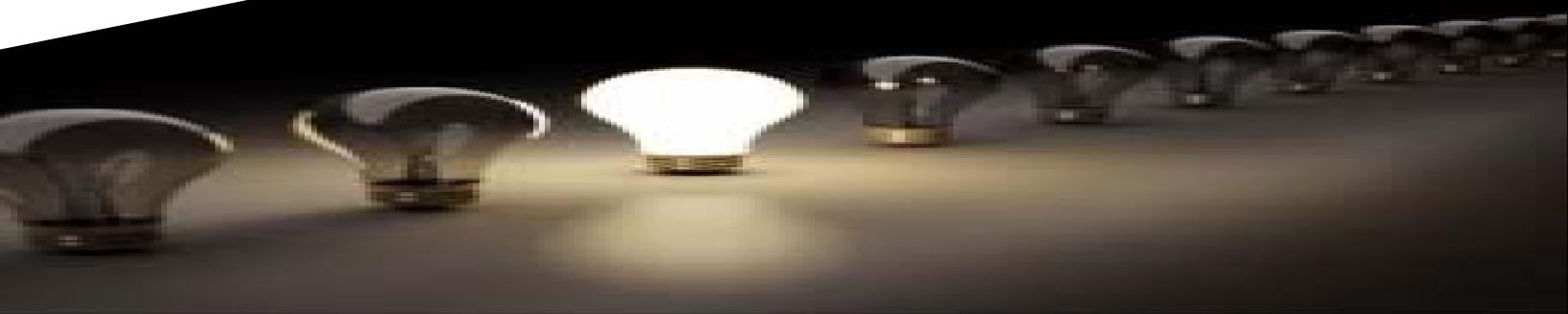
**Acquirer**

M/s Texmaco Rail &  
Engineering Limited

**Triggering Event:** Share Purchase Agreement for the acquisition of 19,37,960 (11.74%) Equity Shares and control over the Target Company.

**Details of the offer:** Offer to acquire upto 49,52,280 (30.00%) Equity Shares at a price of Rs. 68/- per fully paid up equity share.



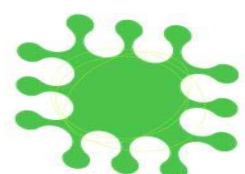
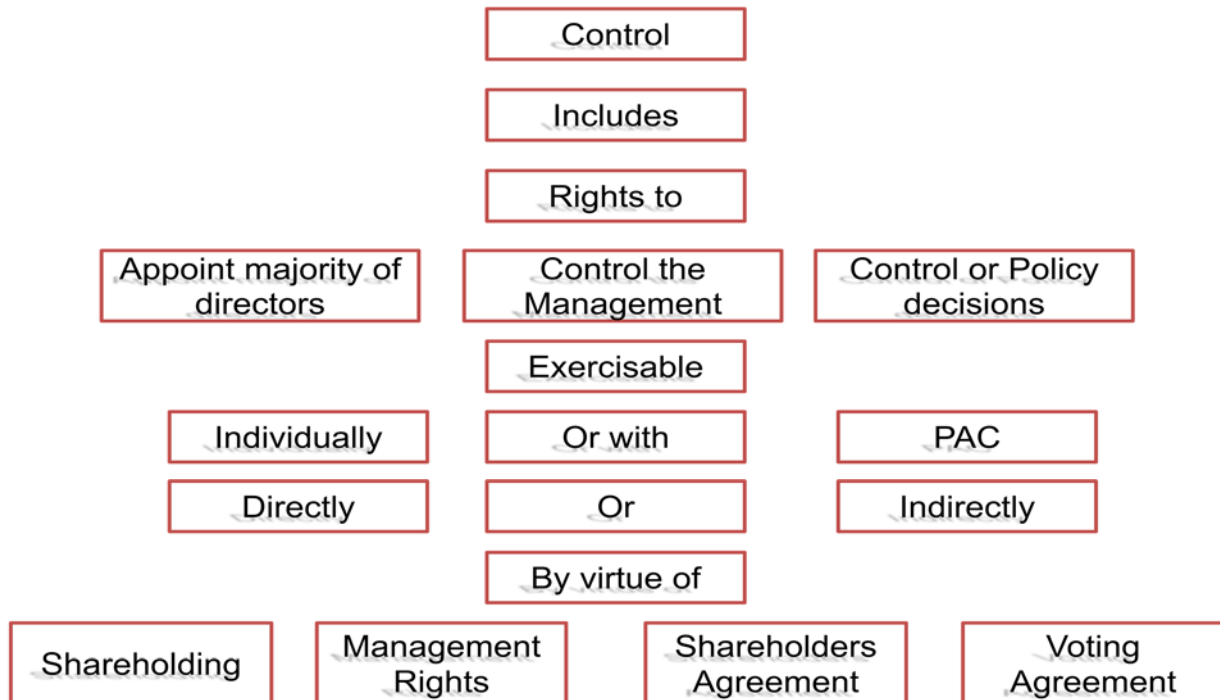


