BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. Order/SM/AD/2022-23/21683]

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992, READ WITH RULE 5 OF SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995

In respect of

Vitthal Corporation Limited
[PAN: AACCV5742M]

In the matter of Vitthal Corporation Limited.

FACTS OF THE CASE IN BRIEF:

1. Securities and Exchange Board of India (hereinafter referred to as '**SEBI**'), on receipt of a complaint conducted an investigation into the scrip of Vitthal Corporation Limited (hereinafter referred to as '**Noticee/Company'**). Noticee is a public unlisted company registered with Registrar of Companies, Pune (hereinafter referred to as "**ROC, Pune**"). Pursuant to the aforementioned investigation, SEBI observed certain instances of non-compliances with SEBI (Disclosure and Investor Protection) Guidelines, 2000 (hereinafter referred to as "**DIP Guidelines**") by Noticee during the period Financial Year (FY) 2008-2009 (hereinafter referred to as "**Examination Period**").Therefore, SEBI initiated adjudication proceeding against Noticee under provisions of Section 15HB of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act**').

APPOINTMENT OF ADJUDICATING OFFICER

2. Vide order dated April 19, 2021, SEBI appointed the undersigned as the Adjudicating Officer under Section 15(I) of SEBI Act and Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter referred to as '**Adjudication Rules'**) to inquire into and adjudge under the provisions of Section 15HB of the SEBI Act the alleged violations of provisions of DIP Guidelines by Noticee.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

3. A show-cause notice dated September 30, 2021(hereinafter referred to as '**SCN**') was issued to Noticee under Rule 4 of the Adjudication Rules to show-cause as to why an inquiry should not be initiated against Noticee and penalty, if any, not be imposed upon it under the provisions of Section 15HB of SEBI Act for the aforesaid violation alleged to have been committed by it.

4. The allegations levelled against Noticee in the SCN are as under:

a) During the course of examination, information was sought from Noticee and RoC, Pune, vide letters dated July 26, 2019.

b) From the information received from Office of RoC, Pune vide email dated October 24, 2019 and Noticee vide letter dated August 02, 2019, it was observed that Noticee had issued NCRPS in the examination period. However, discrepancies were observed regarding details of allotment of NCRPS between information provided by Noticee and ROC, Pune. The details of allotment during the examination period as given by RoC, Pune and as given by Noticee are as mentioned hereunder:

Table-I
Details provided by the Company

Financial Year	Date of Issuance	No. of investors to whom NCRPS issued	Amount raised (Rs. in Crore)

2008-09	15.02.2009	5470	18.04

Table -II
Details provided by RoC, Pune

Financial Year	Date of Issuance	No. of investors to whom NCRPS issued	Amount raised (Rs. in Crore)
2008-09	15.02.2009	14	18.04

c) Based on the information submitted by the company in Table-I above, it was observed that the company had allotted NCRPS to 5470 investors on February 15, 2009. However, as per information received from the RoC, Pune, as stated in Table-II above, it was noticed that number of allottees during examination period was only 14.

d) Thus it was observed by SEBI that the Company had issued NCRPS to 5470 investors i.e. more than 49 persons, during examination period and raised a total Rs. 18.04 Crores during this period. It was further observed that the said allotment in the examination period was made in several tranches on February 15, 2009 and in each such tranche, allotments were made to 49 or less than 49 investors. However, it was observed that on a cumulative basis, Noticee had allotted NCRPS to more than 49 investors during the examination period. Therefore it was alleged that such allotments would qualify as a public issue under the Section 67 of the Companies Act, 1956.

e) It was observed that Noticee in the examination period made public issue of NCRPS without complying with provisions of Sections 73, 60 and 56 (1) and 56 (3) of Companies Act, 1956. In this regard, vide email dated March 16, 2021, Noticee had submitted to SEBI that it had filed a compounding application dated March 16, 2021 with National Company Law Tribunal for violation of Section 56, 60, 67 (3) and 73 of the Companies Act, 1956.

f) Therefore, it was observed that the aforesaid issue of NCRPS by Noticee during to 5,470 investors during Financial Year 2008-2009 amounted to public issue. In this regard it was observed that the following provisions DIP Guidelines were required to be complied with by Noticee:

Clause 2.1.1	filing of offer document
Clause 2.1.4	Application for listing
Clause 2.1.5	Issue of securities in dematerialized form
Clause 2.8	Means of finance
Clause 4.1	Promoters contribution in a public issue by unlisted companies
Clause 4.11	Lock-in of min specified promoters' contribution in public issues
Clause 4.14	Lock-in of pre-issue share capital of an unlisted company
Clause 5.3.1	Memorandum of understanding
Clause 5.3.3	Due diligence certificate
Clause 5.3.5	Undertaking
Clause 5.3.6	List of promoters group and other details
Clause 5.4	Appointment of intermediaries
Clause 5.6	Offer document to be made public
Clause 5.6A	Pre-issue Advertisement
Clause 5.7	Dispatch of issue material
Clause 5.8	No complaints certificate
Clause 5.9	Mandatory collection centres
Clause 5.9.1	Minimum number of collection centres
Clause 5.10	Authorised collection agents
Clause 5.12.1	Appointment of Compliance Officer
Clause 5.13	Abridged prospectus
Clause 6.0	Contents of offer documents
Clause 6.1 to	
Clause 6.15	Contents of Prospectus
Clause 6.16 to	
Clause 6.34	Contents of abridged prospectus
Clause 8.3	Rule 19(2)(b) of SC(R) Rules, 1957
Clause 8.8.1	Opening & closing date of subscription of securities
Clause 9	Guidelines on advertisements by issuer company

Clause 10.1	requirement of credit rating
Clause 10.5	redemption

g) However it was observed that Noticee failed to comply with aforesaid provision of DIP Guidelines in respect of aforementioned public issue of NRCPS during Financial Year 2008-2009. Therefore it was alleged that Noticee had violated Clauses 2.1.1, 2.1.4, 2.1.5, 2.8, 4.1, 4.11, 4.14, 5.3.1, 5.3.3,5.3.5, 5.3.6, 5.4, 5.6, 5.6 A, 5.7, 5.8, 5.9, 5.9.1, 5.10 , 5.12.1, 5.13, 6.0 ,6.1-6.15 , 6.16- 6.34, 8.3, 8.8.1, 9 , 10.1 ,10.5 of DIP Guidelines.

