

WTM/AB/IVD/ID5/8189/2020-21

**SECURITIES AND EXCHANGE BOARD OF INDIA
FINAL ORDER**

UNDER SECTIONS 11 AND 11B OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 AND REGULATION 44 OF SECURITIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVER) REGULATIONS, 1997 READWITH REGULATION 32 OF SECURITIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVER) REGULATIONS, 2011.

In respect of:

Noticee no.	Noticee Name	PAN
1.	Mr. Rajiv R. Kotia	AEJPK0347C
2.	Mrs. Shilpa Amit Kotia	AHEPK2567R
3.	Mrs. Shweta Dhaval Kotia	AHEPK2566Q
4.	Mr. Dhaval Ramesh Kotia	ADUPK0459Q
5.	Mr. Ravi Rajiv Kotia	AUEPK3142K

(The aforesaid entities are hereinafter referred to by their respective names / Noticee numbers and collectively as “the Noticees”)

In the matter of Sungold Capital Limited

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1. Present proceedings have been initiated against the Noticees, vide a show cause notice dated September 12, 2019 (hereinafter referred to as “**the SCN**”) issued by Securities and Exchange Board of India (hereinafter referred to as “**SEBI**”), to the Noticees, under Sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as “**SEBI Act, 1992**”) and Regulation 44 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as “**SAST Regulations, 1997**”) and Regulation 32 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as “**SAST Regulations, 2011**”), for violation of Regulations 10 and 11(1) of the SAST Regulations, 1997.

2. Facts stated in the SCN and the allegations made therein are narrated in brief, as hereunder:

- a. Earlier, SEBI had issued a show cause notice dated September 30, 2015 in this matter to six entities including the Noticees in the present matter. Based on the replies received from the entities for the allegation of failure to make an open offer, in the aforesaid show cause notice dated September 30, 2015, the matter was re-investigated by SEBI to ascertain the violations if any of the provisions of SAST Regulations 1997, pursuant to which the present SCN was issued to the Noticees herein, in supersession of the SCN dated September 30, 2015.
- b. The shareholding of Noticee no. 1 (one of the promoter) in Sungold Capital Limited (hereinafter referred to as “**the Target Company**”), increased from 11.96 % to 15.23 % (an increase of 3.27%) on acquisition of 2,00,100 shares during the quarter ended June 2007 and further increased from 15.23% to 16.53% during the quarter ended September 2007. The Target Company/ promoter vide email dated December 18, 2018 informed that the 2,80,300 shares of the Target Company, were transferred to Noticee no. 1 from the other promoters of the Target Company on the following dates:
 - i. 2,00,100 shares of the company on 01.04.2007
 - ii. 80,200 shares of the company on 01.07.2007
- c. In view of the above reply and based on the quarterly shareholding pattern available on BSE, it was observed that the Noticee no. 1 bought 2,00,100 shares on April 01, 2007 from two other promoters Janak S Kotia and Sanjay I Shah. It was also observed that Noticee no. 1 had bought 80,200 shares on July 01, 2007 from two other promoters of the Target Company i.e. Sharad M Gandhi and Devyani Kotia.
- d. It was alleged that Noticee no. 1 bought the shares from other promoters without submitting any report to SEBI as stipulated under Regulation 3(4) of SAST Regulations, 1997 in respect of the acquisition made by him on April 01, 2007. It is also alleged that Noticee no. 1 did not make any disclosure

under Regulation 7 of SAST Regulations, 1997 in respect of the acquisition made by him on April 01, 2007. BSE vide email dated January 07, 2019 and January 10, 2019, informed that during the period January 1, 2007 to April 30, 2008, it had only received disclosure under Regulation 8(3) of SAST Regulations, 1997 dated April 19, 2007.

- e. BSE vide email dated January 03, 2019, informed that no notice of open offer under SAST Regulations 1997, was received in the scrip of the Target Company for the period April 01, 2007 to March 31, 2008.
- f. In view of the above, it is alleged in the SCN that Noticee no. 1, by his failure to make a public announcement upon acquisition of 3.27% shares of the Target Company on April 01, 2007, which entitled Noticee no. 1 to exercise voting rights of more than 15% in the Target Company, has violated the provisions of Regulation 10 of SAST Regulations, 1997 read with Regulation 35(2) of SAST Regulations, 2011. It is further alleged that Noticee no.1 violated Regulations 3(4) and 7 of SAST Regulations, 1997, respectively, by not submitting report to SEBI and failing to make disclosure in respect of the acquisition made by him on April 01, 2007.
- g. Noticee no. 1 is the Promoter and Managing Director of the Target Company and vide letter dated July 20, 2016, he, *inter alia*, intimated to SEBI that Noticee no. 2, 3, 4 and 5, are related to him. As informed in the said letter, the relationship of the Noticees herein is as under:

Table 1

Noticee No	Entity	Relationship
1	Rajiv R Kotia (Promoter and Managing Director)	Husband of Seema R Kotia and father of Ravi Rajiv Kotia
2	Shilpa Amit Kotia	Wife of Amit Ramesh Kotia and Sister-in-law of Rajiv R Kotia.
3	Shweta Dhaval Kotia	Wife of Dhaval Ramesh Kotia and Sister-in-law of Rajiv R Kotia.
4	Dhaval Ramesh Kotia	Brother of Rajiv R Kotia
5	Ravi Rajiv Kotia	Son of Rajiv R Kotia

- h. It is alleged that, in terms of Regulation 2(1)(e)(2)(iii) of SAST Regulations, 1997 read with Section 6 of the Companies Act, 1956 the abovementioned entities are deemed to be Persons Acting in Concert. It was observed from

the demat statement of the deemed PACs that except for the Noticee no. 1, none of the other PACs held any shares of the Target Company during the period April 01 2007 to September 30, 2007.

