

# TAKEOVER PANORAMA

A Monthly Newsletter by Corporate Professionals

Year VII — Vol I

January Edition

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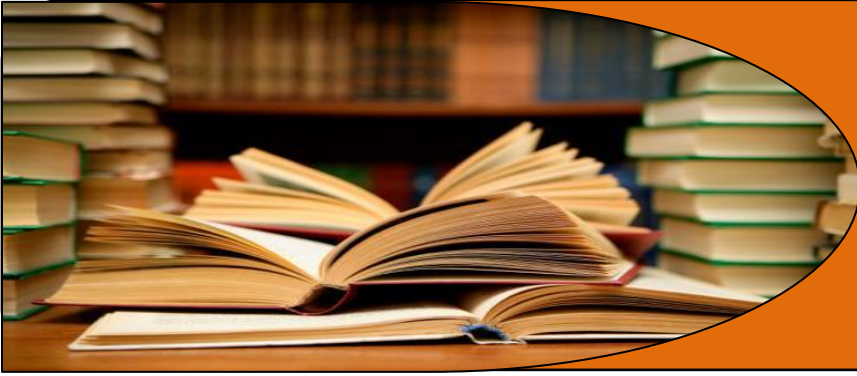
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# LEGAL UPDATES

## *SAT order in the matter of R. Shankar v/s SEBI*

### FACTS:

1. The Appeal has been filed by Mr. R Shankar (Appellant) against a common order passed by the Adjudicating Officer in the matter of acquisition of shares of Datasoft Application Software (India) Limited (Target Company) by nine entities namely M/s Burlington Financial Services (P) Ltd., M/s Dwarkadhish Import & Export (P) Ltd., M/s Hemdil Financial Services Ltd., M/s Ekveera Computers (P) Ltd., M/s Prathakal Comm. & Ag. (P) Ltd., Mr. R Shankar, Mr. GS Sridhar, Mr. PV Muralikrishna, and Mr. A Rajendra Prasad for the violation of the provisions of regulation 7 and 10 of the SEBI (SAST) Regulations, 1997 (SAST Regulations) and imposing a penalty of Rs. 4 Lakhs on each entity.

The Hon'ble Tribunal held that even though all the nine entities have acted in concert while acquiring the shares in violation of SAST Regulations, however, the same cannot be treated as single violation and each of the violator is liable to the penalty.

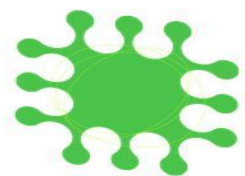
GIST
2. On January 28, 2000, the Target Company made preferential allotment of 1,20,00,000 shares of Rs.10 each at premium of Rs. 17 per share. Out of the total shares allotted, 66,56,000 shares were allotted to nine entities constituting 15.85% of the total share capital of the Target Company. The Board observed that these nine entities were connected with each other and were linked to the core group consisting of Mr. Sridhar, Mr. Rajendra Prasad and Mr. Muralikrishna and their companies.
3. Therefore, the said acquisition by these entities has resulted into triggering of Regulation 7 and 10 of the SAST Regulations. However, the said entities did not make the requisite disclosure as required under Regulation 7 and did not come out with an open offer as required under Regulation 10 of SAST Regulations. Accordingly, the AO imposed the penalty of Rs. 4 Lakhs on each entity. Hence this appeal.



4. The Appellant contended that penalty is based on conjectures and surmises and there is no proof of any wrong doing on their part. Moreover findings given by the adjudicating officer are based on various documents, bank statements and oral testimony of the directors of the Target Company collected behind the back of the appellants and therefore, the adjudication order is passed without following principles of natural justice.
5. The Appellant further contended that they have collectively acquired 15.85% of the shares capital of the Target Company which may be a single violation and the maximum penalty that could have been imposed under section 15H of the SEBI Act 1992 (Act) at the relevant time was only 5 lakhs, whereas a total penalty of 36 lakhs has been imposed. The penalty is highly excessive and grossly disproportionate to the acts allegedly done by the appellants and the adjudicating officer has also ignored the mandatory provisions of section 15 J of the Act
6. On the other hand, Board submitted that there has been no violation of the principles of natural justice as the appellant was given opportunity of cross-examination of persons whose statements have been relied upon and the copies of relevant documents were also made available to them. While imposing the penalty, the Adjudicating Officer has also considered the provisions of section 15 J of the Act and also imposed penalty under section 15 A(b) and section 15 H of the Act as they existed at the relevant time.

## ISSUE:

1. Whether the contention of the appellant that since all the nine entities including the appellant who acted in concert have collectively acquired the shares in violation of SAST Regulations, therefore, the same may be treated as one violation is acceptable?
2. Whether the contention of the appellant that the Board has not followed the principal of natural justice while imposing the penalty is acceptable considering the fact that the appellant was given opportunity of cross-examination of persons whose statements have been relied upon and the copies of relevant documents were also made available to him?