5. The SCN was sent to Noticee through Speed Post Acknowledgement due (hereinafter referred to as '**SPAD'**) on October 02, 2021, and through digitally signed email dated September 30, 2021. The SCN sent through SPAD as well as digitally signed email was duly served on Noticee. Noticee was given fifteen (15) days' time from the date of receipt of SCN to make its submissions in respect of the allegations made in the SCN.

6. Thereafter, Noticee vide its letter dated October 23, 2021, informed the undersigned that in many cases, similar to Noticee, SEBI did not taken any adverse action and did not imposed penalty. Further, Noticee vide the aforementioned letter also requested for copies/inspection of following documents:
    i. Copy of letter dated July 26th, 2019 through which SEBI has requested information from ROC,Pune regarding issuance of NCRPS by Noticee and the reply received
    ii. Copy of SEBI's internal policy of August 2016, *inter alia* deals with cases relating to deemed public issue of securities.
    iii. Copy of file notings on the basis of which SEBI circular of 31st December 2015 was issued.
    iv. Copy of file notings recording the approval of letter no. SEBI/DDHS/2020/21642/1 dated December 10, 2020 issued to Noticee
    v. Copy of investigation report/examination report
    vi. Board Agenda notes of SEBI on this issue
    vii. Copy of material placed before WTM when he approved the present issue.

7. With regard to the aforementioned request, vide email dated December 22, 2021, it was informed to Noticee that SEBI's internal policy of August 2016, *inter alia*, dealing with deemed public issue of securities, file notings on the basis of which the circular of 31st December 2015 was issued, file notings recording the approval of letter no. SEBI/DDHS/2020/21642/1 dated December 10, 2020 issued to Noticee and letter dated July 26th, 2019 through which SEBI had requested information from ROC,Pune regarding issuance of NCRPS by Noticee and Board agenda notes of SEBI were not relied upon by SEBI for crystallizing the charges against Noticee in the SCN. Further, it was informed to Noticee that the relevant reply from RoC, Pune to SEBI was already provided to Noticee as part of Annexure to the SCN. With regard to Noticee's request for investigation report, it was informed vide the aforementioned email that the relevant extracts of the same was already provided to Noticee as part of the SCN.

8. Thereafter, in the interest of natural justice, vide hearing notice dated February 04, 2022, Noticee was granted an opportunity of personal hearing before the undersigned on February 22, 2022. The aforesaid hearing notice was sent to Noticee through SPAD and also through digitally signed email on February 08, 2022 and was duly served upon it.

9. On February 22, 2022, Saachi Purohit, Authorized Representative of Noticee (hereinafter referred to as "**AR**") by email reiterated Noticee's earlier request dated October 23, 2021 for inspection of documents and also made interim submissions on merit in the matter. Vide the aforementioned email, it was also informed that Noticee had moved an application before Hon'ble Whole Time Member (hereinafter referred to as "**WTM**") of SEBI requesting for withdrawal of Order dated April 19, 2021, w.r.t appointment of undersigned as Adjudicating Officer as SEBI has not initiated adjudication proceedings in cases similar to Noticee. AR in this regard, requested undersigned to not to proceed further in the matter till the pendency of its application before Ld. WTM. Considering the contents of the aforementioned email of Noticee, hearing in the matter was adjourned and it was conveyed to AR that next date of hearing will informed in due course.

10. Thereafter, in light of the submissions made by AR vide her email dated February 22, 2022 and decision of Hon'ble Supreme Court in T. Takano v SEBI (Date of Decision:

February 18, 2022; C.A. Nos. 487 – 488 of 2022), it was decided to take a fresh look into the request for inspection made by Noticee vide its letter dated October 23, 2021 and reiterated by AR vide her email dated February 22, 2022. In this regard, vide undersigned's letter dated October 31, 2022, communicated to Noticee vide email dated November 1, 2022, Noticee was informed that it's request for inspection of SEBI's internal policy document dated August 26, 2016, *inter alia*, dealing with matters relating to deemed public issue of securities, file notings on the basis of which the circular of 31st December 2015 was issued, file notings recording the approval of letter no SEBI/DDHS/2020/21642/1 dated December 10, 2020 issued to Noticee was denied. Further, vide the aforementioned email, Noticee was provided a copy of letter dated July 26, 2019 through which SEBI had requested information from RoC regarding issuance of NCRPS by Noticee and copy of redacted examination report in the matter. Moreover, an opportunity of hearing in the matter was granted to Noticee on November 10, 2022 vide the aforesaid letter.

11. On the schedule date of hearing, AR appeared on behalf of Noticee and reiterated earlier submissions made by her vide email dated February 22, 2022. Further, at the time of hearing, Noticee was granted time of one week from date of hearing i.e. till November 17, 2022 for making additional written submissions in the matter.

12. On November 17, 2022, Noticee filed additional written submissions in the matter. Further, Noticee in its aforementioned submissions reiterated it's request for inspection of documents made vide its letter dated October 23, 2021. In this regard, vide email dated November 23, 2022 to AR, Noticee was granted an inspection of following documents on November 24, 2022:
    - Investigation Report in the matter
    - email dated October 24, 2019 and relevant attachment pertaining to Noticee received from RoC, Pune by SEBI
    - Letter dated July 26, 2021 from SEBI to the ROC Pune

13. On the scheduled date of inspection, AR availed the inspection of the aforementioned documents. The inspection in the matter was carried out through videoconferencing on cisco webex platform.