- i. Upon analysis of the demat statement of the Noticees and based on the submission by the Target Company and RTA, it was observed that on September 14, 2007, the shares of the Target Company were purchased by Noticee no. 2 (2,90,000 shares/4.74% of total shares), Noticee no. 3 (2,69,400 shares/ 4.40% of total shares), Noticee no. 4 (2,80,000 shares/ 4.60 % of total shares) and Noticee no. 5 (5,29,400 shares/ 8.65% of the total shares) in physical form. It was further observed that Noticee no. 2, 3 and 4 dematerialized their shares on March 26, 2008 and Noticee no. 5 dematerialized his shares on April 24, 2008. The earlier investigation in the matter of the Target Company had considered the date of dematerialization as the date of purchase for the abovementioned entities.
- j. It is observed that prior to the acquisition of shares on September 14, 2007, the Noticee no. 1 was already holding more than 15% shares of the Target Company. It is, therefore, alleged that the collective acquisition of 22.39% shareholding of the Target Company by Noticee no. 2 to 5 on September 14, 2007, resulted into more than 5% acquisition of the voting rights of the Target Company in a financial year and thereby breached the threshold limit as stipulated in Regulation 11(1) of the SAST Regulations 1997 and triggered the requirement for open offer. BSE vide email dated January 03, 2019, informed that no notice of open offer under SAST Regulations, 1997, was received in the scrip of the Target Company for the period April 01, 2007 to March 31, 2008. The SCN, thus, alleges that the Noticees have violated the provisions of Regulation 11(1) of SAST Regulations, 1997 read with Regulation 35(2) of SAST Regulations, 2011.
- k. In view of the allegations in the SCN, the Noticees were called upon to show cause as to why appropriate directions, under Sections 11(4) and 11B read with Section 11(1) of SEBI Act, 1992 and Regulation 32(1) of SAST Regulations, 2011, should not be issued against them.

Personal hearing, replies and written submissions:

3. On the basis of the request received from the Noticees, an opportunity of inspection of documents was granted to the authorised representatives of all the Noticees on January 20, 2020. Noticee no. 1 has raised an objection that he has not been provided with the inspection of the Investigation Report on the basis of which the earlier show cause notice dated September 30, 2015 was issued and also that he has not been provided with inspection of the Investigation Report on the basis of which the present SCN has been issued. Noticee no. 2 to 5 have raised the objection that they have not been provided with the copy of the order passed by the Whole Time Member, SEBI in relation to the earlier show cause notice dated September 30, 2015 issued in this matter and also that they have not been provided with inspection of the Investigation Report on the basis of which the present SCN was issued.
4. The personal hearing was held for Noticee nos. 1 to 5 on February 20, 2020. At the personal hearing, Noticee no. 1 was personally present alongwith his authorised representative Mrs. Menka Jha and Noticee no. 2 to 5 were represented through their authorised representative Mr. Amit Kotia. The Noticees tendered their replies at the hearing and they were given further time to file their additional reply/written submission on the conclusion of the hearing.
5. The key contentions raised by Noticee no. 1 vide its reply dated February 20, 2020 and additional reply dated March 03, 2020, are as follows:
 - a. The shareholding of the promoter, Mr. Rajiv Kotia - Noticee No. 1 (acquirer) increased from 11.96% to 15.22% in FY 2007-08. As on March 31, 2007, the promoter and promoter group of the Target Company was holding 17.94% shares of its total share capital. One of the promoters of the Target Company i.e. Mr. Rajiv Kotia acquired 2,00,100 equity shares and 80,200 equity shares constituting 3.27% of the share capital of the Target Company through transfer from two other promoters Janka S Kotia and Sanjay I Shah on April 01, 2007 and from two other promoters Sharad M Gandhi and Devyani Kotia on July 01, 2007.

- b. Prior to the acquisition of the Target Company's shares, the acquirer was one of the promoters of the Target Company who along with other promoters of the Target Company, collectively, held 17.94% shares of the Target Company and that the promoters, prior to the acquisition of the Target Company's shares, were already in control of the management of the Target Company. As a result of the aforesaid acquisition by the acquirer (who was an existing promoter of the target company on the date of acquisition), the collective shareholding of the promoter group of the target company increased from 17.94% to 19.25% (i.e. an increase of 1.31%) which was within the permissible limit of 5% which could be acquired by the promoter group as a whole by virtue of regulation 11(1) of the Takeover Regulations, 1997.
- c. Then existing regulation that allowed creeping acquisition of 5% a year for promoters with ownership stakes of between 15% and 55% was changed such that promoters with stakes of between 15% and 55% were allowed to acquire up to 5% of their firms' stake in a year.
- d. Regulation 10 of the SAST Regulations, 1997, applies only when the essential ingredient i.e. the acquirer together with other promoter and promoter group of the Target Company does not hold 15% shares and has acquired and breached the Triggered limit of 15% in a financial year.
- e. In instant case the Acquirer and other Promoter and Promoter group of the Target Company are already in control of the management of the Target Company and because of that Regulation 10 is not applicable.
- f. Noticee no. 1 submitted that he is related to Noticee no. 2, 3, 4 and 5 in terms of Regulation 2(1)(e)(2)(iii) of SAST Regulations, 1997, read with Section 6 of the Companies Act, 1956 and are coming under deemed PACs. However, they are not having any relationships amongst them and affidavit dated November 22, 2018 (filed by Noticee No. 1, before Honb'le Securities Appellate Tribunal in the matter of Sungold Capital Limited in Appeal No. 250 of 2017 against

Adjudication Order No. EAD-5/SVKM/AO/49-57/2017-18 dated June 30, 2017) confirms their separation from each other and is self-explanatory.

