BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. Order/BM/DS/2022-23/20813]

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

In the matter of
Indreshwar Sugar Mills Limited
(PAN: AACCI2876F)

BACKGROUND:

1. Securities and Exchange Board of India (hereinafter being referred to as "**SEBI**") conducted an examination in the matter of Indreshwar Sugar Mills Limited (hereinafter referred to as "**the Company**"/ "**ISML**" / "**Noticee**"), for the period commencing April 01, 2010 to March 31, 2014 (hereinafter referred to as "**examination period**" / "**EP**"). Pursuant to examination, it was alleged that there were violations of provisions of SEBI (Non-Convertible Redeemable Preference Shares) Regulations, 2013 (hereinafter referred to as "**NCRPS Regulations**") with respect to issuance of Non-Convertible Redeemable Preference Shares (NCRPS) by ISML.

2. In view of the above, SEBI initiated adjudication proceedings under the provisions of Section 15HB of the SEBI Act, 1992 against the Noticee for the aforementioned alleged violations.

APPOINTMENT OF ADJUDICATING OFFICER

3. Vide Order dated May 17, 2022, the undersigned was appointed as the Adjudicating Officer (**"AO"**) under Section 19 and Section 15-I of the SEBI Act,

and Rule 3 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties Rules, 1995 (hereinafter referred to as "**Adjudication Rules**") to enquire into and adjudge under the provisions of Section 15HB of the SEBI Act, 1992, the alleged violations of provisions of regulations 4(2)(a), (b), (c), (d), regulation 4(5), regulations 5, 6, 7, 8, 9, 13, 15, 16, 16B(1) and 22 of NCRPS Regulations by the Noticee.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

4. Show Cause Notice no. EAD/BM/DS/44960/2022 dated August 25, 2022 (hereinafter referred to as "**SCN**") was issued by the undersigned to the Noticee via Speed Post Acknowledgement Due (SPAD) and digitally signed e-mail under the provisions of Rule 4(1) of the Adjudication Rules and section 15-I of the SEBI Act, calling upon the Noticee to show cause as to why an inquiry should not be held against it for the aforesaid alleged violations of provisions of regulations 4(2)(a), (b), (c), (d), regulation 4(5), regulations 5, 6, 7, 8, 9, 13, 15, 16, 16B(1) and 22 of NCRPS Regulations, and why penalty, if any, should not be imposed on it under Section 15HB of the SEBI Act, 1992.

5. The allegations levelled against the Noticee are as under:
   a. A letter dated July 26, 2019 was sent to ISML, seeking information regarding mobilization of funds from public through issue of Non-Convertible Redeemable Preference Shares (NCRPS)/Debentures by the company.
   b. As per information received from the Company, it was observed that ISML raised funds from total 21,814 (10,924+10,890) investors in multiple tranches and raised Rs. 26.21 crore during FY 2010-11 to FY 2012-13. Out of this, share application money from 10,890 investors amounting ₹12,17,79,000 was refunded to the applicants due to the non-allotment of securities to such investors through banks. Thus, allotment of NCRPS was made to 10924 investors, i.e. more than 49 persons.

c. *The limit of 49 allottees as per the First Proviso to Section 67(3) of the Companies Act, 1956 cannot be breached or bypassed by making multiple allotments, which individually may fall within the limit but cumulatively exceed 49 in number. In terms of Section 67(3) of the Companies Act, 1956, any issue to "50 persons or more" is a public issue.*
d. *Hence, in view of first proviso to section 67(3) of Companies Act, 1956, it was alleged that ISML made a public issue of redeemable preference shares during aforesaid years without complying with Section 67(3) of Companies Act, 1956.*
e. *As the issue of NCRPS was alleged to be a deemed public issue, it is observed that statutory requirements of public issue were not complied with, and lead to violation of provisions of section 73, section 60 read with section 2(36) and section 56 of Companies Act, 1956 and also provisions of regulations 4(2)(a), (b), (c), (d), regulation 4(5), regulations 5, 6, 7, 8, 9, 13, 15, 16, 16B(1) and 22 of NCRPS Regulations.*