14. Noticee's reply to SCN dated October 23,2021, February 22, 2022 and November 17, 2022 is summarized hereunder:

- *Our letter dated October 23, 2021, we had sought a list of crucial documents, which would enable us to understand the instant matter properly. The documents requested go to the core of the issue and are essential for Noticee to understand the charges levelled against us, especially the Enforcement Action Policy relating to deemed public issue.*
- *SCN in this matter has been issued after considerable delay of around 12 years after the period in which the allotments in question were made by Noticee. The SCN dated September 30, 2021 has been issued after a considerable delay of almost 12 years. The transactions in question are pertaining to the FY 2008-2009. Therefore it is clear that there has been an inordinate delay in issuing the SCN and on this ground alone the SCN should be set aside.*
- *Noticee had moved an Application before Hon'ble Whole Time Member, inter alia praying that the Hon'ble Whole Time Member's Order dated April 19, 2021 appointing your Honour as the Adjudicating Officer in the instant matter be withdrawn. The said application is presently pending and no decision has been taken as yet. Since this matter is now pending before a higher authority, your Honour is requested to not proceed until our Application before the Board is decided,.the present proceedings should not be decided upon while an Application to the superior authority is pending and also inspection has not been completed in the present matter.*
- *SEBI's interpretation of the limit of 50 persons in one financial year is absolutely incorrect as the word financial year itself does not find any mention in law and the relevant provision of the Companies Act, 1956 talks about a particular offer and not number of allottees in one financial year. Even this limit of 50 for one offer is not applicable in cases where the offer is made to a domestic concern.There was no cap*

on the number of offers which could be floated in a particular financial year by a company under the Companies Act, 1956.

- *Further, Noticee would like to bring to your kind attention Letter dated June 21, 2018, from the Registrar of Companies addressed to the NCLT in the matter of M/s Vishwaraj Sugar Industries Ltd., which clearly states that a plain reading of section S. 67(3) of the Companies Act, 1956 reflects that if multiple separate/different allotments are made to 49 persons or less after obtaining shareholders approval by way of Board Resolution, it cannot be said that the Company has violated the provisions of the Companies Act, 1956. This said letter and the view taken by the ROC has also been observed and accepted by the NCLT in its order passed in the said matter. In contradiction to what the ROC has held, the SCN alleges violation on the same facts and on the same sections/law and clearly there are two contradictory views being taken by two different authorities.*
- *In the present case it has been submitted that all these offers /allotments were made only to our sugarcane suppliers/farmers who work on day to day business with the Company. These issues amount to domestic concern where expressly Section 67(3) has no application. On this ground itself, the matter should be closed on immediate basis without any adverse findings.*
- *Noticee would also like to point out that by SEBIs letter dated December 10, 2020 the Applicant was advised to provide the following information : (i.) confirm whether the money is refunded along with 15 % interest p.a. as per SEBI's circular (no. CIR/ CFD/DIL3/18/3015) dated December 31st, 2015 (ii). submit a certificate from an independent peer reviewed practicing CA / CS certifying compliance of procedure prescribed in the aforesaid circular and (iii.) to apply for compounding of violation with NCLT and submit evidence for the same with SEBI. In this letter it was clearly stated that if the aforesaid information is not furnished in the time period given by SEBI, then SEBI will proceed to take suitable action against the Applicant. However, Noticee has complied with the same and therefore initiation of the present proceedings is bad in law on this ground as well and should be disposed of in view of the same.*
- *the Company has made the allotments as per the law and has not violated any of the provisions of Section 67 (3) of the Companies Act, 1956 and without prejudice to the above submissions, even assuming that the alleged violations stand against Noticee,*

Noticee would like to submit that, without admitting any violations, out of abundant caution, Noticee had bonafidely given the investors an Exit offer. Therefore even if any prejudice has been caused to any investors the same stands rectified/corrected by Noticee in accordance with SEBI's circular of CIR/CFD/DIL3/18/2015 dated 31st December, 2015 and no investor stands prejudiced as on date.

- *SEBI has not taken any adverse action and has not initiated adjudicating proceedings imposing penalties such similarly placed entities. In fact, in these similar cases, the entities had not even bonafidely given exit option to investors to take refund of the monies collected in accordance with SEBI's circular of CIR/CFD/DIL3/18/2015 dated 31st December, 2015 and SEBI by its Order had to direct them to give refund to the investors. Therefore, those matters are in fact graver than the present matter; and despite that no penalty proceedings were initiated.*

CONSIDERATION OF ISSUES, EVIDENCE AND FINDINGS

15. I have carefully perused the charges levelled against Noticee, replies/submissions filed by Noticee and other documents/ evidence available on record. The issues that arise for consideration in the present case are:

    I. Whether Noticee has violated Clauses 2.1.1, 2.1.4, 2.1.5, 2.8, 4.1, 4.11, 4.14, 5.3.1, 5.3.3,5.3.5, 5.3.6, 5.4, 5.6, 5.6 A, 5.7, 5.8, 5.9, 5.9.1, 5.10 , 5.12.1, 5.13, 6.0 ,6.1-6.15 , 6.16- 6.34, 8.3, 8.8.1, 9, 10.1 ,10.5 of DIP Guidelines?