- g. The relationship between him and his wife Seema is strained and hence, his son – Noticee no. 5 is living separately with his wife Seema since last 20 years. No judicial separation proceedings have been taken out as it would result into drastic reputational damage in the community. Due to asymmetric relationship between me and my wife, my relations with other family members were ruined and I was isolated from my parents and other family members.
 - h. The Target Company came with the IPO in year 1995 and the name of the Noticee no. 2, 3, 4 and 5, are not mentioned as promoters in the Prospectus.
 - i. Noticee no. 2, 3, 4 and 5 had separate source of income and not dependent on Noticee no. 1 for their source of living. They have different Electricity Meter connection and different Kitchen from other Family Members. All of them are financially independent and is not in terms to help each other.
6. Noticee no. 2, 3, 4 and 5, vide their replies dated February 20, 2020 and additional replies dated March 6, 2020, have raised similar contentions, hence, they are being herewith dealt collectively. The summary of the contentions raised by Noticee no. 2, 3, 4 and 5 is as follows:
- a. The provision of Regulation 11(1) were not attracted in case of Noticee no. 2 to 5 as they did not hold any shares of the Target Company prior to September 14, 2007 and therefore, their purchases of 2,90,000 shares (4.74% of the equity capital), 2,69,400 shares (4.40% of the equity capital), 2,81,371 shares (4.60% of the equity capital), and 5,29,400 shares (8.65% of the equity capital) by the Noticee No. 2 to 5 respectively, was not an acquisition of ‘additional shares’ as contemplated by the said regulation. It was the first and the only purchase by Noticee no. 2 to 5 in the scrip of Target Company’s equity shares.
 - b. Noticee no. 2 to 5 were not acting in concert with others for the aforesaid acquisitions as they have not entered any agreement and made formal or informal agreement with others for change in control of the management of the

Target Company or consolidation of their shareholding in the Target Company as the Noticee no. 2 to 5 were never shown as Promoters and they were not the direct family member of Noticee No. 2 and he being the Director and one of the Promoters of the Target Company never shown other Noticees as the Promoters of the Target Company since the day of incorporation of the Target Company and the day it got listed. Merely because of the relations with Director and Promoter of the Target Company does not indicate that they are acting in concert with each other for the said acquisition triggering the threshold limit of the SAST Regulations, 1997.

- c. The purchase of the Target Company's shares by Noticee no. 2 to 5 has neither caused any change in the board structure of the Target Company, nor has such purchase of the Target Company's shares by them resulted in any change in the control of the Target Company in any manner whatsoever.
- d. The additional shares should be acquired by the acquirer himself or through or with the persons with whom they had acquired shares either in concert with each other. It cannot be assumed that the acquisitions of Equity Shares by the Noticee no. 2 to 5 was in concert with Noticee No. 1. It is not on record that said Noticees had acquired any shares of the Target Company prior to 2007.
- e. The date of acquisition is not confirmed from the record of the Target Company or the RTA and based on assumption of September 14, 2007, the Noticee no. 2 to 5 have been wrongly alleged to have failed to make an open offer under Regulation 11(1) of SAST Regulations, 1997.
- f. The Noticee no. 2 to 5 have all contended that they have their separate source of income and they are not dependent on any family member for their source of living. They have different Electricity meter and different Kitchen.
- g. They are not socially and financially connected with Noticee no. 1 since long time because he left family and boycotted them.
- h. The provisions of Regulation 11(1) have been considered and explained by the Hon'ble Supreme Court in the case of *Swedish Match AB v. SEBI* [2004] 54S

CL 549 and to be taken on consideration for this matter.

- i. In the case of Phiroze Sethna (P) Ltd vs Adjudicating Officer 2008 83 SCL 330 SAT has also clarified as to when a person can be said to be acting as person acting in concert. The relevant observations can be taken for consideration in our case.
- j. The Bombay High Court in the case of K.K. Modi vs. SAT (2002) 35 SCL 230, 247 has also clarified as to when a person can be said to be acting as person acting in concert.

Consideration of submissions and findings:

- 7. Before dealing with the issues involved in the matter, it would be appropriate to refer to the relevant provisions of law involved in the matter, the relevant extract of which is reproduced hereunder:

Relevant extract of provisions of SAST Regulations, 1997:

“Definition:

2. (1) In these regulations, unless the context otherwise requires--

(a).....

(b) ‘acquirer’ means any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer;

(c).....

(e) ‘person acting in concert’ means, —

(1) persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company

(2) Without prejudice to the generality of this definition, the following persons will be deemed to be persons acting in concert with other persons in the same category, unless the contrary is established:

.....

(iii) directors of companies referred to in sub-clause (i) of clause (2) and their associates;

.....

Note : For the purposes of this clause — ‘associate’ means,—

- (a) any relative of that person within the meaning of section 6 of the Companies Act, 1956 (1 of 1956); and
 - (b) family trusts and Hindu undivided families;
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Applicability of the regulation.

3. (1) Nothing contained in regulations 10, 11 and 12 of these regulations shall apply to:

.....

(e) inter se transfer of shares amongst—

.....

(ii) relatives within the meaning of section 6 of the Companies Act, 1956 (1 of 1956);

(iii) (a) [Qualifying Indian promoters] and foreign collaborators who are shareholders;

(b) [qualifying promoters]:

[Provided that the transferor(s) as well as the transferee(s) have been holding shares in the target company for a period of at least three years prior to the proposed acquisition.]

[Explanation.— For the purpose of the exemption under sub-clause (iii) the term [—qualifying promoter] means—

(i) any person who is directly or indirectly in control of the company; or

(ii) any person named as promoter in any document for offer of securities to the public or existing shareholders or in the shareholding pattern disclosed by the company under the provisions of the Listing Agreement, whichever is later; and includes,

(a) where the [qualifying promoter] is an individual,—

(1) a relative of the [qualifying promoter] within the meaning of section 6 of the Companies Act, 1956 (1 of 1956);

.....

[Explanation.—

(1).....

(2) The benefit of availing exemption under this clause, from applicability of the regulations for increasing shareholding or inter se transfer of shareholding shall be subject to such transferor(s) and transferee(s) having complied with regulation 6, regulation 7 and regulation 8;

.....