## DECISION:

1. The Hon'ble Tribunal held that even though all the nine entities have acted in concert while acquiring the shares in violation of SAST Regulations, however, the same cannot be treated as single violation. Each of the violator is liable to the penalty in accordance with law and such penalty cannot be clubbed treating it as a single violation.
2. The Hon'ble Tribunal observed that the order itself records that the appellant was granted an opportunity to cross-examine the persons whose statements were recorded, hence, it is not clear what further principles of natural justice were required to be complied with. However, the Hon'ble SAT noted that the violation took place in year 2000 and the Board started investigation in year 2003, to which the SCN was issued in February, 2009 and then impugned order was passed in April, 2012. There is no justification on record as to why the SCN was issued after nine years of violation of the SAST Regulations and then taking another three years to pass a final order. The very purpose of taking action gets defeated in case of inordinate delay especially in matters where the facts are simple and investigation can be concluded within a short time. At the relevant time, the maximum penalty that could have been imposed was Rs. 5 Lakhs under Section 15 H and Rs. 25,000 under section 15 A(b) of the Act. Therefore, while upholding the findings of adjudicating officer and keeping in view the inordinate delay in the matter, the Hon'ble SAT reduced the penalty to Rs.1 Lakh in respect of each of the appellant.

### *Informal Guidance in the matter of M/s Commercial Engineers and Body Builders Company Limited*

## FACTS:

1. The Commercial Engineers and Body Builders Company Limited (Target Company/the Company) is listed on BSE and NSE since October 18, 2010. The Promoter and Promoter Group of the Target Company collectively hold 55.81% of the paid up share capital of the Target Company.
2. Mr. Ajay Gupta (AG/Transferor) and Mr. Kailash Gupta (KG/Transferee) are the promoters of the Target Company since December 23, 2006 and October 3, 2005 respectively.



3. Mr. Ajay Gupta holding 20.53% in the paid up share capital of the Company wants to transfer 17.61% to Mr. Kailash Gupta by way of interse transfer under Regulation 10(1)(a)(ii) of SEBI (SAST) Regulations, 2011. However for claiming the exemption under Regulation 10(1)(a)(ii), the Promoters must be disclosed as such in the shareholding pattern of the Target Company for a continuous period of 3 years before such transfer .
4. Since the shares of the Target Company are listed from October 18, 2010 onwards, therefore it is not possible to comply with the above mentioned Regulation. However, the transferor and transferee are the shareholders of the Target Company for more than 3 years.

Where the Target Company is listed for less than 3 years and accordingly the promoters are disclosed as such in the shareholding pattern for the less than 3 years, therefore would become ineligible for an exemption under regulation 10(1)(a)(ii) of the SEBI (SAST) Regulations, 2011.

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## ISSUES:

Whether the inter-se transfer of shares from AG to KG will qualify for an exemption under regulation 10(1)(a)(ii) of the SEBI (SAST) Regulations, 2011 i.e. as an inter-se transfer of shares amongst the promoters?

## DECISION:

As per Regulation 10(1)(a)(ii) of the SEBI (SAST) regulations, 2011, persons are required to be named as promoters in the shareholding pattern filed for a period of 3 years prior to the proposed transaction. However, since the company was listed in October 2010, therefore shareholding pattern is available for two years only. Thus, Promoter do not qualify for exemption under Regulation 10(1)(a)(ii) of SEBI (SAST) Regulations, 2011.



## ***Consent Order in the matter of S R Industries Limited***

Ms. Meenakshi Sud (Noticee) acquired 7,52,144 shares constituting 5.98% and sold 24,726 shares constituting 0.19% of the share capital of SR Industries Limited (Target Company). Further on April 8, 2011, the Noticee acquired 1,50,911 shares thereby increasing her shareholding from 4.19% to 5.39%. Therefore, the Noticee was required to make disclosure under Regulation 7(1) read with 7(2) of the SEBI (SAST) Regulations, 1997 and Regulation 13(1) of SEBI (PIT) Regulations, 1992 but she failed to do so.

Accordingly, adjudication proceedings were initiated against the Noticee for the above non compliances. Pending the adjudicating proceedings, the Noticee has filed the consent application for the settlement of above violations and proposed to pay a sum of Rs. 7,24,625 towards settlement charges. The terms as proposed by the Noticee were placed before High Powered Advisory Committee (HPAC) and on the recommendation of HPAC, SEBI settle the above non compliances and disposes of said proceedings against the Noticee.

## ***Consent Order in the matter of Spangle marketing Ltd***

Spangle marketing Ltd (Applicant) had delayed in complying with the provisions of Regulation 6(2) and 6(4) of SEBI (SAST) Regulations, 1997 for the year 1997 and Regulation 8(3) for the year 1998 to 2003, 2005 to 2008 and 2011. The Applicant submitted that there was no change in overall promoter shareholding of the company since 1997 and the above delay did not result into any loss or damage to the investor or anyone else.

The Applicant had voluntary filed the consent application to settle the above non compliances on the payment of Rs. 5,50,000 towards 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-compliances of the Applicant.



