

**SECURITIES AND EXCHANGE BOARD OF INDIA
ORDER**

IN THE MATTER OF ACQUISITION OF VOTING RIGHTS OF OCL INDIA LIMITED—APPLICATION FILED UNDER REGULATION 4(2) OF THE SECURITIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 1997

1. OCL India Limited (hereinafter referred to as the target company) is a company incorporated under the Companies Act, 1956 having its registered office at AT/PO: Rajgangpur, District- Sundargarh, Orissa - 770 017 and Delhi office at 17th Floor, Narain Manzil, 23 Barakhamba Road, New Delhi-110001. The equity shares of the target company are listed on the Bhubaneswar Stock Exchange Limited, Calcutta Stock Exchange Limited, Delhi Stock Exchange Limited and Bombay Stock Exchange Limited. Mr. Gaurav Dalmia on his behalf and on behalf of Mr. Raghu Hari Dalmia, Mrs. Padma Dalmia, Mr. Mridu Hari Dalmia, Mrs. Abha Dalmia, Sharmila Dalmia Parivar Trust, Mr. Gaurav Dalmia, Kanupriya Trust, Devanshi Trust, Aryamanhari Trust, Aanyapriya Trust, Raghu Hari Dalmia Parivar Trust, Ms. Vrinda Dalmia, Gautam Dalmia HUF, Vasumana Trust, Mrs. Kanupriya Somany, Raghu Hari Dalmia HUF, Mridu Hari Dalmia HUF, Mridu Hari Dalmia Parivar Trust, Mrs. Usha Devi Jhunjhunwala, Ms. Rasalika Dalmia and Ms. Saudamini Dalmia (hereinafter collectively referred to as the acquirers), vide letter dated November 30, 2010 filed an application under Regulation 4(2) read with Regulation 3(1)(I) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the Takeover Regulations). Brief facts which led to the filing of the aforesaid application are as follows. Consequent to a buy back of the shares of the target company in the year 2003, the shareholding/voting rights of the acquirers in the target company had increased from 62.56% to 75%. Though,

the said increase in the shareholding of the acquirers triggered the provisions of the Takeover Regulations, they had not made a public announcement as required under Regulation 11(1) thereof and therefore, SEBI issued a show cause notice dated July 17, 2007 to the acquirers *inter alia* alleging that the acquirers are liable for penal action under the Takeover Regulations and Securities and Exchange Board of India Act, 1992. Further, the acquirers were also called upon to show cause as to why they should not be directed to give an offer to the shareholders of the target company. SEBI disposed of the said notice, vide an Order dated January 20, 2010 by directing to initiate adjudication proceedings against the acquirers under the provisions of Securities and Exchange Board of India Act, 1992 read with Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995. The appeal filed against the said Order was disposed of by the Hon'ble Securities Appellate Tribunal, vide Order dated October 26, 2010 with a direction to SEBI to consider the application of the appellants therein for exemption in accordance with law without being influenced by any observation or finding recorded in the impugned order. Thereafter, the acquirers filed the present application.

2. As per the application, the acquirers belong to the promoter group of the target company. It is stated in the application that, during the year 2003, the target company made a buy-back offer of upto 11,83,708 fully paid up equity shares. According to the application, at the time of the buy-back offer, the acquirers held 44,64,770 shares, representing 62.56% of the paid-up equity capital of the target company. It is further mentioned in the application that the acquirers did not tender any of their shares in the said buy-back offer and that due to the shares offered by other shareholders in the buy-back offer, the shareholding of the acquirers increased from 62.56% to 75% (on account of reduction of the issued, subscribed and paid-up share capital of the target company). The application is filed *inter alia* on the following grounds:

- a) There was no acquisition of any additional share by the acquirers in the target company, which resulted in the increase in percentage shareholding/voting rights of the acquirers.
- b) There was no change in control of the target company, as the acquirers were holding 62.5% shares of the target company and were in control of the target company even prior to the buy-back. The shareholding of the acquirers remained the same as none of them tendered their share in the buy-back offer.
- c) The increase in voting rights of the acquirers from 62.5% to 75% was incidental to the aforesaid reduction of capital of the target company pursuant to the buy-back and was not a pro-active acquisition on part of the acquirers.
- d) The purpose of the buy-back was to provide an opportunity to its shareholders who desired to sell their equity shares and to provide improved returns to the shareholders by enhancing the shareholders value.
- e) The offer price in the buy-back offer was higher than the quoted share price of ₹59.20 per equity share as on January 17, 2003, being the earliest day before the Board meeting when buyback was approved.
- f) Even after the buy-back, the voting rights of the acquirers would remain upto 75%, which meets the requirement of the Listing Agreement.