    II. Do the violations, if any, attract monetary penalty under Section 15HB of SEBI Act?

    III. If the answer to issue no. II is in affirmative, then what should be the quantum of monetary penalty?

16. Before proceeding to the merits of the matter, I find it pertinent to deal with preliminary objections raised by Noticee in its reply to the SCN. The preliminary objections raised by Noticee are as follows:

I. <u>Delay of 12 years in issuance of the SCN</u>

17. Noticee has contended that there has been a delay of 12 years in issuance of the SCN in the matter and the SCN is liable to be disposed of on the grounds of the aforesaid delay as it had caused great prejudice to Noticee. In this regard, Noticee in support of its contentions has placed reliance on the decisions of Hon'ble Securities Appellate Tribunal (hereinafter referred to as "**SAT**") in the matters of Yatin Pandya HUF vs SEBI (Order dated March 24, 2022; Appeal No 719 of 2021), Ashlesh Gunvantbhai Shah Vs SEBI (Order dated January 31, 2020); Mr. Rakesh Kathotia & Ors. Vs SEBI (27.5.2019) etc.

18. I have perused the decisions cited by Noticee with regard to the delay in issuance of SCN. I note from the aforementioned judgements of Hon'ble SAT that it has become trite law that SCN has to be issued within reasonable period of time and what constitutes reasonable period would depend on facts and circumstances in each case, nature of default/statute, prejudice caused, whether the third party rights had been created etc. I note from the material available on the record that in the present case, the examination was initiated by SEBI on receipt of an internal reference dated March 08, 2019 pursuant to an preliminary enquiry done on the basis of complaint dated August 22, 2016 received by SEBI against sugar mill companies. I note from the material available on record that the investigation in the matter entailed a series of communication with RoC, Pune and Noticee by SEBI. In this regard, I observe from the investigation report in the matter that during the course of investigation, Noticee had submitted vide its letter dated August 02, 2019 that it had initiated the process of exit/refund option to all of their existing NCDs/NCRPS holders and the process of giving option will be completed soon. Later, vide its letter dated February 24, 2020, I note that Noticee had informed that the process of refund has been completed. Vide email dated May 12, 2020 Noticee was advised to comply with the SEBI circular no. CIR/CFD/DIL3/18/2015 dated December 31, 2015 with regard to the process of refund by the concerned department of SEBI. Further, a reminder vide email dated July 06, 2020 was also given to Noticee. Since no information/documents related to refund after lockdown was received from Noticee, SEBI vide its letter dated December 10, 2020 asked the company to :

a. Confirm whether the money is refunded along with the interest @15% per annum
b. Submit a certificate from an independent peer reviewed practicing Chartered Accountant/Company Secretary. The said certificate shall state that the certification has been made after verifying various documentary evidences including proof of dispatch / delivery of letters, response of investors, complaints from investors, bank statements of the company etc.
c. Apply for compounding of violation with NCLT and submit evidence for the same with SEBI.

19. I note that Noticee, vide its letter dated January 07, 2021 confirmed that the exit offer was given to all the shareholders in respect of all the allotments to 50 or more allotees in one single financial year. Company, further confirmed that the refund was given along with an interest @15% per annum. A peer reviewed CA certificate dated December 29, 2020 from C.V Chitale & Co., Chartered Accountants was also submitted by Noticee. Noticee also submitted that exit option was offered to all 866 investors (investors at the time of exit option) and only 14 investors accepted the offer of refund. Further, vide its letter dated February 20, 2021, company had submitted that it has refunded Rs. 19.80 lakhs (including interest) to the investors who accepted the refund offer. Company, vide its email dated March 16, 2021 also submitted that it had filed for compounding of violation of Section 56, 60, 67(3) and 73 of the Companies Act, 1956 with NCLT vide its application dated March 16, 2021.

20. On completion of the examination, examination report was put up before the competent authority on March 22, 2021 and the action in the matter was approved by the competent authority on March 24, 2021. Thereafter, the undersigned was appointed as Adjudicating Officer in the matter on April 19, 2021. After receipt of certain clarifications sought by the undersigned from the concerned department of SEBI, the SCN in the matter was issued on September 30, 2021. In light of the above, I find that the examination in the matter was completed within 2 years, which also includes period of Covid pandemic.

21. In light of the foregoing, I find that examination in the matter was concluded and adjudication proceedings in the matter was proposed by the concerned department of SEBI on conclusion of refund to investors pursuant to the exit option offered to investors and filing of compounding application by Noticee. Considering the above, I find that examination in the matter was completed within a reasonable period of time and SCN was also issued without any delay.

22. Though Noticee has claimed that grave prejudice was caused to it in locating the documents and preparing for its defense, I note that all the relied upon documents, which has been considered as evidence are the documents furnished by Noticee itself and by RoC, Pune and no other documents obtained from any third party are part of the evidence in these proceedings. I also note that the facts alleged in the SCN i.e. issuance of NCRPS to 5470 investors etc. are admitted to by Noticee. I therefore find that the claim of Noticee that grave prejudice has been caused to it is not borne out by the aforesaid facts. In light of the above, I am unable to accept the contention of Noticee that there has been inordinate delay in issuance of SCN and that prejudice has been caused to Noticee.

II. <u>All documents sought by Noticee has not been furnished during proceedings.</u>

23. Noticee has contended that the several of the crucial documents sought by it vide its letter dated October 23, 2021, were not provided to it. In this regard, Noticee has contended that the aforementioned documents requested go to the core of the issue and are essential for Noticee to understand the charges levelled against us, especially the enforcement Action Policy relating to deemed public issue. In support of its contentions, Noticee has placed reliance on the decision of Hon'ble Supreme Court in the matter of T. Takano vs SEBI & Anr. (Date of Decision: February 18, 2022, C.A. Nos. 487 – 488 of 2022).