## ***Consent Order in the matter of ACJ Infocom Limited***

ACI Infocom Limited (Applicant) had delayed in complying with the provisions of Regulation 6(2), 6(4) of SEBI (SAST) Regulations, 1997 for the year 1997 and 8(3) for the year 1998 to 2005, 2008 and 2009. Therefore, the Applicant had voluntarily filed the consent application for the settlement of above non compliances.

However, in respect of non-compliances of Regulations 6(2) and (4), it is noted that the requisite disclosures were to be made within 3 months from the date of notification of the SEBI (SAST) Regulations, 1997. Since those requirements are dated thus now the non compliances of the same are not being considered for the purpose of formulation of terms of settlement. Therefore, the applicant had proposed to settle the non-compliances for Regulation 8(3) on the payment of Rs. 5,50,000 towards 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-compliances of the Applicant.

## ***Consent Order in the matter of Exedy India Ltd.***

Pradeep B Chinai, Pradeep B Chinai (HUF), Mahesh B Kothari, Nauka M Kothari, Irma P Chinai, Alisha P Chinai, Sona M Kothari, Twisha P Chiani, Saurabh M Kothari and Satin Engineering Ltd. (Applicants) belonging to promoter group of the Exedy India Ltd. (Target Company) have not complied with the provisions Regulation 8(2) of SEBI (SAST) Regulations, 1997 for the years 1998, 1999, 2006 and 2008 and Regulation 7(1A) for the year 2007 pursuant to the acquisition of 1,11,604 shares constituting 4.75% of the share capital of the Target Company by Pradeep B Chinai (HUF), one of the applicant from open market on September 05, 2007.

Therefore, the applicants had proposed to settle the above non-compliances on the payment of Rs. 5,00,000 towards settlement charges. The terms as proposed by the applicants were placed before High Power Advisory Committee (HPAC) and on the recommendation of HPAC, SEBI settle the above non-compliances of the Applicants.



## *Adjudicating/WTM orders*

TARGET COMPANY	NOTICEE	REGULATIONS	PENALTY IMPOSED/ DECISION TAKEN
M/s Bilcare Ltd.	Mr. Mohan H. Bhandari	Regulation 3(4) of the SEBI (SAST) Regulations, 1997	Rs. 1,00,000/-
M/s Alka Securities Ltd.	Mr. Mahesh Kothari	Regulations 11(1), second proviso of Regulation 11(2) and 7(1A) read with 7(2) of SEBI (SEBI) Regulations, 1997	Matter disposed off.
Ms. Prudential Pharmaceuticals Ltd.	M/s Tropical Securities and Investments Pvt. Ltd.	Regulation 7 of SEBI (SAST) Regulations, 1997	Rs. 2,50,000/-
M/s GHCL Ltd.	M/s General Exports & Credits Ltd.	Regulation 7(1A) of SEBI (SAST) Regulations, 1997	Rs. 3,00,000/-
M/s GHCL Ltd.	M/s GTC Industries Ltd. (Now known as "Golden Tobacco Limited")	Regulation 7(1A) SEBI (SAST) Regulations, 1997	Rs. 3,00,000/-
M/s Empower Industries India Ltd.	Mr. Prasad Tandel	Regulations 3 (a), 4 (1), 4 (2) (a) and (e) of SEBI (PFUTP) regulations, 2003, Regulation 7(1) read with Regulation 7(2) SEBI (SAST) Regulations, 1997 and Regulation 13(1) and Regulation 13(3) read with Regulation 13(5) of SEBI (PIT) Regulations, 1992	Rs. 4,00,000/-



M/s. Khaitan Electricals Ltd.	Mr. Sunil Khaitan, Mr. Krishna Khaitan, Khaitan Lefin Ltd. and The Orientale Mercantile Company Ltd.	Regulation 10 and 11(1) SEBI (SAST) Regulations, 1997	SEBI directed to make combined public announcement under Regulations 10 and 11(1) along with consideration amount with interest at the rate of 10% per annum.
M/s Premier Capital Services Ltd.	Mr. Sandeep Hissaria, Ms. Renu Hissaria, Mr. Shiv Tekriwal, Ms. Sharda Tekriwal and Mr. Sanjay Tekriwal	Regulations 7(1), 7(1A) r/w 7(2), 10 and 12 of the SEBI (SAST) Regulations, 1997.	Rs. 10,00,000/-

## HJNT OF THE MONTH

The term 'offer period' pertains to the period starting from the date of the event triggering open offer till completion of payment of consideration to shareholders by the acquirer or withdrawal of the offer by the acquirer as the case may be.

The term 'tendering period' refers to the 10 working days period falling within the offer period, during which the eligible shareholders who wish to accept the open offer can tender their shares in the open offer.