(4) In respect of acquisitions under clauses (a), (b), (e) and (i) of sub-regulation (1), the acquirer shall, within 21 days of the date of acquisition, submit a report along with supporting documents to the Board giving all details in respect of acquisitions which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him) would entitle such person to exercise 15 per cent or more of the voting rights in a company.

Acquisition of 5 per cent and more shares or voting rights of a company.

7 (1) Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent or ten per cent or fourteen per cent [or fifty four per cent or seventy four per cent] shares or voting rights in a company, in any manner whatsoever, shall disclose at every stage the aggregate of his shareholding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed.]

(1A) Any acquirer who has acquired shares or voting rights of a company under sub-regulation (1) of regulation 11, or under second proviso to sub-regulation (2) of regulation 11 shall disclose purchase or sale aggregating two per cent or more of the share capital of the target company to the target company, and the stock exchanges where shares of the target company are listed within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale.

.....

Acquisition of fifteen per cent or more of the shares or voting rights of any company.

10. No acquirer shall 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), entitle such acquirer to exercise fifteen per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the regulations.

Consolidation of holdings.

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

Relevant extract of provisions of SAST Regulations, 2011:

Repeal and Savings.

35.(1) The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, stand repealed from the date on which these regulations come into force.

(2) Notwithstanding such repeal,—

(a) anything done or any action taken or purported to have been done or taken including comments on any letter of offer, exemption granted by the Board, fees collected, any adjudication, enquiry or investigation commenced or show-cause notice issued under the repealed regulations, prior to such repeal, shall be deemed to have been done or taken under the corresponding provisions of these regulations;

(b) the previous operation of the repealed regulations or anything duly done or suffered thereunder, any right, privilege, obligation or liability acquired, accrued or incurred under the repealed regulations, any penalty, forfeiture or punishment incurred in respect of any offence committed against the repealed regulations, or any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, shall remain unaffected as if the repealed regulations has never been repealed;

(c) any open offer for which a public announcement has been made under the repealed regulations shall be required to be continued and completed under the repealed regulations

8. The SCN alleges that on April 01, 2007 (**'first trigger'**), Noticee no. 1 acquired 3.27 % shares of the Target Company, because of which the shareholding of the acquirers in the first trigger, increased from 11.96 % to 15.23 %. As per Regulation 10 of SAST Regulations, 1997, no acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him or by persons acting in concert with him in such target company, entitle the acquirer to exercise fifteen per cent or more of the voting rights in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company. Thus, the SCN alleges that the acquirers in first trigger, by acquiring more than 15% shares (i.e. additional 3.27% voting rights) on April 1, 2007 taking the shareholding of acquirer i.e. Noticee no. 1 from 11.96 % to 15.23 %, without making public announcement for an open offer and without making disclosures as per Regulation 7 of SAST Regulations, 1997, has violated Regulation 10 of SAST Regulations, 1997.
9. SCN further alleges that during the Financial Year 2007-08, Noticee no. 2 acquired 4.74% shares of the Target Company, Noticee no. 3 acquired 4.40% shares of the

Target Company, Noticee no. 4 acquired 4.60% shares of the Target Company, Noticee no. 5 acquired 8.65% shares of the Target Company, on September 14, 2007. Thus SCN alleges that because of these acquisitions, on September 14, 2007 ("**second trigger**") by the acquirers in the second trigger i.e. Noticee no. 2, 3, 4 and 5, the shareholding of the acquirers in second trigger alongwith shareholding of the persons acting in concert in the second trigger i.e. Noticee no.1, increased from 16.53% to 38.92%. As per Regulation 11(1) of SAST Regulations,1997, no acquirer who together with person acting in concert with him was holding 15% or more but less than 55% shares or voting rights in a company, could acquire in any financial year 5% or more shares or voting rights in such company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company. Thus, the SCN alleges that the acquirers in second trigger (i.e. Noticee no. 2 to 5) alongwith person acting in concert (i.e. Noticee no. 1) in second trigger, by acquiring more than 5% shares (i.e. 22.39% shares) in a financial year on September 14, 2007, without making public announcement for an open offer, have violated Regulation 11(1) of SAST Regulations, 1997.

10. Be it noted that none of the Noticees have disputed the quantum of acquisition of shares made by them in the Target Company. Be it further noted that none of the Noticees have disputed percentage of their respective shareholding in the Target Company or the percentage of pre or post acquisition shareholding of other Noticees in the Target Company.

11. At the outset, it is important to consider the preliminary objections raised by the Noticees to these proceedings. The Noticees have raised the contention that failure to provide with the inspection of Investigation Report that was the basis for the issuance of SCN had resulted in non-compliance of principles of natural justice. I note that the SCN contained the relevant findings of the investigation report qua each Noticees alongwith the following documents as annexures:

Annexure	Particular of Document
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1	Copy of Show Cause Notice dated September 30, 2015 earlier issued to six entities including Noticee no. 1 to 5.
2	Copy of letter dated July 20, 2016 from Noticee no. 1 wherein he has replied to the Investigating Authority at SEBI during investigation of this matter and <i>inter alia</i> admitted his relationship with other Noticees.
3	Copy of email dated December 18, 2018 from the Target Company, wherein the Target Company has provided the details of the shares purchased by Noticee no. 1.
4	Copy of email dated January 7, 2019 from BSE showing that only disclosure under Regulation 8(3) of SAST Regulations, 1997 were received by BSE in the scrip of the Target Company for the period from January 1, 2007 to April 30, 2008. Copy of email dated January 10, 2019 from BSE, denying the receipt of any letter from the Target Company along with its disclosure under Regulation 8(3) of SAST Regulations, 1997.
5	Copy of the email dated January 3, 2019 from BSE showing that BSE had not received any notice of open offer in the scrip of the Target Company during the FY 2007-08.
6	Copy of demat statements of all the Noticees, showing that except Noticee no. 1, none of the other Noticees held any shares in the Target Company during the period April 1, 2007 to September 30, 2007.
7	Copy of letter dated December 10, 2018 from the Target Company wherein the Target Company <i>inter alia</i> provides the date of acquisition of shares by Noticee no. 2 to 5 in physical form. Copy of email dated August 27, 2018 from R&TA providing the details of acquisition of shares by Noticee no. 2 to 5 in the Target Company in physical form and subsequent dematerialization of the acquired shares in March 2008.