## Regular Section

### CONCEPT OF CONTROL

As per Regulation 2(1)(e) of SEBI (SAST) Regulations, 2011, “**Control**” includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner:

**Provided** that a director or officer of a target company shall not be considered to be in control over such target company, merely by virtue of holding such position;



#### Regulation 4 – Acquisition of Control

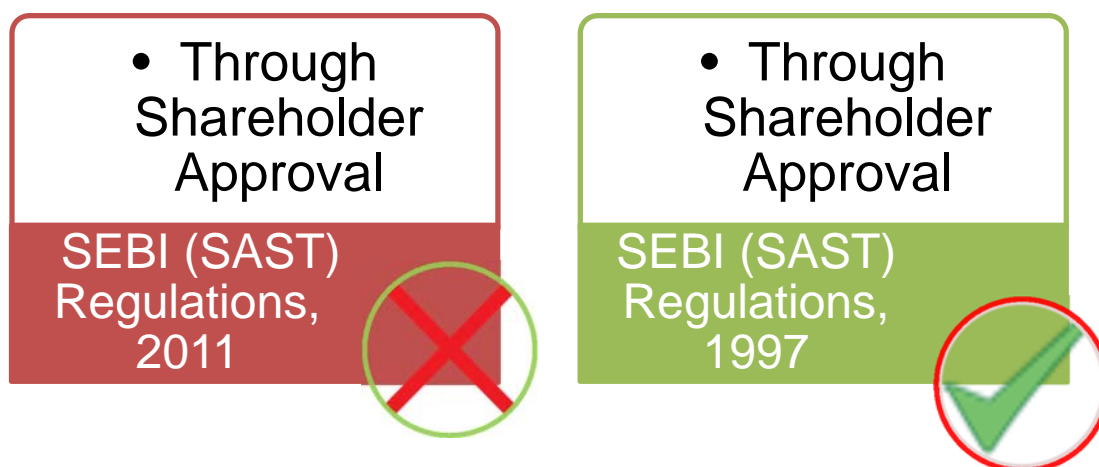
**Regulation 4** of SEBI (SAST) Regulations, 2011 provides that *“Irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.”*

SEBI (SAST) Regulations, 2011 recognizes both voting rights as well as control irrespective of acquisition of shares. This regulation deals with acquisition of control, irrespective of whether or not there has been any acquisition of shares or voting rights.

The regulation states that if any acquirer acquires control over the target company irrespective of any acquisition of shares or not, he has to give public announcement to acquire shares from shareholders of the target company.

It is appreciable that the acquisition of control also includes both direct & indirect acquisition of control over target company by virtue of acquisitions of companies whether listed or unlisted and whether in India or abroad.

It is noteworthy to mention here is that the exemption from Open Offer available in case of change in control without acquisition of substantial shares, through a special resolution by postal ballot process as available in erstwhile SEBI (SAST) Regulations, 1997 has now been withdrawn from SEBI (SAST) Regulations, 2011. The only route available for change in management and control in SEBI (SAST) Regulations, 2011 is by way of Open Offer to the shareholders of the target company.



**The concept of "Control" has been very well clarified in the Hon'ble SAT order in the matter of Subhkam Ventures (I) Pvt. Ltd. dated..... which explained below:**

On October 20, 2007 Subhkam Ventures (I) Pvt. Ltd (Appellant) was allotted 17.90% of the paid up capital of the Target Company, thereby, triggering regulation 10 of SEBI (SAST) Regulations, 1997. Accordingly, Appellant made the open offer under regulation 10 of SEBI SEBI (SAST) Regulations, 1997 and thereafter, the draft letter of offer was filed with SEBI wherein it was mentioned that the acquisition would not result in change in control over the Target Company. However, SEBI directed the acquirer to revise the offer to reflect that the open offer was being made under Regulation 10 as well as Regulation 12 (change in control). However SAT held that the acquisition of certain affirmative rights with the purpose only to protect the investment does not constitute the acquisition of control. According to SAT, 'control' is a proactive and not a reactive power.