**{As substantiated from FAQ of SEBI on SEBI (SAST) Regulations, 2011}**





## Latest Open Offers

### Target Company

M/s Welspun Syntex Limited

### Registered Office

Silvasa

### Net worth of TC

97.63 Cr. (30.09.2012)

### Listed At

BSE

### Industry of TC

Textiles

### Acquirers

M/s Krishiraj Trading Limited, (Acquirer) along with M/s Welspun Mercantile Limited (PAC)

**Triggering Event:** Acquisition of 9,08,075 equity shares (3.84%) along with conversion of OCCPS into 15,594,541 Equity Shares (upto 39.74%) of the post conversion equity shares capital at a price of Rs. 10.26 per share payable in cash.

**Details of the offer:** Offer to acquire 102,02,288 (26%) Equity Shares at a price of Rs. 13 per share payable in cash.

**Triggering Event:** SPA for the acquisition of 781,155 (22.37%) equity shares and control over Target Company.

**Details of the offer:** Offer to acquire 907,712 (26.00%) Equity Shares at a price of Re. 1/- per share payable in cash.

### Target Company

M/s Parag Fans And Cooling Systems Limited

### Registered Office

Madhya Pradesh

### Net worth of TC

(11.09) Lakhs (31.03.2012)

### Listed At

MPSE ASE, JSE and MSE

### Industry of TC

Electrical Equipment

### Acquirers

Mr. Sandeep Badjatia and M/s Impact Projects And Consultants Private Limited



**Target Company**

M/s Count N Denier (India)  
Limited

**Registered Office**

Mumbai

**Net worth of TC**

Rs. (2.31) Lakhs (30.09.2012)

**Listed At**

BSE and ASE

**Industry of TC**

Textiles

**Acquirer**

Mr. Gautam Mohan  
Deshpande

**Triggering Event:** SPA for the acquisition of 14,47,400 (48.25%) fully paid up equity shares and control over Target Company

**Details of the offer:** Offer to acquire 7,80,000 (26.00%) Equity Shares at a price of Rs. 1.50/- per share payable in cash.

**Triggering Event:** SPA for the acquisition of 1,76,450 (65.35%) fully paid up equity shares and control over Target Company.

**Details of the offer:** Offer to acquire 70,200 (26.00%) Equity Shares at a price of Rs. 55/- per share payable in cash.

**Target Company**

M/s EINS Edutech Limited

**Registered Office**

Mumbai

**Net worth of TC**

Rs. 112.72 Lacs (30.09.2012)

**Listed At**

BSE and CSE

**Industry of TC**

Education

**Acquirer**

M/s Westfied Apparels Private  
Ltd.



**Target Company**

M/s Wheels India Limited

**Registered Office**

Chennai

**Networth of TC**

Rs. 2,579.60 Mn. (30.09.2012)

**Listed At**

NSE and BSE

**Industry of TC**

Auto Parts & Equipment

**Acquirers**

Titan Europe Plc (Acquirer)  
and Titan International Inc.  
(PAC)

**Triggering Event:** Indirect acquisition of 35.91% of the fully paid up equity shares and control over Target Company.

**Details of the offer:** Offer to acquire up to 14,19,405 (14.38%) Equity Shares at a price of Rs. 725.81/- per share payable in cash.





## Regular section

### “COMPLETION OF ACQUISITION”

Under **SEBI (SAST) Regulations, 1997**, the acquirer is not allowed to complete the acquisition of shares or voting rights in, or control over, the Target Company under any agreement attracting the obligation to make an open offer for acquiring shares until the completion of offer formalities. However, **SEBI (SAST) Regulations, 2011** have removed this restriction and allowed the completion of acquisition under any agreement which has resulted into triggering the open offer obligations after a period of 21 working days from the date of detailed public statement subject to the acquirer depositing 100% of the consideration payable under the open offer in the escrow account, assuming full acceptance.

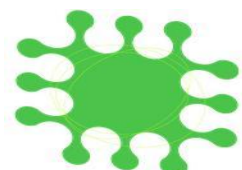
**Regulation 22 of SEBI (SAST) Regulations, 2011** deals with the concept of “**Completion of Acquisition**”.

### LEGAL TEXT

*22(1) The acquirer shall not complete the acquisition of shares or voting rights in, or control over, the target company, whether by way of subscription to shares or a purchase of shares attracting the obligation to make an open offer for acquiring shares, until the expiry of the offer period:*

*Provided that in case of an offer made under sub-regulation (1) of regulation 20, pursuant to a preferential allotment, the offer shall be completed within the period as provided under sub-regulation (1) of regulation 74 of Securities and Exchange Board of India (Issue of Capital and Disclosure) Regulations, 2009.*

*22(2) Notwithstanding anything contained in sub-regulation (1), subject to the acquirer depositing in the escrow account under regulation 17, cash of an amount equal to one hundred*



*per cent of the consideration payable under the open offer assuming full acceptance of the open offer, the parties to such agreement may after the expiry of twenty-one working days from the date of detailed public statement, act upon the agreement and the acquirer may complete the acquisition of shares or voting rights in, or control over the target company as contemplated.*

*22(3) The acquirer shall complete the acquisitions contracted under any agreement attracting the obligation to make an open offer not later than twenty-six weeks from the expiry of the offer period:*

*Provided that in the event of any extraordinary and supervening circumstances rendering it impossible to complete such acquisition within such period, the Board may for reasons to be published, may grant an extension of time by such period as it may deem fit in the interests of investors in securities and the securities market.*

## **ANALYSIS**

**Regulation 22(1)** restricts the Acquirer from completing the acquisition that has attracted the obligation to make an open offer under these regulations until the expiry of the offer period.