I note that the SCN was issued alongwith the annexure of all the documents that were relied upon by SEBI in the SCN and also contained the relevant findings of the investigation report qua each Noticee. I find that all the relevant facts and material such as acquisition by the Noticees on different dates attracting provisions

of SAST Regulations, the details of acquisition of shares by Noticees in physical form and the demat statements showing subsequent dematerialization of the said shares acquired by Noticee no. 2 to 5, enabling Noticees to defend their case have been furnished to the Noticees. I find that Noticees have also filed their detailed replies to the SCN. Therefore, I find that the requirements of principles of natural justice have been complied in the present matter and the request for inspection of Investigation Report, by the Noticees, is untenable. Noticee no. 2 to 5 have raised another request for copy of the order passed by the Whole Time Member, SEBI in respect of the earlier show cause notice dated September 30, 2015 that was issued in this matter. I note that no order came to be passed pursuant to the earlier show cause notice dated September 30, 2015, because subsequent to the replies received from the entities in respect of the said show cause notice, it was found that as in the said show cause notice the date of dematerialization of shares was considered as date of acquisition, therefore, the matter was ordered to be re-investigated and thereafter, present SCN has been issued in supersession of the SCN dated September 30, 2015. Since, the then WTM who had ordered re-investigation demitted the office due to end of his tenure, therefore, present SCN has been placed before undersigned for passing *quasi-judicial* order in the matter. In view of the above, I do not find any merit in the objections raised by the Noticees with respect to the 'Inspection of Documents'.

12. Regarding the acquisition on the first trigger date, Noticee no. 1 has contended that Regulation 10 of SAST Regulations, 1997 is not applicable in the instant case as the acquirer alongwith promoter group was already holding 17.94% equity shares in the Target Company. According to Noticee no. 1, if at all any regulation is attracted then it may be the creeping acquisition under Regulation 11(1) of SAST Regulations, 1997, if the acquisition exceeds 5% in a financial year, which is not so in the instant case. I note that from the language of Regulation 10 of SAST Regulations, 1997, as quoted above, it is amply clear that Regulation 10 is attracted when the acquisition of 15% or more shares is made by the acquirer either individually or alongwith the persons acting in concert. Thus, the contention of the Noticee no. 1 to the effect that since the promoter group was already holding more than 15% and hence, his crossing of 15% threshold, individually, does not attract Regulation 10 of the SAST Regulations, 1997, is contrary to the plain language of

Regulation 10, as the Regulation 10 is attracted upon acquisition of 15% or more shares by an individual or by a group as acquirer. In the extant case, Noticee no. 1 was holding 11.96% shares in the Target Company and had acquired 3.27% share capital of the Target Company individually on April 1, 2007, thereby increasing his individual shareholding in the Target Company from 11.96 % to 15.23%, thereby crossing threshold limit of 15% without making any offer as required under Regulation 10 of SAST Regulations, 1997. The acquisition by Noticee no. 1 would have also attracted Regulation 11(1) of the SAST Regulations, 1997, had it resulted into 5% or more increase in the shareholding of the promoter group in a financial year. Thus, I find that acquisition of 3.27% shares of the Target Company by Noticee no. 1 which took his individual shareholding in the Target Company from 11.96% to 15.23%, attracted regulation 10 of the SAST Regulations, 1997 and the contention raised above by the Noticee no. 1 is not tenable.

13. Another contention raised by the Noticee no.1 regarding the acquisition of 3.27% shares of the Target Company which resulted into first trigger is that in the instant case the acquirer and other promoter and promoter group of the Target Company are already in control of the management of the Target Company and therefore, Regulation 10 of the SAST Regulations, 1997 is not applicable. In this regard, I note that Regulation 10 is attracted on acquisition of either shares or voting right by an acquirer which entitles him to exercise 15% or more voting rights in a target company. Obligation under Regulation 10 is irrespective of any change in control of the target company and arises on acquisition of substantial shares or voting rights i.e. 15% or more, in a target company. However, if there is any change in control of a target company because of the acquisition of either shares or voting right or even without acquisition of any shares or voting rights, then provisions of Regulation 12 of the SAST Regulations, 1997 also become applicable. Therefore, the contention of Noticee no. 1 that Regulation 10 was not attracted because of his acquisition of 3.27% shares of the Target Company as there was no change in control, is misplaced and hence, not tenable.

14. In view of the above, I find that acquisition of 3.27% shares of the Target Company on the first trigger date which increased the individual shareholding of Noticee no.

1 from 11.96% to 15.23%, attracted regulation 10 of the SAST Regulations, 1997, upon crossing of threshold of 15%, for which Noticee no. 1 was required to make a public announcement of the open offer, which Noticee no. 1 failed to make and therefore has resulted in violation of Regulation 10 of the SAST Regulations, 1997.