6. In response to aforesaid letter dated July 26, 2019, ISML made various submissions vide letter dated February 20, 2020, and it also stated that it is willing to comply with SEBI Circular No. CIR/CFD/DIL3/18/2015 dated December 31, 2015 by providing *the option of surrender of securities to the investors, but by looking into current scenario of financial position, the company is not in a position to make refund of money if investors exercise the option of refund.*

7. Vide letter dated December 10, 2020, ISML was advised to:
   i. Confirm whether the money is refunded along with the interest @15% per annum
   ii. 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.

iii. Apply for compounding of violation with NCLT and submit evidence for the same with SEBI.

8. Vide its email dated July 30, 2021, ISML provided a certificate from peer reviewed CS (Mr. Raghavendra J Joshi) and list of investors to whom the exit option was offered by the company. As per the certificate issued by CS, none of the NCRPS holders opted to surrender the securities. Thus, the company was not required to issue the refund. Further, company also submitted copy of compounding application under section 56, 60, 67(3) and 73 of the Companies Act, 1956 along with the fee payment receipt for applying to the NCLT for compounding of aforesaid sections. Thus, no allegations were made in the SCN against ISML for violation of aforesaid provisions of Companies Act, 1956.

9. It was alleged, thus in the SCN dated August 25, 2022 that Noticee has violated following provisions of NCRPS Regulations.

Regulation no. of SEBI NCRPS Regulations	**Provisions**
4(2)(a), (b), (c), (d)	To apply for listing of specified securities on one or more recognized stock exchange; to obtain approval for listing of NCRPS on recognized stock exchanges; to obtain credit rating; and to enter into an arrangement with Depositories to issue securities in Dematerialized mode
4(5)	To appoint merchant banker
5	To make all material disclosures in the offer document
6	To file draft offer document with SEBI and the designated stock exchange and RoC
7	Mode of disclosure of offer document
8	To issue advertisement for public issue
9	Abridged Prospectus and application forms
13	Minimum subscription
15	Prohibition of mis-statements in the offer document

Regulation no. of SEBI NCRPS Regulations	Provisions
16	Mandatory listing of NCRPS issued to public on one or more recognized exchanges
16B(1)	To keep security deposit with stock exchanges
22	Obligations of the Issuer, Lead Merchant Banker, etc

10. It was observed that no reply was received from the Noticee till September 28, 2022. Hence, in the interest of natural justice, the Noticee was granted an opportunity of hearing, vide letter dated September 28, 2022, wherein the Noticee was advised to appear before the undersigned on October 12, 2022 through video-conferencing mode. Vide letter dated October 10, 2022, received through e-mail, the Noticee submitted its reply to the SCN. Vide mail dated October 12, 2022, Noticee made a request for adjournment of the hearing, which was accepted by the undersigned. Vide letter dated October 12, 2022, Noticee was advised to appear before the undersigned on October 18, 2022.

11. The submissions made by Noticee, vide letter dated October 10, 2022 are summarized as under:
    a. *It is confirmed that the Company has received the letter dated July 26, 2019 seeking information on the mobilisation of funds from the public by way of issue of Non-Convertible Redeemable Preference Shares by the Company. The Company has also provided the replies to all the queries raised in the said letter with necessary supportive documents.*
    b. *It is confirmed that the Company raised Rs.26,21,79,639/- as share application money from a total of 21,814 investors in multiple tranches during the financial years 2010-11 to2012-7013. The company has however refunded Rs.12,17,79,000 to 10,974 persons and hence the Company raised only Rs.14,04,00,000 from 10,924 investors.*

c. With regard to your allegation in Paragraph 5 of the letter, the Company however submits that this allotment was made under the Companies Act, 1956 which did not expressly specify that allotment shall not be made to only 49 persons. As per Section 67(3) of the Companies Act, 1956, allotment shall be restricted to only 49 persons per resolution and accordingly allotments were made to 10,974 investors over multiple tranches under multiple resolutions. The Company submits that the allotments were made even before the SEBI (NCRPS) Regulations, 2013 were notified and hence none of the provisions of these Regulations were also applicable to the money raised from the investors by the Company during the period from 2010 to March 31, 2013. Hence, the Company has not violated the provisions of the Companies Act, 1956.