On the other side **Regulation 22(2)** provides that even if the offer period is not completed, the acquirer may complete the acquisition subject to the deposit of 100% of the consideration payable under the open offer in the escrow account, assuming full acceptance and after a period of 21 working days from the date of detailed public statement.

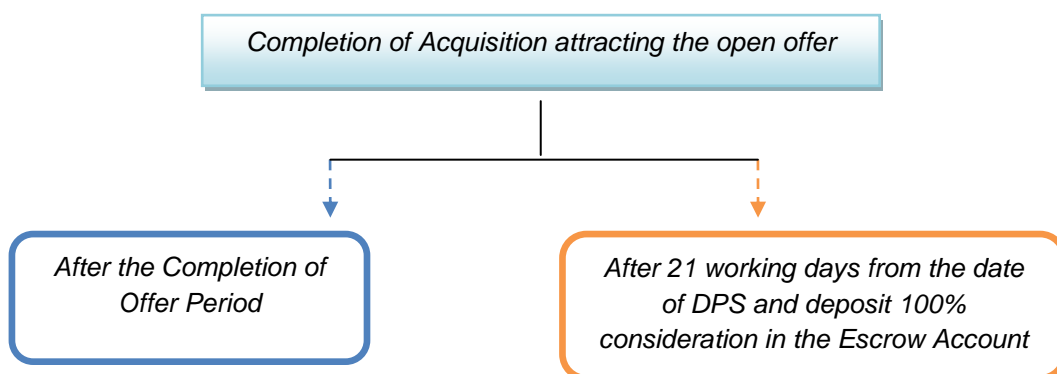
Further **Regulation 22(3)** provides the maximum time within which the acquisition contracted under any agreement attracting the obligation to make an open offer shall be completed i.e. not later than 26 weeks from the expiry of the offer period.

**Accordingly, there are three routes through which the acquirer may/shall complete the acquisition attracting the open offer requirements:**



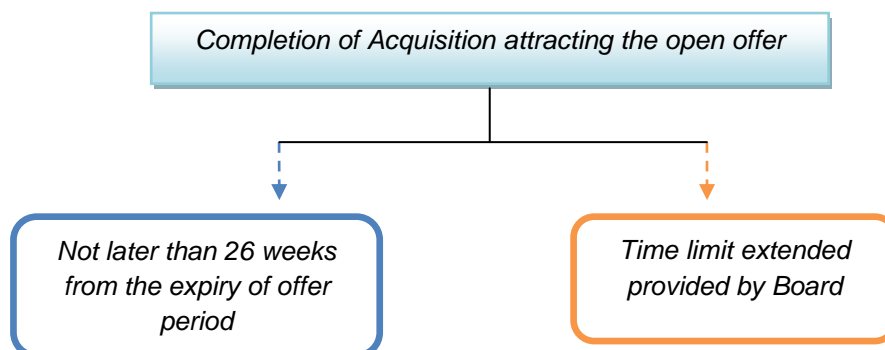
**Completion of Acquisition under Regulation 22(1) and 22(2) of SEBI (SAST) Regulations,**

**2011**



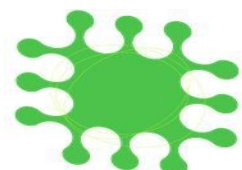
**Note:** If the open offer made as a result of preferential allotment then the **offer shall** be completed within a period provided under Regulation 74(1) of SEBI (ICDR) Regulations, 2009.

**Completion of Acquisition under Regulation 22(3)**



**NOTE:**

Under Regulation 22(1) and regulation 22(2), it is an option available to the acquirer to complete the transaction before the completion of offer period. However under Regulation 22(3) the acquirer is mandatorily required to complete the acquisition attracting the open offer within the period of 26 weeks or such other time as extended by the Board.



## FAQS

1. **Can the acquisitions, resulting from any agreement attracting the obligation to make an open offer, be completed by way of transactions settled on Stock exchange such as bulk/block deals?**

**No.** Regulation 22(1) of SEBI (SAST) Regulations, 2011, specifically provides that the acquirer shall not complete the acquisition of shares and voting rights in, or control over, the target company, whether by way of subscription of shares or a purchase of shares attracting the obligation to make an open offer for acquiring shares, until the expiry of the offer period.