15. SCN further alleges that Noticee no. 1 bought the shares from other promoters without submitting any report to SEBI as stipulated under Regulation 3(4) of SAST Regulations, 1997 in respect of the acquisition made by him on April 01, 2007 which resulted into first trigger. Thus, SCN alleges that Noticee no. 1 has violated Regulation 3(4) of the SAST Regulations, 1997. In this regard, I note that Regulation 3(1) of the SAST Regulations, 1997 provides that nothing contained in regulation 10, 11 and 12 shall apply to certain acquisitions enumerated thereunder. Thus, Regulation 3 which deals with "Applicability of the regulation" provides for exemption for certain acquisitions enumerated thereunder from applicability of Regulation 10, 11 and 12 of the SAST Regulations, 1997. One of the acquisition enumerated in Regulation 3(1)(e)(iii)(b) is *inter se* transfer of shares amongst qualifying promoters. However, such exemption to the acquisitions including acquisition mentioned under Regulation 3(1)(e)(iii)(b), from applicability of Regulations 10, 11 and 12, is subject to compliance with certain conditions provided in Regulation 3, itself. One of the conditions, for availing exemption under Regulation 3(1)(e)(iii)(b), as specified in Regulation 3(4) is that the acquirer shall, within 21 days of the date of acquisition, submit a report along with supporting documents to SEBI giving all details in respect of acquisitions which taken together with shares or voting rights, if any, to the held by him or by persons acting in concert with him would entitle such person to exercise 15% or more of the voting rights in a company. The scheme of Regulation 3 indicates that compliance with the conditions enumerated in the said regulation is must for availing exemptions provided thereunder. Meaning thereby, if the condition is not satisfied, the exemption shall not be available. Thus non-compliance with condition disentitles an acquirer from availing exemption. Noticee no. 1 has not disputed the allegation that no report, as required under Regulation 3(4), was filed with SEBI by him within stipulated time or at all, for his acquisition which resulted in first trigger. I find that non-compliance with the condition of filing of report as required under Regulation

3(4) disentitles Noticee no. 1 from availing exemption under Regulation 3(1)(e)(iii)(b).

16. I note that the SCN alleges that Noticee no. 1 did not make any disclosure under Regulation 7 of SAST Regulations 1997 in respect of the acquisition made by him on April 01, 2007 and thus Noticee no. 1 has violated Regulation 7 of the SAST Regulations, 1997. In this regard, I note that Regulation 7 of SAST Regulations, 1997, requires an acquirer, who acquires shares or voting rights which would inter alia entitle him to exercise more than fourteen per cent voting rights in a company, in any manner whatsoever, shall disclose the aggregate of his shareholding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed. In the instant case, Noticee no. 1 had acquired 2,00,100 shares of the Target Company on April 01, 2007 which increased his shareholding in the Target Company from 11.96% to 15.23% i.e. more than 14%, for which Noticee no. 1 was required to make a disclosure under Regulation 7(1) of the SAST Regulations, 1997. BSE vide email dated January 07, 2019 & January 10, 2019 (annexed as Annexure 4 to SCN), confirmed that during the period January 1, 2007 to April 30, 2008, it had only received disclosure under regulation 8(3) of SAST Regulations, 1997 dated April 19, 2007, in the scrip of the Target Company. I also note that Noticee No. 1 has neither refuted the allegation that he failed to make the necessary disclosures required under Regulation 7 of SAST Regulations, 1997, nor disputed the contents of Annexure 4 to SCN. Thus, I find that Noticee no. 1 has failed to make the disclosure required to be made under Regulation 7 of the SAST Regulation, 1997 and has thus violated Regulation 7.

17. Regarding second trigger, Noticee no. 2 to 5 have contended that they were not persons acting in concert with Noticee no. 1, as they did not share any common objective or purpose of acquiring shares voting right or control over the Target Company which is an essential requirement as held by the Hon'ble Supreme Court in Daiichi Case (supra) and by the Hon'ble Bombay High Court in K. K. Modi Case (supra). In this regard, I note that SCN has alleged that Noticees are deemed 'persons acting in concert' in terms of Regulation 2(1)(e)(2)(iii) of SAST Regulations, 1997 read with Section 6 of the Companies Act, 1956. I note that

Regulation 2(1)(e)(2)(iii) *inter alia* provides that the directors of a company and their associates will be deemed to be persons acting in concert with other persons in the same category. Admittedly, Noticee no. 1 is the managing director of the company and in terms of Regulation 2(1)(e)(2)(iii), his associate would be deemed as person acting in concert. In terms of 'Note' appended to Regulation 2(1)(e)(2), term 'associate' means any relative of the person, as defined in Section 6 of the Companies Act, 1956. Noticee no. 1, in its letter dated July 20, 2016 (Annexure 2 to the SCN), has acknowledged his relationship with Noticee no. 2 to 5, as under:

S. No.	Noticee Number	Relationship
1.	Noticee no. 2	Wife of Amit Ramesh Kotia and Sister-in-law of Noticee no. 1.
2.	Noticee no. 3	Wife of Noticee no. 4 and Sister-in-law of Noticee no. 1.
3.	Noticee no. 4	Brother of Noticee no. 1.
4.	Noticee no. 5	Son of Noticee no. 1

18. All these relations acknowledged by Noticee no. 1 with Noticee no. 2 to 5, fall within the meaning of Section 6 readwith Schedule IA of Companies Act, 1956. Therefore, I note that Noticee no. 2 to 5 are associate of Noticee no. 1 in terms of Regulation 2(1)(e)(2)(iii) and consequently, are deemed persons acting in concert. I note that in Daiichi case (supra) and K.K. Modi case (supra), it has been held that even for deemed persons acting in concert, there is requirement of shared common objective or purpose amongst the persons, for terming them as persons acting in concert. However, as the 'deemed acting in concert', as given under Regulation 2(1)(e)(2) is a rebuttable presumption operating against the Noticees who are alleged to be deemed persons acting in concert, the burden of proving that there did not exist any shared common objective or purpose of acquiring shares or voting rights or control, in/over the Target Company, is on the Noticees. To rebut the said presumption, Noticee no. 2 to 5 have contended that they were financially independent from each other and were living separately from each other. These Noticees have also contended that there was a family discord between them and Noticee no. 1. Therefore, they did not share any common objective or purpose of acquiring shares or voting right or control over the Target Company, with Noticee no. 1. I note that apart from making such bald submissions, Noticee no. 2 to 5 have not submitted any proof in respect of their claims. They have not provided any proof