3. The shareholding pattern of the target company (as given in the application) before and after the buy-back is as under:

Shareholders Category	Before the buy-back		After the buy-back	
	No of Shares/ total voting rights held	% of Shares/ total voting rights held	No of Shares/ total voting rights held	% of Shares/ total voting rights held
Promoter Group (including the acquirers)	4464770	62.56	4464770	75.00
FIs/ Banks	805742	11.29	1488257	25.00
FIIIs/ NRIs/ OCBs	74356	1.04		
Public	1791867	25.11		
Total	7163735	100.00		

4. Thereafter, the acquirer vide letter dated January 14, 2011 filed various information as sought by SEBI. The aforesaid application was forwarded to the Takeover Panel, by SEBI, in terms of Regulation 4(4) of the Takeover Regulations. The Takeover Panel, vide report dated January 14, 2011, has recommended as under:

"...Before going into the merits of the case, the Panel decided to examine the maintainability of the exemption application when the buy back has already been completed way back in 2003 and as a consequence thereof promoters' share holding has increased from 62.56% to 75%. In this connection, the Panel looked at Regulation 4(2) of SEBI (SAST) Regulations which reads as under:-

*"(2) For seeking exemption under I of sub-regulation (1) of regulation 3, the acquirer shall file an application supported by duly sworn affidavit with the Board, giving details of the **proposed acquisition** and the grounds on which the exemption has been sought."*

From the aforesaid provision, it became clear that any application for exemption can be made to the Panel only in respect of the proposed acquisition i.e. before the actual acquisition and not thereafter. In other words, any exemption application filed by the acquirer after acquisition of shares/voting right would not be maintainable. In the past, Panel has never entertained any application seeking post facto exemption and the panel did not see any reason for deviating from the said practice which has been mandated by the Regulations. Accordingly, the Panel did not recommend the exemption on this ground itself without going into merits of the case."

5. Subsequently, an opportunity of hearing was granted on May 25, 2011 wherein Mr. R.K. Agarwal, Chartered Accountant, Mrs. Shailashri Bhaskar, Company Secretary, Mr. Sharad Vaid, Advocate and Ms. Boski Sharma, Advocate appeared and made submissions before me on behalf of the acquirers. During the aforesaid hearing, the learned advocate undertook to file written submissions. Thereafter, the acquirers, vide letter dated June 3, 2011 filed its written submissions. It was *inter alia* submitted that SEBI in the past, has granted post facto exemption under Regulation 4(2) of the Takeover Regulations, despite the Takeover Panel refusing to consider such applications without going into merits. Further, in view of the SAT's Order dated October 26, 2010 and the facts and circumstances of the case, the acquirers requested SEBI to consider the application on merits and to drop the show cause notice against them.

6. I have considered application filed on behalf of the acquirers, the oral as well as written submissions made on behalf of them and other material available on record. It is an admitted fact that the shareholding of the

acquirers increased from 62.56% to 75% of the paid-up equity capital of the target company, pursuant to the buy back of shares of the target company in the year 2003. The aforesaid increase of 12.44% triggered Regulation 11(1) of the Takeover Regulations (as applicable in the year 2002-03), which required a public announcement to be made in accordance with the provisions thereof. The said requirement was not complied with by the acquirers. No application for grant of exemption was made by the acquirers before such acquisition. As observed by the Takeover Panel, an application under Regulation 4 of the Takeover Regulations can be made only in respect of a **proposed acquisition**. Regulation 4(2) of the Takeover Regulation read as follows:

*“for seeking exemption under 1 of sub-regulation (1) of regulation 3, the acquirer shall file an application supported by duly sworn affidavit with the Board, giving details of the **proposed acquisition** and the grounds on which the exemption has been sought.” (emphasis supplied)*

7. Thus, an application under Regulation 4 of the Takeover Regulations can be made only in respect of a proposed acquisition of shares/voting rights. The learned counsel submitted that SEBI had earlier granted post facto exemption in the matters of Jaiswal Neco Limited (Order dated February 7, 2006) and Seahorse Hospitals Limited (Order dated August 18, 2006) and submitted that SEBI ought to afford the same treatment. I have perused the said orders of SEBI and find that the facts and circumstances of the said cases are not similar to that of the present one. In both the cases, exemptions were granted where the target companies were financially sick and the allotments were made pursuant to stipulations from financial institutions. In the matter of Jayaswal Neco Limited, the target company was a potentially sick industrial company and the preference shares held by the acquirer and PACs were converted into equity shares of the target company against funds infused by them. The conversion of cumulative preference