In cases where acquisitions, resulting from any agreement triggering open offer are sought to be completed through transactions such as bulk/ block deals, settled on a recognized stock exchange, the same would get completed/ settled on T+2 basis i.e. within 2 days after the date of such transaction. Therefore such acquisitions, if done, will not be in line with the provisions of Regulation 22(1) since the same would result in completion of the triggering acquisition before the expiry of the offer period. Hence the acquisition resulting from any agreement attracting the obligation to make an open offer cannot be executed through transactions such as block/ bulk deal.

2. **Whether the restriction as prescribed under Regulation 22(1) of SEBI (SAST) Regulations, 2011 with respect to the completion of acquisition covers within its ambit the market purchases?**

The restriction prescribed under Regulation 22(1) relates to an acquisition pursuant to an agreement and is not applicable in cases of transaction involving market purchases without any agreement. **(Informal Guidance dated July 09, 2012 in the matter of R Systems International Limited)**



## *SEBI Order in the matter of Khaitan Electricals Limited*

### **ABOUT KHAITAN ELECTRICALS LIMITED (TARGET COMPANY)**

Khaitan Electricals Limited (hereinafter referred to as “Target Company/KEL”) is a company incorporated under the Companies Act, 1956 having its registered office at A-13, Co-operative Industrial Estate, Balanagar, Hyderabad- 500 037. The shares of the Target Company are listed at BSE and NSE.

### **ABOUT THE ACQUIRERS**

Mr. Sunil Khaitan, Mr. Krishna Khaitan, Khaitan Lefin Limited (KLL) and the Orientale Mercantile Company Limited (OMCL) (hereinafter collectively referred to as Acquirers/Noticees”) belong to Promoter Group of the Target Company.

### **BACKGROUND OF THE CASE**

1. On March 12, 2007, the Noticees acquired 13,00,000 shares pursuant to the conversion of warrants in the Target Company. Out of 13,00,000 shares, Mr. Sunil Khaitan and Mr. Krishna Khaitan acquired 50,000 shares each and KLL and OMCL acquired 9,00,000 and 3,00,000 shares respectively. The total shares were allotted in two trenches i.e. 5,00,000 in one transaction and 8,00,000 in second transaction.
2. Pursuant to the said acquisition, there was increase in their pre-acquisition shareholding (as on March 11, 2007) of –
  - KLL, the individual shareholding of which increased from 10,73,415 shares (10.52%) to 19,73,415 shares (17.16%) thereby triggering Regulation 10 of SEBI (SAST) Regulations, 1997 (SAST Regulations) but KLL failed to make an open offer.



- The promoter group, collectively increased its holding from 26,34,639 shares (25.83%) to 39,34,639 shares (34.21%) i.e. acquisition of more than 5% shares in one F.Y. in the Target Company, thereby, triggering the Regulation 11(1) of the SAST Regulations to make an open offer. However, the Acquirers collectively failed to make open offer.

3. Accordingly, SEBI issued SCN to the Noticees to which they made the following submissions:

## CONTENTIONS OF NOTICEES:

1. The applicability of Regulation 10 of SAST Regulations is limited to only those cases wherein the acquisition of shares by the acquirer along with the person acting in concert results in breach of the thresholds limits of 15% in the Target Company. However, in the present case the shareholding of acquirer along with the PAC was already more than 15%, therefore, Regulation 10 does not applies to KLL.
2. The definition of expression "person acting in concert" is acquisition specific. Since KLL is admittedly part of the promoter group, to determine whether the provisions of regulation 10 or 11 are triggered, the acquisitions made by the promoter group acting in concert, as a whole, should be taken into consideration.

These contentions were substantiated by Noticees with reference to orders of Adjudicating Officer of SEBI in the matter of **Jamnalal Sons Private Limited and Hon'ble Securities Appellate Tribunal (SAT)** in the matter of **Rajesh Toshniwal vs. SEBI**.

3. Regulation 10 and regulation 11 are mutually exclusive such that only either regulation 10 or regulation 11 may be applicable to an acquisition, but not both. Thus, if an acquirer along with persons acting in concert already holds shares or voting rights in excess of 15%, then he cannot be in breach of regulation 10 and thus KLL being PAC, already together held more than 15% shares prior to the said acquisition and further will fall under the ambit of regulation 11 not under regulation 10.
4. Summary of transactions are as follows:

Date	Promoters shareholding	Events
April 1, 2006	47.68%	Beginning of financial year 2006-2007
April/May 2006	29.63%	Sale of shares



<b>June 30, 2006</b>	34.20%	Conversion of 5,00,000 warrants into shares by KLL.
<b>July-Sept 2006</b>	34.22%	Market purchase of shares
<b>December 14, 2006</b>	25.83%	Allotment of 25,00,000 shares to strategic investors KLL was allotted 10,00,000 warrants.
<b>March 12, 2007</b>	<b>34.21%</b>	<ul style="list-style-type: none"> <li>• 5,00,000 equity shares were allotted to KLL, OMCL, Mr. Sunil Khaitan and Mr. Krishna Khaitan pursuant to conversion of 5,00,000 warrants allotted to them.</li> <li>• Conversion of 8,00,000 warrants into shares by KLL.</li> </ul>