24. With regard to the aforementioned contention of Noticee, I note that Noticee in its letter dated October 23, 2021 requested the inspection of following documents:
    a. Copy of letter dated July 26^{th}, 2019 through which SEBI has requested information from ROC regarding issuance of NRCPS by Noticee and the reply received

b. Copy of SEBI's internal policy of August 2016, *inter alia* deals with DPI cases.
c. Copy of file nothings on the basis of which the circular of 31st December 2015 was issued.
d. Copy of File notings recording the approval of letter no. SEBI/DDHS/2020/21642/1 dated December 10, 2020 issued to Noticee
e. Copy of investigation report/examination report
f. Board Agenda notes of SEBI on this issue
g. Copy of material placed before WTM when he approved the present issue.

25. I note that it was duly informed to Noticee during the instant adjudication proceedings that the Board Agenda Notes and relevant circulars issued from time to time by the Board are disseminated in the public domain through SEBI website. It was also informed to Noticee that file notings and copy of SEBI's internal policy of August 2016 dealing with DPI cases are not the part of record before me and also same are not part of the relied upon documents in the instant proceedings and therefore the aforesaid documents were not provided to Noticee during inspection. I am of a view that SEBI's internal policy documents are issued to ensure consistency and uniformity in handling such cases by the concerned operational department. Further, no circular or communication was issued about aforesaid policy, as the same was framed for the purpose of bringing consistency and uniformity while dealing with DPI matters within SEBI. Therefore, in my view, the aforesaid policy documents which deal with the internal procedures and process to examine the DPI cases within SEBI, are not relevant in the instant proceedings.

26. I have perused the judgment of Hon'ble Supreme Court in the matter of T.Takano (Supra) and I note that the relied upon and relevant documents in the present matter were duly provided to Noticee during the course of instant proceedings which are in line with the principle pronounced via the aforesaid judgement of Hon'ble Supreme Court. It is pertinent to note that the question before the Hon'ble Supreme Court in the aforesaid judgement was whether an investigation report under Regulation 9 of the PFUTP Regulations must be disclosed to the person whom a notice to show cause is issued, when all the relied upon documents have been furnished to Noticee. In this context, the

Apex court has opined at para 39 of the judgement that "*the actual test is whether the material that is required to be disclosed is relevant for the purpose of adjudication*". The Apex Court also relied on test for the standard of 'relevancy' laid down by a four judge Bench of the Hon'ble Supreme Court in Khudiram Das v. State of West Bengal (1975) 2 SCC 81. The test is a two prong test where; firstly, the material must have nexus with the order and secondly, the material might have influenced the decision of the authority. The Black's Law Dictionary defines "nexus" as "a connection or link, often a casual one". Since, all relevant material relied upon in the instant proceedings have been provided to Noticee and most of them are the documents and replies furnished by Noticee itself such as the details of issuance of NCRPS to more than 49 investors and the certificate of refund made to shareholders etc., I find that the principle pronounced by the Hon'ble Supreme Court in said order has been duly complied with and therefore, I reject such contentions of Noticee.

27. Noticee has also contended regarding communication issued by my office regarding rejection of their requests for inspection of documents in these proceedings. In this regard, I note that that all the communications issued to Noticee during the instant proceedings are either issued by me or issued under my directions by my office. In any case, through my letter dated October 31, 2022, communicated to Noticee vide email dated November 1, 2022, I have decided on the request for inspection of documents made by Noticee vide its letter dated October 23, 2021 and also provided reasons for arriving at the decision. Therefore, I reject the aforementioned contention of Noticee.

III. Pending of miscellaneous application before Ld. WTM of SEBI regarding appointment of Adjudicating Officer

28. Noticee has submitted that it has moved an application before Hon'ble WTM, inter alia praying that the Hon'ble WTM Order dated April 19, 2021, appointing the Adjudicating Officer in the instant matter be withdrawn and that the said application is presently pending before the Hon'ble WTM. It has further stated that, I cannot proceed in the matter till the time a decision is made by the Ld. WTM on the said application of Noticee. In support of its contentions, Noticee has placed reliance on the decision of Income Tax

Appellate Tribunal in MSEB vs. Joint CIT (81 ITD 299)(Mum); decision of Allahabad High Court in Behari Lal And Anr. vs M.M. Gobardhan Lal And Ors. dated 29 April, 1948, decision of Madras High Court in Ramanadhan Chetti vs Narayanan Chetti Alias dated 25 February, 1904 . In this regard I note that till the date of this order no directions have been issued by the Ld. WTM with regard to keeping the instant proceedings in abeyance. In my view, in absence of any specific directions/ order to keep the adjudication proceedings in abeyance by the competent authority or in absence withdrawal of appointment of undersigned as adjudicating officer on the basis of said application of Noticee by the competent authority, there is no bar on the present adjudication proceedings and I can proceed with the matter and can decide the matter on the merits. I have also perused the judgements relied upon by Noticee and I note that, these judgements discuss about the appeals filed before the appellate court/ tribunal, however, in this matter the application is filed before the Ld. WTM in SEBI, instead of the appellate tribunal/ court. Therefore, the aforesaid judgements can easily be distinguished on the basis of above fact. Considering the above discussion, I found the above contention of Noticee to be devoid of any merit.

29. After dealing the aforesaid preliminary objections of Noticee, I now proceed to deal with this case on the basis of merits.

Issue No. I: Whether Noticee has violated Clauses 2.1.1, 2.1.4, 2.1.5, 2.8, 4.1, 4.11, 4.14, 5.3.1, 5.3.3,5.3.5, 5.3.6, 5.4, 5.6, 5.6 A, 5.7, 5.8, 5.9, 5.9.1, 5.10 , 5.12.1, 5.13, 6.0 ,6.1-6.15 , 6.16- 6.34, 8.3, 8.8.1, 9, 10.1 ,10.5 of DIP Guidelines?

30. It has been alleged in the SCN that Noticee failed to comply with the requisite provisions of DIP Guidelines 2000 with regard to its public issue of NRCPS during financial year 2008-2009.