### **SEBI's and SAT's Analysis**

SEBI	SAT
The Power of the acquirers to nominate one of its director on the Board of the Target Company	The board of the TC comprises of 10 directors including the nominee of the appellant. The single nominee would be in a microscopic minority and he has no veto powers.
Standstill provisions- Between the signing of the agreement and allotment of shares to the appellant, the Target Company would not change its basic contours.	It is only a temporary provision and would cease to operate on the allotment of shares to the appellant.
The presence of the appellant nominee to constitute the quorum reflects that the acquirer is in control over the Target Company.	The clause only provides that if adequate quorum is not present, the matter would be adjourned by a week where the directors then present would constitute the quorum except for the protective provisions which will not be dealt with by the directors unless the appellant nominee is also present.
Veto rights on the crucial matters pertaining to the policy decisions would confer control.	Such veto rights are meant only to protect the interest of the Acquirer and the investment made by it from the whims and fancies of the promoters of the Target Company.



## SAT order in the matter of M/s AKSHYA INFRASTRUCTURE PRIVATE LIMITED Vs SEBI

### About MARG Limited (“MARG”/Target Company)

Incorporated in the year 1994, MARG is an infrastructure company and operates in four segments: Engineering, Procurement and Construction (EPC), Urban Infrastructure Development, Port and Logistics and Leasing. MARG is listed on BSE Limited (BSE) and its shares are traded on the NSE under the category of 'Permitted Security'.

### Background of the case

1. On October 20, 2011, Akshya Infrastructure Private Limited (“Appellant”) made a voluntary public announcement through M/s. Motilal Oswal Investments Advisors Private Limited (Merchant Banker) to the shareholders of MARG Limited (Target Company) and subsequently filed the Draft Letter of Offer with SEBI (“Respondent”)
2. The tendering period was scheduled to commence on December 1, 2011 and conclude on December 20, 2011. The consideration for the tendered shares was to be paid before January 4, 2012.
3. On October 25, 2011, the Respondent sought certain details relating to an earlier change in the shareholding of the Promoter Group. The same was provided forthwith by the Merchant Banker on behalf of the Appellant vide letter dated November 8, 2011.
4. Despite of timely submission of all the details as required by the Respondent, there was no clear indication as to when the Draft LO would be cleared by them. Therefore, Appellant requested respondent to allow the acquirer to withdraw the open offer. However, Respondent declined the same and directed the Appellant to go ahead with the same offer after making certain modifications as per the comments contained in the impugned letter dated November 30, 2012.

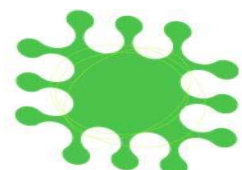


## Appellant's Contentions

- a. The Appellant submits that the open offer in question was made voluntarily and because of the lapse of a period of more than one year from the date of the open offer, the same has been rendered non-feasible and now remains only academic in nature and therefore the same ought to be allowed to be withdrawn.
- b. Vide letter dated November 11, 2011, the respondent stated that the Promoter Group appeared to have acquired shares in excess of the limits prescribed by Regulations 11(1) and 11(2) of the SEBI (SAST) Regulations of 1997 on March 30, 2007, October 12, 2007 and February 19, 2011. In this respect, the Appellants contended that at no point of time was there any acquisition by the Promoter Group which could lead to its shareholding going beyond the threshold of 5% during any financial year.
- c. An amount of Rs. 17.46 crore deposited by the Appellant in an escrow account in relation to the open offer was also lying dormant without any productive use and, therefore, it be allowed to be withdrawn.
- d. The Promoter Group would not derive any benefit out of withdrawal of the open offer.