7. It was argued that while calculating the benchmark holding for creeping acquisition, the gross purchases had to be included and any sale or dilution of stake due to issuance have to be ignored. Therefore, the sale of shares during April/May 2006 by promoters and allotment of shares to the strategic investors would be ignored while calculating the benchmark holding.
8. Moreover for determining the pre- acquisition shareholdings for the purpose of percentage of creeping acquisition limit, the board has taken March 11, 2007 as the reference date. However, the notices contended that the reference date for determining the pre-allotment and post-allotment shareholding for the purposes of regulation 11(1) should be the first acquisition of shares by the acquirer in the financial year ending March 31, 2007, i.e. June 30, 2006. Thus the shareholding of the promoter group immediately preceding this acquisition was 29.63% and the acquisition made during the year was of only 4.58%, which is within the creeping acquisition limit.

## ISSUES UNDER CONSIDERATION:

1. Whether the obligation to make public announcement under regulation 10 of SAST Regulations is attracted where the collective shareholding of the acquirer along with person in acting in concert with him prior to the acquisition is already more than 15%, however, the individual shareholding cross the threshold limit of 15% after the acquisition?



2. Whether the Noticees triggered the obligation to make public announcement under regulation 11(1) by virtue of acquisition of shares by the promoter group on March 12, 2007 and what should be the reference date for determining the pre acquisition shareholding?

## SEBI ORDER:

1. ***Whether the obligation to make public announcement under regulation 10 of SAST Regulations is attracted where the collective shareholding of the acquirer along with person in acting in concert with him prior to the acquisition is already more than 15%, however, the individual shareholding cross the threshold limit of 15% after the acquisition?***

On analyzing the expression **"acquire shares or voting rights which taken together with shares or voting rights, if any, held by him or by persons acting in concert with him"** of Regulation 10, SEBI observed that an acquirer is under obligation to make the public announcement to acquire shares of the Target Company in following two situations:-

- shares/voting rights ***sought to be acquired by an acquirer*** + shares/voting rights ***already held by the acquirer*** prior to the acquisition entitle him to exercise 15% or more voting rights; OR
- shares/voting rights ***sought to be acquired by an acquirer*** + shares/voting rights already ***held by the acquirer*** + shares/voting rights ***already held by person acting in concert*** with the acquirer, entitle him to exercise 15% or more voting rights.

Thus it was held that even if the individual acquisition of any person in a group breaches the threshold limit of 15%, then such acquirer is under an obligation to make open offer under Regulation 10. In the present case, the acquisition of KLL individually exceeds 15% limit as prescribed under regulation 10, therefore, KLL is liable to make an open offer.

SEBI further observed that if the interpretation of the regulation 10 is made in such a manner that shareholding of the acquirer along with the PAC must be taken into consideration while calculating the limit of 15% and not individually, then an **individual may acquire shares beyond specified threshold and evade the obligations by claiming benefit of creeping acquisition under regulation 11 by joining the holdings of other persons who might be PAC or who may join the acquirer as such to enable him to evade the obligation under regulation 10.**



SEBI further quoted the judgment of Hon'ble SAT in the matter of ***Hanumesh Realtors Limited vs. SEBI*** wherein it was held that an acquirer is obligated to make a public announcement if he is able to exercise more than 5% in a financial year, in terms of regulation 11(1), irrespective of whether the promoter group was able to exercise 5% or more.

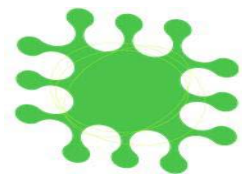
Moreover Hon'ble Supreme Court in the matter of ***Swedish Match AB vs SEBI*** makes it clear that even when a single acquirer acquires more than 5% voting rights, irrespective of the total voting rights of the promoter group, the acquirer is under an obligation to make Public Announcement under Regulation 11. It was also held that regulations 10, 11 and 12, operate in three different fields but in some cases regulations 11 and 12 may overlap with each other and the acquirer can issue a combined public announcement fulfilling the requirement of both regulations 11 and 12.

2. ***Whether the Noticees triggered the obligation to make public announcement under regulation 11(1) by virtue of acquisition of shares by the promoter group on March 12, 2007 and what should be the reference date for determining the pre acquisition shareholding?***

SEBI held that to avail benefit of creeping acquisition, the additional acquisition should not entitle the acquirer to exercise more than 5% of the voting rights in the Target Company in any financial year that starts on April 01 and ends on March 31. Regulation 11(1) had put a limit on percentage of creeping acquisition and did not allow netting of acquisition and disinvestment for determining the percentage of increase. If at any point of time, in that financial year, the acquisition breaches the threshold of 5% creeping acquisition, the obligation to make public announcement is triggered at that time itself.