31. I note that, in the instant case, it is an admitted fact that Noticee has made allotment of NCRPS to 5470 investors during financial year (FY) 2008-09. The details of the same are given hereunder:

Financial Year	Date of Issuance	No. of investors to whom NCRPS issued	Amount raised (Rs. in Crore)
2008-09	15.02.2009	5470	18.04

32. I note from the details of the aforementioned allotment submitted by Noticee to SEBI during the examination that the aforesaid allotments were made in several tranches on multiple dates and in each such tranche, allotments were made to 49 or less number of investors, however, on a cumulative basis, Noticee had allotted NCRPS to 5470 investors during FY 2008-09. In the light of above observations, I find that Noticee had issued NCRPS to 5470 investors during FY 2008-09.

33. In order to determine whether the aforementioned issuance of NCRPS amounts to public issue, I find it pertinent to refer to the provisions of Section 67(3) of Companies Act, 1956. I note that section 67(3) of Companies Act, 1956 which states as follows:

"67. (1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

...

(3) No offer or invitation shall be treated as made to the public by virtue of sub- section (1) or sub- section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-

(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation …

***Provided** that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:*

***Provided** further that nothing contained in the first proviso shall apply to non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956).”*

34. From the perusal of section 67(3) of Companies Act, 1956, I note that as per first proviso to Section 67(3) Companies Act, 1956, a company making offer of shares/debentures to fifty or more persons would become automatically bound to follow the obligations laid down in the Act for making public issue and listing of securities. Thus, considering that Noticee had issued NCRPS to 5470 investors i.e. to more than 49 people, during financial year (FY) 2008-09, I find that Noticee had made a public issue of NCRPS in terms of the first proviso to Section 67(3) of the Companies Act, 1956 in the FY 2008-09.

35. In this context, I place reliance on the decision of the Hon’ble Supreme Court of India in Sahara India Real Estate Corporation Limited & Ors. vs. SEBI [Civil Appeal Nos. 9813 and 9833 of 2011; decided on August 31, 2012 ;(2013) 1 SCC 1], wherein it was held as under:

    “...The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000,which clearly indicates, nothing contained in Subsection (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. ... Resultantly, after 13.12.2000, any offer of securities by a public company to fifty persons or more will be treated as a public issue under the Companies Act, even if it is of domestic concern or it is proved that the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation...

    …..*I may, therefore, indicate, subject to what has been stated above, in India that any share or debenture issue beyond forty nine persons, would be a public issue attracting all the relevant provisions of the SEBI Act, regulations framed thereunder, the Companies Act, pertaining to the public issue. …”*

36. In light of the above and ratio laid down in the aforementioned judgment of Supreme Court, I find that Noticee made a public issue of securities in the FY 2008-09.

37. With regard to allegations in the SCN, Noticee in its reply to SCN has contended that its issuance of NCRPS to 5470 investors during FY 2008-09 cannot be considered as a public issue. In this regard, Noticee has contended that an invitation to subscribe can be extended in one single offer to not more than 49 persons in a private placement and that it has not made offer to more than 49 persons in a single offer during FY 2008-09 and therefore, its offers of NCRPS was a private placement. In this regard, I find it pertinent to rely on the decision of Hon'ble SAT in Neesa Technologies Limited vs. SEBI vide Appeal No. 311 of 2016, dated April 28, 2017, wherein Hon'ble SAT has held as under:

"In terms of Section 67(3) of the Companies Act any issue to '50 persons or more' is a public issue and all public issues have to comply with the provisions of Section 56 of Companies Act and ILDS Regulations. Accordingly, in the instant matter the appellant have violated these provisions and their argument that they have issued the NCDs in multiple tranches and no tranche has exceeded 49 people has no meaning"

38. The facts and circumstances of the instant adjudication matter are similar to the one dealt with in the aforesaid order of Hon'ble SAT. In the instant matter, multiple tranches of shares (112 instances) were issued within one FY 2008-2009, where each issue, except in one instance, were made exactly to 49 persons i.e. issues were to person not exceeding 49. Considering the similarities in the cases, I do not find any reason to differ from the ratio laid down in the aforesaid judgement of the Hon'ble SAT and therefore, conclude that such issue of NCRPS to 5470 investors during FY 2008-09, would be public issue. In view of the foregoing, I am not inclined to accept the contention of Noticee.

39. Noticee has also contended that Companies Act, 1956 is silent on the number of offers a company can make in any period or a financial year and there was no cap on the number of offers which could be floated in a particular financial year by a company under the Companies Act, 1956. Noticee has also contended that the cap of 200 on the number of

persons to whom offer / allotment can be made in one financial year was introduced only after the enactment of Companies Act, 2013 (effective from 1st April, 2014). Hence, in respect of the offers made before 31st March, 2014, this limit is not applicable. With regard to the aforementioned contention of Noticee, I note that Hon'ble SAT in Neesa Technologies Limited vs. SEBI (*supra*), where the appellant in the matter had issued non convertible debentures (NCDs) during the FY 2013-14 to 341 persons in multiple (8) tranches, with no tranche exceeding 49 people, had clearly considered the same to be a public issue. I am of the view that since the facts of the instant matter are also concerning issuance of securities in one financial year i.e. 2008-09, the decision of Hon'ble SAT in the aforesaid judgement would prevail in this case also. Therefore, I find the aforementioned contention of Noticee to be of no merit.

40. I note that Noticee in its reply has further contended that offers/ allotments were made only to its sugarcane suppliers/farmers who work on day to day business with it and these issues amount to domestic concern where section 67(3) of Companies Act, 1956 has no application. In this regard, I place reliance on the decision of Hon'ble SAT in Zenith Highrise Infracon Ltd. & Ors v SEBI (Appeal No. 459 of 2018 and other connected appeals) wherein Hon'ble SAT has held as under:

    " The effect is, that an issue would remain in the category of a "domestic concern" only when the offer is confined to less than fifty persons. As offer extending to fifty or more persons will tantamount to a public issue."