of financial independence, as claimed by them. I note that Noticee no. 2 and 3 are the Sister-in-laws, Noticee no. 4 is brother and Noticee no. 5 is son, of the Noticee no. 1. I note that except for Noticee no. 5, the residence address of all the other Noticees is also the same. Some of the said Noticees have submitted proof of independent electricity connection, but I note that separate electricity connections are permitted to be installed even for relatives residing in the same house on different floors. I further note that the common intention or objective of acquiring shares or voting rights can also be inferred from the timing of acquisition of shares in the Target Company. In the instant case, Noticee no. 2 to 5, collectively acquired 22.39% shares in the Target Company on the same day i.e. September 14, 2007. Although, Noticee no. 2 to 5 have disputed this date of acquisition, however, the said Noticees have not provided any alternate date of acquisition with supporting documents. I note that if SCN provides September 14, 2007 as the date of acquisition by the Noticee no. 2 to 5 which is being contested by them, then it is incumbent upon these Noticees to provide their actual date of acquisition with supporting documents such as transfer deed/payment particulars, etc. For the sake of argument, even if it is assumed that date of acquisition, as alleged in the SCN is incorrect, then the fact of acquisition being the fact which is specially within the knowledge of the Noticee no. 2 to 5, as they acquired the shares, must be proved by these Noticees. However, instead of proving so, Noticees have sought refuge in the contention that since their acquisition happened 12 years ago, therefore, such an old record is not available with company and therefore, they are unable to produce the same. In this regard, I note that in terms of Section 150 of the Companies Act, 1956 and Section 88 of the Companies Act, 2013, *inter alia* register of members of a company is permanent record which is required to be maintained by every company on continuous basis. Therefore, the inability pleaded by the Noticee no. 2 to 5 to provide the date of acquisition in the absence of records with the Target Company as the matter being 12 years old, is untenable. Moreover, the fact of acquisition, has itself not been disputed by Noticee no. 2 to 5. to the aforesaid facts give rise to reasonable inference that Noticee no. 2 to 5 acquired shares of the Target Company on September 14, 2007 while acting in concert with Noticee no. 1. In view of the above, I find that the contentions raised by Noticee no. 2 to 5 to the effect that they did not share any common objective or purpose

with Noticee no. 1, are not tenable and the allegation made in this regard in the SCN is sustained.

19. Another contention raised by Noticee no. 2 to 5 regarding second trigger is that the provision of Regulation 11(1) of SAST Regulations, 1997, were not attracted in their case as they did not hold any shares of the Target Company prior to September 14, 2007 and therefore, their purchase of shares on September 14, 2007, was not an acquisition of 'additional shares' as contemplated by the said regulation. In support of their contention, Noticee no. 2 to 5 have relied upon the judgment of Hon'ble Supreme Court in *Swedish Match AB Vs. SEBI* (2004) 54 SCL 549 and order dated November 15, 2007 passed by Hon'ble SAT in Appeal No. 64 of 2006 – *Phiroze Sethna Private Ltd. & Ors. Vs. AO, SEBI*. I do not agree with the interpretation given by Noticee no. 2 to 5, to the provision of Regulation 11(1) of the SAST Regulations, 1997. The language of Regulation 11(1) is amply clear that the acquisition of shares or voting rights has to be reckoned after considering acquisitions by the acquirer and the persons acting in concert with him. In the extant case, Noticee no. 1 was already holding 16.53% shares in the Target Company prior to the second trigger date. As discussed in the preceding para, Noticee no. 2 to 5 and Noticee no. 1 were persons acting in concert by virtue of Regulation 2(1)(e)(2)(iii) of SAST Regulations, 1997. Thus, the persons acting in concert was already holding 16.53% shares in the Target Company. It was only when Noticee no. 2 to 5 collectively acquired 22.39% shares in the Target Company that the shareholding of all the persons acting in concert increased from 16.53% to 38.92% i.e. an increase of more than 5% in the financial year ending on March 31, 2008. Thus, there was an additional consolidation of 22.39% of voting rights in the already existing pool of voting power of persons acting in concert, thereby requiring the acquirer to make public announcement for an open offer in accordance with Regulation 11(1) of SAST Regulations, 1997. Noticee no. 2 to 5 have placed reliance on the judgement of the Hon'ble Supreme Court in the matter of *Swedish Match case* (supra), to contend that acquirer must already hold shares in the Target Company to attract Regulation 11(1). Since the acquirers were not already holding any shares in the Target Company prior to the acquisitions in question, therefore, in terms of *Swedish Match judgment*, Regulation 11(1) is not attracted in the present case. In this regard, I note that in the *Swedish Match case*

(supra), regarding applicability of Regulation 11(1) of SAST Regulations, 1997, Hon'ble Supreme Court observed as under:

“.....The pre-conditions attracting Regulation 11 are: (i) that an acquirer had acquired shares in concert with another; (ii) such acquisition was more than 15% but less than 50% of the shares or voting rights in a company; (iii) in the event, the acquirer intends to acquire such additional shares or voting rights which would allow him to exercise more than 5% of the voting rights within a period of 12 months, public announcement is required to be made therefor. (iv) such acquisition of additional shares contemplates three different situations, i.e., the acquisition may be by acquirer himself or through or with the person acting in concert with the person with whom they had acquired shares earlier in concert with each other.....”

20. A perusal of the aforesaid observation made by the Hon'ble Supreme Court reveals that Hon'ble Supreme Court has not held that to attract Regulation 11(1) acquirer must previously held some shares in the Target Company. In fact, I note that contention raised by the Noticee no. 2 to 5 on the basis of the observation of the Hon'ble Supreme Court, was understood to be a ratio of the judgment of the Swedish Match case (supra) by the Hon'ble SAT in Phiroze Sethna case (supra) which has also been relied upon by the said Noticees, wherein Hon'ble SAT observed as under:

“.....8. It is clear from a perusal of Regulation 11(1) and the above judgment of the Supreme Court in the case of Swedish Match that for this clause to be triggered : (a) the acquirer should have made acquisition of shares or voting rights in the target company during earlier financial years to the extent of more than 15% but less than 75%; (b) the acquisition of additional shares or voting rights that triggers Regulation 11(1) during the relevant financial year should provide the acquirer more than 5% of voting rights; (c) the same acquirer should be involved, in the acquisitions of both the initial shares as well as additional shares; and (d) such acquisitions should be either by the acquirer himself or with the persons acting in concert with him.....”