d. The Company denies that it has made a public issue of Non-Convertible Redeemable Preference Shares in violation of the provisions of the Companies Act, 1956.

e. Since the provisions of the NCRPS Regulations were not applicable to the Company as the Regulations were notified after the Company made the allotment of the securities, the Company humbly submits that the provisions of Regulations 4(2)(a), (b), (c), (d), Regulation 4(5), Regulations 5,6,7,8, 9 , 13, 15, 16, 16(B)(1) and 22 of the SEBI (NCRPS) Regulations, 201 3 were not applicable to the Company.

f. In accordance with the directive, necessary exit option was provided, no investor availed the opportunity, a report regarding the same was submitted by M/s. Joshi & Joshi, Practising Company Secretaries and necessary compounding application has also been filed with the NCLT in compliance with the SEBI Directive. The same was also informed to SEBI. Accordingly, the Company is in compliance with the SEBI Circular No: CIR/CFD/DIL3/18/2015 dated December 31, 2015 and hence as per Paragraph 2 of the said Circular, there can be no penal action as the Company has extended the exit option to *alt the security holders. However, for immediate reference the relevant para from your circular dated December 31,2015, is reproduced below:*

"Considering the higher cap for private placement provided in the Companies Act, 2013, it has now been decided that in respect of earlier cases involving issuance of securities to more than 49 persons but up to 200 persons in a financial year, the companies may avoid penal action if they provide the investors with an option to surrender the securities and get the refund amount at a price not less than the amount of subscription money (emphasis supplied by Noticee) paid along with 15% interest p.a. thereon or such higher return as promised to investors."

g. *With regard to your allegation that the Company has violated the provisions of Regulation 4(2) SEBI (NCRPS) Regulations, 2013, the Company submits that these Regulations were notified on June 12, 2013 and the Company made allotments of securities before March 31, 2013. Hence, the Regulations which were notified later on June 17, 2013 cannot be made applicable to these allotments and hence the Company has not violated any of the provisions of the SEBI(NCRPS) Regutations,2013 as alleged by you in Paragraph 11 of your Show Cause Notice.*

h. *It may be pertinent to mention here that the Hon'ble Supreme Court in "L. R. Brothers Indo Flora Ltd v. Commissioner of Central Excise", [2020 SCC Online SC 7051, decided on 01 .09.2020] has held that for application of a subsequent legislation retrospectively it is necessary to show that the previous legislation had any omission or ambiguity or it was intended to explain an earlier act. In absence of the above ingredients, a legislation cannot be regarded as having retrospective effect.*

i. *Further, Regulation 3 of the SEBI (NCRPS) Regulations, 2013 states the following:*

Applicability

3. "These regulations shall apply to, (1) public issue of non-convertible redeemable preference shares; (2) Listing of non-convertible redeemable preference shares on a recognized stock exchange which are issued by a public company through public issue or on private placement basis; and (3) issue and listing of Perpetual Non-Cumulative Preference Shares and Perpetual Debt instrument, issued by banks on private placement basis in compliance with Guidelines issued by Reserve Bank of India."

j. It can be seen from the above that the legislation did not seek to apply to all issues made earlier nor contained any clarificatory ingredient. Hence, the NCRPS Regulations cannot be applied with retrospective effect.

k. In view of the submissions made above, the Company submitted that it has not violated the provisions of Regulations 4(2)(a), (b), (c), (d), Regulation 4(5), Regulations, 5,6,7,8,9,13,15,16,16(8)(1) and 22 of the SEBI (NCRPS) Regulations, 2013, since not applicable, as alleged in Paragraph 12 of the Show Cause Notice.

l. As necessary exit option has been provided and compounding application has been submitted to NCLT, which is in compliance with the requirements of Companies Act, 1956 and as per the advice by SEBI vide its communication to the Company which has been confirmed in Paragraph 10 of the Show Cause Notice and the fact that the NCRPS Regulations, 2013 were not applicable as they have been notified later than the date of allotment; we request you to take a lenient view and drop all further proceedings against the Company.