    Placing reliance on the aforesaid judgement of Hon'ble SAT, I hold that in the present case, this exemption as argued by Noticee would not be applicable since the issue of NCRPS was made to more than 49 persons. In any case, I find that other than making a bald statement that the allotments were made only to its sugarcane suppliers/farmers, Noticee has not furnished any documents to substantiate its claim. Therefore, I am unable to accept the aforesaid contention of Noticee.

41. During the proceedings, Noticee has produced a letter of Registrar of Companies, Karnataka (RoC) dated June 21, 2018 addressed to NCLT, Bangalore in the matter of M/s Vishwaraj Sugar Industries Limited, wherein RoC, Karnataka has given an opinion before NCLT, Bangalore stating that – "*By plain reading of Sec 67(3) and its proviso, it*

cannot be said that the Company has violated the said provision. *Hon'ble NCLT may kindly pass appropriate orders as deemed fit and proper in the matter*". I note from publicaly available records that Hon'ble NCLT in its judgement dated October 31, 2018 (C.P. No. 325/BB/2018) in the aforesaid matter held as under: "……*SEBI is the regulating authority to deal with the issues raised by the Applicants. The interests of farmers are at stake in the instant case, and it is SEBI that has to decide the issue when the issue has come before them…. Tribunal cannot prejudge the issue before SEBI judging the issue at appropriate time…. The petition bearing no. C.P. No. 325/BB/2018 is hereby rejected as premature, leaving the matter to SEBI to decide the issue in accordance with law at the appropriate time* "

42. From the above, I note that Hon'ble NCLT had acknowledged the jurisdiction of SEBI in the matters regarding public issue of securities and therefore had not decided the matter on merits, leaving the matter to SEBI to decide the issue in accordance with law. I note that SEBI has been mandated under Section 55A of the Companies Act, 1956 to administer various provisions of the said Act with respect to issue and transfer of securities of listed companies, companies that intend to list as well as companies that are required to list its securities while making offer and issue of securities to the public and same has also been accepted by the Ld. NCLT, Banagalore in its said order relied upon by Noticee. While examining the scope of this section in the Sahara Case, Apex Court held as follows: -

"*We, therefore, hold that, so far as the provisions enumerated in the opening portion of Section 55A of the Companies Act, so far as they relate to issue and transfer of securities and nonpayment of dividend is concerned, SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized stock exchange in India." "SEBI can exercise its jurisdiction under Sections 11(1), 11(4), 11A(1)(b) and 11B of SEBI Act and Regulation 107 of ICDR 2009 over public companies who have issued shares or debentures to fifty or more, but not complied with the provisions of Section 73(1) by not listing its securities on a recognized stock exchange."*

43. Therefore, having regard to the aforesaid judgements, it is clear that SEBI has been considered to have jurisdiction on the aspect of determination of public issue of securities. As noted earlier in the order, Hon'ble SAT, which is the appellate tribunal of SEBI, has already laid down that such issues of securities to 49 persons in multiple tranches would amount to public issue of securities. Therefore, I find the aforesaid contentions of Noticee based on the letter of RoC to be of no merit.

44. I note that since Noticee had made a public issue of NCRPS in the FY 2008-2009, it was under an obligation to comply with the requisite provisions of DIP Guidelines. In this regard, I note that the following provisions DIP Guidelines were required to be complied with by Noticee:

Clause 2.1.1	filing of offer document
Clause 2.1.4	Application for listing
Clause 2.1.5	Issue of securities in dematerialized form
Clause 2.8	Means of finance
Clause 4.1	Promoters contribution in a public issue by unlisted companies
Clause 4.11	Lock-in of min specified promoters' contribution in public issues
Clause 4.14	Lock-in of pre-issue share capital of an unlisted company
Clause 5.3.1	Memorandum of understanding
Clause 5.3.3	Due diligence certificate
Clause 5.3.5	Undertaking
Clause 5.3.6	List of promoters group and other details
Clause 5.4	Appointment of intermediaries
Clause 5.6	Offer document to be made public
Clause 5.6A	Pre-issue Advertisement
Clause 5.7	Dispatch of issue material
Clause 5.8	No complaints certificate
Clause 5.9	Mandatory collection centres
Clause 5.9.1	Minimum number of collection centres
Clause 5.10	Authorised collection agents
Clause 5.12.1	Appointment of Compliance Officer

Clause 5.13	Abridged prospectus
Clause 6.0	Contents of offer documents
Clause 6.1 to	
Clause 6.15	Contents of Prospectus
Clause 6.16 to	
Clause 6.34	Contents of abridged prospectus
Clause 8.3	Rule 19(2)(b) of SC(R) Rules, 1957
Clause 8.8.1	Opening & closing date of subscription of securities
Clause 9	Guidelines on advertisements by issuer company
Clause 10.1	requirement of credit rating
Clause 10.5	redemption

45. However, I note from records pertaining to SEBI's examination in the matter that there is no evidence placed to show that Noticee had complied with aforesaid provisions of NCRPS Regulations in respect of aforementioned public issue of NCRPS during FY 2008-2009. I also note from the submissions of Noticee that it has not disputed the aforementioned findings of SEBI as stated in the SCN.

46. In light of the above observations, I find that the allegation that Noticee has violated Clauses 2.1.1, 2.1.4, 2.1.5, 2.8, 4.1, 4.11, 4.14, 5.3.1, 5.3.3,5.3.5, 5.3.6, 5.4, 5.6, 5.6 A, 5.7, 5.8, 5.9, 5.9.1, 5.10 , 5.12.1, 5.13, 6.0 ,6.1-6.15 , 6.16- 6.34, 8.3, 8.8.1, 9, 10.1 ,10.5 of DIP Guidelines stands established.