shares had taken place in accordance with the conditions stipulated by the Financial Institution for restructuring the loans of the target company, as per the terms and conditions of the CDR package. Further, the acquirer filed the exemption application in respect of the acquisition of voting rights accrued pursuant to section 87(2)(b) of the Companies Act, 1956. The exemption was granted on the ground that the target company was a sick company and the allotments had happened in pursuance of CDR stipulations. In the matter of Seahorse Hospitals Limited, the target company could not repay its due to the Financial Institutions for many years and the said Financial Institutions filed recovery proceedings before the Hon'ble Debts Recovery Tribunal at Chennai. The One Time Settlement (OTS) made by the target company to the financial institutions was necessary for survival of the target company and was in the interest of the shareholders of the target company. The recovery proceedings initiated by the Financial Institutions were disposed of as withdrawn on the basis of the said OTS. The acquirer had to buy the shares of the target company held by the Financial Institutions, as per the terms and conditions of the aforesaid OTS. The Financial Institution handed over the shares to the acquirer in terms of the OTS and the acquirer had taken steps for seeking exemption under the Takeover Regulations. However, the Panel could not examine the exemption since the Financial Institutions, except one, had handed over the share certificates to the acquirer when the request seeking exemption was under consideration. However, SEBI Order noted that had the financial Institution not handed over the said equity shares to the acquirer before the grant of exemption, the exemption application filed by the acquirer could have been allowed. In view of the mitigating facts and circumstances of the case, the exemption was granted by SEBI in the instant case. Having noted so, Regulation 4 does not allow me to consider cases where the acquisitions have been completed.

8. The acquirers also submitted that the first order of SEBI granting exemption in a buy-back case was passed only in the year 2006. According to

them, upto 2005, various listed companies had gone for buy-back of their shares. It was submitted that SEBI has not taken any action in any of such cases against the promoters of such companies even where the shareholding of promoters of such company increased as a result of buy back of shares being made by such companies. With respect to the aforesaid contention, I note that even if it is accepted that none of the exemption orders passed by SEBI under the Takeover Regulations, prior to the instant buyback (i.e., in the year 2002-03), in relation to increase in shareholding resulting from buy-back of shares of target company, the same cannot absolve the acquirers in respect of their non compliance of the requirement of Regulation 11(1) of the Takeover Regulations (as existed in the year 2003). The said Regulation clearly mandates a public announcement for open offer if an acquirer acquires additional shares or voting rights entitling him to exercise more than 5% of voting rights irrespective of the mode of acquisition, as stated therein.

9. Further, in the present case, the action was initiated against the acquirers by SEBI (vide show cause notice dated July 17, 2007) pursuant to the direction of the Hon'ble High court of Delhi in Writ Petition (Civil) No.16007/2006 (in the matter of Jindal Securities Private Limited v/s. Securities and Exchange Board of India & Ors.) wherein, the Hon'ble High Court directed *"This petition is disposed of with the direction that the petition be treated as a complaint/representation made to the respondent No.1 (SEBI). The Learned Counsel appearing on behalf of the respondent No.1 states that it shall so consider this petition and shall deal with it in accordance with law indicating the outcome to the proceedings undertaken by the SEBI to the petitioner. This is without prejudice to the rights and contentions to the parties."* The appeal preferred against the order of SEBI (passed pursuant to the aforesaid notice) was disposed of by the Hon'ble Securities Appellate Tribunal, vide order October 26, 2010, as stated in paragraph I above. Therefore, the present application has to be rejected for the above reasons and I do so accordingly.

10. In view of the foregoing, I, in exercise of the powers conferred upon me under Section 19 of the Securities and Exchange Board of India Act, 1992 read with Regulation 4(6) of Takeover Regulations, hereby do not grant exemption to the acquirers, namely, Mr. Gaurav Dalmia, Mr. Raghu Hari Dalmia, Mrs. Padma Dalmia, Mr. Mridu Hari Dalmia, Mrs. Abha Dalmia, Sharmila Dalmia Parivar Trust, Mr. Gaurav Dalmia, Kanupriys Trust, Devanshi Trust, Aryamanhari Trust, Aanyapriya Trust, Raghu Hari Dalmia Parivar Trust, Ms. Vrinda Dalmia, Gautam Dalmia HUF, Vasumana Trust, Mrs. Kanupriya Somany, Raghu Hari Dalmia HUF, Mridu Hari Dalmia HUF, Mridu Hari Dalmia Parivar Trust, Mrs. Usha Devi Jhunjhunwala, Ms. Rasalika Dalmia and Ms. Saudamini Dalmia from complying with Regulation 11(1) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 with respect to their increase in shareholding and voting rights from 62.56% to 75% consequent to the buy-back of equity shares by the target company, OCL India Limited in the year 2003.

11. Accordingly, the application dated November 30, 2010 filed by the aforesaid acquirers is disposed of.

DR. K. M. ABRAHAM
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA

PLACE: MUMBAI
DATE: JULY 19, 2011