21. The aforesaid order passed by the Hon'ble SAT in Phiroze Sethna case (supra) was taken in appeal by SEBI before Hon'ble Supreme Court, under Section 15Z of the SEBI Act, 1992, by filing Civil Appeal No. 1152 of 2008 – AO, SEBI Vs. Phiroze Sethna & Others, which was disposed by Hon'ble Supreme Court vide its order dated March 22, 2018, *inter alia*, observing that cases under SAST Regulations, 1997 would be decided on the merits without being influenced by the order of the

Securities Appellate Tribunal impugned in this appeal which shall not act as a precedent for such cases. In view of the above, I find that the contentions raised by the Noticee regarding the applicability of Regulation 11(1) to the acquisitions made by them, is misplaced and untenable.

22. I note that, no document for open offer was received by SEBI in the matter of the Target Company during the period April 01, 2007 – March 31, 2008. Thus, I find that during the Financial Year 2007-08, because of the acquisition made by Noticee no. 2 of 4.74% shares of the Target Company, by Noticee no. 3 of 4.40% shares of the Target Company, by Noticee no. 4 of 4.60% shares of the Target Company and by Noticee no. 5 of 8.65% shares of the Target Company, on September 14, 2007, the shareholding of the acquirers on the second trigger date alongwith shareholding of the persons acting in concert in the second trigger i.e. Noticee no.1, increased from 16.53% to 38.92%. Thus, I find that the acquirers in second trigger i.e. Noticee no. 2, 3, 4 and 5, alongwith persons acting in concert in second trigger i.e. Noticee no. 1, by acquiring more than 5% shares (i.e. 22.39% shares) in the financial year ending on March 31, 2008, without making public announcement for an open offer, have violated Regulation 11(1) of SAST Regulations, 1997.

23. I note that SAST Regulations, 1997 has been repealed by Regulation 35(1) of SAST Regulations, 2011 and has been replaced by SAST Regulations, 2011. Regulation 35(2)(b) of SAST Regulations, 2011, provides that all obligations incurred under the SAST Regulations, 1997, including the obligation to make an open offer, shall remain unaffected as if the repealed regulations has never been repealed. Therefore, the obligations to make open offer, incurred by the Noticees under SAST Regulations, 1997, are saved and can be enforced against the Noticees by virtue of Regulation 35 of SAST Regulations, 2011.

24. As observed above, the respective acquirers/PAC's after acquiring shares/voting rights in the Target Company beyond the threshold of initial/creeping acquisition have failed to make an open offer in terms of Regulation 10 and 11(1) of SAST Regulations, 1997, on, April 1, 2007 and September 14, 2007, respectively. I also note that as per Regulation 21(19) of SAST Regulations, 1997, the acquirer and

the PAC's are jointly and severally liable for discharge of obligations under SAST Regulations, 1997. I also note that for trigger on April 1, 2007, Noticee no. 1 was liable to make an open offer, whereas for the trigger on September 14, 2007, acquirers viz. Noticee no. 2, 3, 4 and 5 and PAC viz, Noticee no. 1, were jointly and severally liable to make an open offer. However, I note that no pragmatic outcome will be achieved by directing Noticee no. 1 to give two separate open offers. Hence, as a measure of feasibility and practicality, I find that a single open offer by all the acquirers along with the persons acting in concert would suffice in the facts and circumstances of this case.

25. However, I note that under SAST Regulations, 1997, one of the principle underlying is exit opportunity to the public shareholders of the Target Company at the best price and accordingly, Regulation 20 of SAST Regulations, 1997 which deals with offer price provides that offer price in an open offer has to be highest of the prices of shares of the Target Company derived through various methods enlisted therein. Thus, I note that public shareholders of the Target Company are entitled to highest of the offer price to be computed in accordance with Regulation 20 of the SAST Regulations, 1997, from each date of trigger.

26. In view of the above, I, in exercise of the powers conferred upon me under Sections 11(1) and 11B of the SEBI Act, 1992 read with Section 19 of the SEBI Act, 1992 and Regulation 44 of SAST Regulations, 1997 and Regulation 32 of SAST Regulations, 2011 read with Regulation 35 of SAST Regulations, 2011, hereby direct that:

- a. Noticee no. 1, 2, 3, 4 and 5 to make a public announcement of a combined open offer for acquiring shares of Sungold Capital Ltd., under Regulation 10 and 11(1) of the SAST Regulations, 1997, within a period of 45 days from the date when this order comes into force, in accordance with SAST Regulations, 1997;
- b. Noticee no. 1, 2, 3, 4 and 5, shall along with the offer price, pay interest at the rate of 10% per annum for delay in making of open offer, for the period starting from the date when the Noticees incurred the liability to make the public announcement and till 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 are accepted in the open offer, after adjustment of dividend paid, if any.

27. In view of the exceptional circumstances emerging due to the outbreak of a COVID-19 and consequential lock down imposed, this order shall come into force on July 31, 2020 or at the end of the lockdown period, if the lockdown is further extended beyond July 31, 2020.

28. A copy of this order shall be sent to the Noticees, recognised Stock Exchanges and Depositories to ensure that the directions given above are strictly complied with.

Sd/-

ANANTA BARUA

WHOLE TIME MEMBER

Date: July 07, 2020

Place: Mumbai

SECURITIES AND EXCHANGE BOARD OF INDIA