## SEBI's Reply

- a. Under the provisions of Regulation 27(1) of SEBI (SAST) Regulations, 1997, no public offer can be withdrawn except under the contemplated circumstances being that the statutory approvals necessary have been refused, the sole acquirer of shares (if a natural person) has died or the existence of such circumstances as in the opinion of the Respondent/Board merit withdrawal. However, none of the contemplated circumstances exist(s) for the withdrawal of the public offer in the present case, and the Respondent has exercised its discretion in relation to the same after careful consideration and found that no circumstance(s) exist(s) which merit(s) withdrawal of the said public offer.”
- b. “Regulation 11(1) makes reference to the acquisition of shares or voting rights entitling an acquirer to exercise more than 5% of the voting rights ‘in any financial year ending on 31st March.’ In canvassing the aforementioned argument, the Appellant is inviting this Hon’ble Tribunal to read the words ‘**in any financial year**’ as ‘**at the end of any financial year**’ which is entirely impermissible. On a plain reading of the language of Regulation 11(1), it is clear that the purpose and object of the said provision is to place a limit on the percentage of acquisition in a given year, with the said limit of 5% being reckoned without making allowances for decrease in shareholding or disinvestment.”



**Issues:**

- a. Whether the Appellants should be allowed to withdraw the Open Offer?
- b. Whether the Appellants have violated the provisions of Regulations 11 (1) and (2) of SEBI (SAST) Regulations, 1997?

**Decision:**

The Hon'ble Tribunal observed that the open offer in question was not triggered by any crossing of the statutory limit to acquire the shares instead was made voluntarily to consolidate its holding in the Target Company. This move was considered viable as on the date of the Public Announcement. However, due to the long lapse of time in securing the Respondent's approval the same was rendered futile. Therefore, **the request for withdrawal by the Appellant was bona fide** and direct the Respondent to consider the case of the Appellant in view of the provisions of Regulation 27 of the SEBI (SAST) Regulations of 1997 and graciously granted permission to withdraw the voluntary open offer.

Further, it was observed that the alleged violation of Regulations 11(1) and (2) against the Appellant could have been proceeded with only as per law laid down in the SEBI Act, particularly provisions of Regulation 11C, 15I and 15J read with provisions of Chapter V of the SEBI (SAST) Regulations. However, the said provisions have not been followed by the Respondent. Therefore, SAT did not intend to make any observation on the merit of the issue regarding the three Alleged Triggers date i.e. March 30, 2007, October 12, 2007 and February 19, 2011 and the contentions of parties in this regard are kept open.





## *Market Updates*

### **McGraw-Hill Buys Tata's Stake**

McGraw-Hill Education, US-based digital learning firm has acquired Tata Group's stake in JV - Tata McGraw -Hill Education Pvt. Ltd. As part of the agreement, McGraw-Hill Education purchased the minority ownership stake in the company held by two Tata charitable trusts. The company will change its name to McGraw-Hill Education India Private Ltd. The purchase comes as McGraw-Hill Education increases its focus on providing its educational solutions and services globally.

### **Four Season Wines Acquired by USL**

United Spirits Limited has acquired 49% stake in its JV - Four Season Wines. USL acquired the minority shares held by the Sharad Pawar family to make it a 100% subsidiary. Four Season Wines was formed as a 51:49 JV between the UB group and the farmers from the Baramati, led by the Pawar family, in 2007. Through this JV, USL had forayed into the premium domestic wine segment. As per the JV, UB group had agreed to buy all the grapes produced by these farmers at a fixed price besides buying about 300 acres of land within that area.

### **One97 Communications Buys Plustxt**

One97 Communications has acquired Bangalore based Plustxt that provides an app which allows text messaging in any of the Indian language as well as language keyboards for around \$2 Mn. One97 plans to monetize the app by providing digital goods on the app.



# Quiz

PLAY The QUIZ  
TEST YOURSELF

The name of winners of the quiz will be posted on our website [Takeovercode.com](http://Takeovercode.com) and will also be mentioned in our next edition of **Takeover Panorama**. So here are the questions of this edition:

## Question: 1

The total capital of the Target Company as on August 01, 2013 is 5,000 Equity Shares. There are 5,000 warrants in the Target Company convertible into equal number of equity shares in the month of September 2013. In such a circumstance, what will be the offer size for mandatory Open Offer if the Offer is proposed to be made on August 20, 2013?

- A. 1000
- B. 2600
- C. 1300
- D. 2000

*Mail your answer at [info@takeovercode.com](mailto:info@takeovercode.com)*

## Question: 2

Change in control can take place in the Company by which of the following mode?

- A. Shareholders' approval
- B. Open Offer
- C. Application to SEBI
- D. Through any mode

*Mail your answer at [info@takeovercode.com](mailto:info@takeovercode.com)*

## Winners of Quiz – June 2013-edition

Shashi Singhvi  
Mansi Singhal  
Harish Verma



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- ✦ Indian and Global Business Setup

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