Such intention is noted from Justice P.N. Bhagwati Committee Report of 1997 wherein the Committee had recommended that -

*“The percentage of acquisition referred to above is on absolute basis i.e. there should be no netting of acquisition and disinvestment during the said period. In other words, if a person **acquired x%** during a period of 12 months, **sold y%** and **acquired z%** his **aggregate acquisitions of (x% + z%)** would be reckoned for the purpose of the Regulation and **not (x% - y% + z%).**”*



With regard to determination of reference date for calculating creeping acquisition limit, it was held by SEBI that on analyzing the definition of Acquirer under Regulation 2(1)(b) and provision of Regulation 11, the shareholding shall be calculated taking into account the shareholding of the acquirer immediately prior to the acquisition.

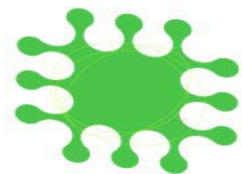
The gross acquisitions by way of conversion of warrants or purchase of shares, if any, during the financial year 2006-2007 are relevant for calculating the 5% creeping benchmark. Further, the 5% increase in the financial year has to be calculated on gross basis without netting the dilution and/or divestment and acquisition.

Accordingly, during the financial year, the promoters have acquired 12.97% shares (4.57%+0.02%+8.38%), hence, are liable to make open offer under Regulation 11(1) of SAST Regulations.

Therefore, after considering the facts of the case and the order of Hon'ble SAT in the matter of ***Nirvana Holdings Private Limited vs SEBI***, it was directed that the Noticees shall make a combined public announcement under regulation 10 and 11(1) of the SAST Regulations and would also pay interest at the rate of 10% per annum, from June 16, 2007 to the date of payment of consideration, to the shareholders who were holding shares in the Target Company on the date of violation and whose shares have been accepted in the open offer, after adjustment of dividend, if any, paid.

#### **Conclusion:**

- 1. Regulation 10 is applicable where the individual shareholding of the acquirer exceeds the threshold of 15% after the acquisition even though the collective holding of the acquirer along with PACs is already more than 15% prior the acquisition.**
- 2. The reference date for determining the pre acquisition shareholding should be the date on which the acquisition in question is done.**





## Market Updates

### **BHARTI INFRATEL RAISED FUNDS FROM ANCHOR INVESTORS**

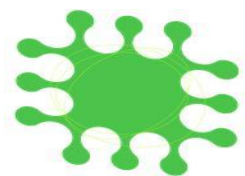
Bharti Infratel has raised funds amounting to Rs. 651.70 crores from 18 Anchor Investors by allotting 2.83 crores shares at a price of Rs. 230 per share. Further, the Company is also planning to raise Rs. 4,533.60 crores through the issue of 18.89 crores equity shares in the price band of Rs. 210 to 240 per share.

### **WIPRO SELL OFF ITS BRAND "SUNFLOWER" TO CARGILL INDIA**

Wipro has separated its flagship brand i.e. "Sunflower" to an American food producer and marketer "Cargill India". This move will help Wipro to concentrate on its core activity like Personal Care, Skin Care, Wellness and Lightning business. On the other hand, the acquisition of said brand will boost the Cargill's consumer brand portfolio and expand its market reach.

### **DLF SIGNED AN AGREEMENT TO SELL ITS LUXURY RESORT**

DLF has signed an agreement with Adrian Zecha to sell its luxury resort chain **Amanresorts** for a total consideration of \$300 Million (over Rs 1,600 crore). The Proceeds would be utilised for reducing its debt burden. Further, it has recently sold the Mumbai plot to Lodha Developers for about Rs 2,700 crore and further planning to sell hotel - Hilton Garden Inn situated in New Delhi.



# 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

**Q.1 As on January 2012: Total Capital of the Company: 1000 Equity Shares**

**As on January 2012: Total Promoters Shareholding prior to the preferential allotment: 500 Equity Shares (50%)**

**In the month of January 2012: Preferential Allotment made to the promoters: 200 Equity Shares**

**In the month of January 2012: Preferential allotment made to the public: 100 Equity Share**

Whether the increase in shareholding of promoters on account of preferential allotment is within the creeping acquisition as allowed under regulation 3(2) of SEBI (SAST) Regulations, 2011 assuming the fact that both the preferential allotment to promoters as well non promoters were made simultaneously and there has been no acquisition during the FY 2011-12?

- A. Yes
- B. NO

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

## Question: 2

**Q.2 As on January 2013: Total Capital of the Company: 100 Equity Shares**

**As on January 2013: Total Promoters shareholding: 30 Equity Shares (30%)**

**Acquisition made during the F.Y. 2012-13: 4 Equity Shares (4%)**

**Sale made during the F.Y. 2012-13: 2 Equity Shares (2%)**

**Remaining number of shares that can be acquired as creeping acquisition during the F.Y.2012-13:**

- A. 3 Equity Shares
- B. 6 Equity Share
- C. 8 Equity Shares
- D. 1 Equity Share

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

## Winners of Quiz – December 2012-edition

**Karan B. Khattri**

**CS Sharvari S.Kashalikar**

**Sapna Chourasia**



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