47. I note that Noticee in its submissions has also contended that in many cases similar to the present case, SEBI has consciously not taken any adverse action and not imposed penalty and SEBI has not provided the rationale behind discriminating against Noticee and having a completely different approach in the present matter. However, I note that Noticee has made contradictory submissions quoting certain other orders of SEBI where penalties have been levied by Hon'ble AOs in matters where facts are similar to the ones in the present matter. Be that as it may, I regard these contentions to be more in nature of SEBI's policy regarding enforcement actions in such matters and find these to be

outside the purview of the present adjudication proceedings. Therefore, I find these contentions to be devoid of merit.

<u>Issue No. II: Do the violations, if any, attract monetary penalty under Section 15HB of SEBI Act?</u>

48. It has been established in the preceding paragraphs that Noticee has violated Clauses 2.1.1, 2.1.4, 2.1.5, 2.8, 4.1, 4.11, 4.14, 5.3.1, 5.3.3,5.3.5, 5.3.6, 5.4, 5.6, 5.6 A, 5.7, 5.8, 5.9, 5.9.1, 5.10 , 5.12.1, 5.13, 6.0 ,6.1-6.15 , 6.16- 6.34, 8.3, 8.8.1, 9, 10.1 ,10.5 of DIP Guidelines.

49. I note that Noticee in its reply to the SCN has contended that it has given exit offer to the investors pursuant to SEBI's direction and I note that Noticee in its reply to the SCN has stated that as per the direction given by SEBI and therefore, imposition of penalty is not warranted in the instant matter. With regard to the aforementioned contention of Noticee, I find that though the same may be considered as a mitigating factor in the instant matter, considering the number of investors involved and amount collected, Noticee cannot avoid penal action in the instant matter just because it had attempted to make good its default.

50. I note that the Hon'ble Supreme Court of India in the matter of SEBI v/s Shri Ram Mutual Fund [2006] 68 SCL 216(SC) held that "*In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established..….".*

51. Therefore, for the above violations, as brought out in the foregoing paragraphs, I find that Noticee would be liable for monetary penalty under section 15HB of the SEBI Act which provides as following: -

    SEBI Act

    Penalty for contravention where no separate penalty has been provided.

    15HB. Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which may extend to one crore rupees.

<u>Issue No. III: If the answer to issue no. II is in affirmative, then what should be the quantum of monetary penalty?</u>

52. While determining the quantum of penalty under Section 15HB of the SEBI Act, it is important to consider the factors as stipulated in Section 15J of the SEBI Act, which reads as under:-

<u>SEBI Act</u>

Factors to be taken into account by the adjudicating officer.
Section 15J *- While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-*

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
(b) the amount of loss caused to an investor or group of investors as a result of the default;
(c) the repetitive nature of the default.

53. I note that it is a settled position that the factors under section 15J are not exhaustive but are inclusive. As established in the Order, during the financial year 2008-09, Noticee had raised Rs 18.04 crores from 5470 investors without complying with DIP Guidelines. I further note that the impugned deemed public issues are in violation of law and money is collected from innocent, ill-informed and gullible public, without the Company giving the statutory protection available to those investors under the law such as, full and necessary disclosures about the company, an exit opportunity by way of listing of the shares etc. I note that the nature of the default by Noticee is found to be serious and such defaults by Noticee are blameworthy and grave considering the amount of Rs 18.04 crores from 5470 investors during the aforesaid period.

54. However, I observe from Noticee’s reply that Noticee has given the exit offer to its investors only after the direction of SEBI vide letter dated December 10, 2020 and In my view providing exit offers to its investors can be considered as a mitigating factor while deciding upon the quantum of penalty in this case. Similarly, the fact that the impugned NCRPS issuance belongs to period of FY 2008- 2009 and much time has elapsed since then is also a mitigating factor in this case.

ORDER

55. Having considered all the facts and circumstances of the case, the material available on record, the submissions made by Noticee and also the factors mentioned in Section 15J of the SEBI Act, as enumerated above, I, in exercise of the powers conferred upon me under Section 15-I of the SEBI Act read with Rule 5 of the Adjudication Rules, hereby impose a penalty of Rs. 5,00,000/-(Rupees Five Lakh only) on Noticee i.e. Vitthal Corporation, under the provisions of Section 15HB of SEBI Act. I am of the view that the said penalty is commensurate with the lapse/omission on the part of Noticee.

56. Noticee shall remit / pay the said amount of penalty within 45 days of receipt of this order through online payment facility available on the website of SEBI, i.e., www.sebi.gov.in on the following path, by clicking on the payment link: ENFORCEMENT -> Orders -> Orders of AO -> PAY NOW. In case of any difficulties in payment of penalties, Noticee may contact the support at portalhelp@sebi.gov.in.

57. The said confirmation of e-payment made in the format as given in table below should be sent to "The Division Chief, EFD – DRA - IV, Securities and Exchange Board of India, SEBI Bhavan, Plot no. C- 7, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051” and also to e-mail id:- tad@sebi.gov.in

1. Case Name:	
2. Name of payee:	
3. Date of payment:	

4. Amount paid:	
5. Transaction no.:	
6. Bank details in which payment is made:	
7. Payment is made for: (like penalties/ disgorgement/ recovery/ settlement amount and legal charges along with order details)	

58. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this Order, recovery proceedings may be initiated under section 28A of the SEBI Act for realization of the said amount of penalty along with interest thereon, *inter alia*, by attachment and sale of movable and immovable properties of Noticee.

59. In terms of the provisions of Rule 6 of the Adjudication Rules, a copy of this order is being sent to Noticee and also to SEBI.

Place: Mumbai
Date: November 30, 2022

SOMA MAJUMDER
ADJUDICATING OFFICER