12. The AR (Authorised Representative) appeared on behalf of the Noticee for the hearing on scheduled date and time and reiterated the submissions already made vide letter dated October 10, 2022. The AR reiterated submissions already made vide letter dated October 10, 2022. The AR was asked to submit the following:

a. *As submitted by the Noticee that all issuances and allotment of Non-Convertible Redeemable Preference Shares (NCRPS) were made simultaneously, at what time was issuance was done for the allotments made between August 21, 2013 and January, 2014?*
b. *As claimed by Noticee that all issuances were made upto March, 2013, whether issuances were within the authorized capital or beyond the authorized capital at the time of issue?*

13. The AR sought time till October 21, 2022 to submit the details sought from the Noticee, which was granted by the undersigned. Vide mail dated October 19, 2022, Noticee was asked to submit the following documents:
    a. *Copy of application forms / documents through which the applicants applied for the preferential issue of shares, which were allotted between August 21, 2013 and January, 2014.*
    b. *Copy of Board resolutions approving allotment of shares to 10924 allottees.*
    c. *Copy of special resolution for alteration of MoA / AoA and increase of authorised share capital of ISML.*
    d. *Copy of e-form 23 filed within 30 days of above resolutions*

14. Vide mail dated October 21, 2022, Noticee submitted its responses to the queries of the undersigned during the course of hearing. With regard to queries in para 12(a) and (b), Noticee made following submissions:

<u>Table I: Details of Allotments</u>

Date of Allotment	Number of Shares allotted	Date when issued
August 21, 2013 to March 25, 2014	14,04,000 Preference Shares of Rs.100/- each aggregate amounting to Rs.14,04,00,000/- Total 217 allotments of not more than 49 allottees each	During the period from 2010-2011 up to March 31, 2013

Table II: Particulars of Increase in Authorised Capital

Date of Increase in Authorised Capital	From Rs.	To Rs.
Subscribed Capital as per Memorandum of Association	5,00,000/-	5,00,000/-
April 28, 2010	5,00,000/-	1,00,00,000/-
December 01, 2011	1,00,00,000/-	8,00,00,000/-
January 25, 2013	8,00,00,000/-	11,00,00,000/-
September 02, 2013	11,00,00,000/-	35,00,00,000/-
July 14, 2017	35,00,00,000/-	47,00,00,000/-

15. Vide mail dated October 27, 2022, Noticee submitted copies of Form SH-07 (Notice to registrar on alteration of share capital), along with challan of registration fees and stamp duty, and certified true copy of Notice of Extraordinary General Meeting (EGM) held on September 02, 2013, and also provided certified true copy of resolution passed in EGM regarding increase of authorized share capital. Noticee also submitted an excel sheet with details of allotments made in 223 tranches. The allotment of NCRPS were made on a daily basis to 49 different persons each day beginning August 21, 2013 till March 31, 2014. Vide email dated October 27, 2022, Noticee also provided copies of 3 samples of board resolutions of allotment of preference shares. However, copies of samples of application forms were not provided by the Noticee.

ISSUES FOR CONSIDERATION, EVIDENCE AND FINDINGS

16. After perusal of the material available on record, I have the following issues for consideration.

    ISSUE I: Whether Noticee has violated provisions of regulations 4(2)(a), (b), (c), (d), regulation 4(5), regulations 5, 6, 7, 8, 9, 13, 15, 16, 16B(1) and 22 of NCRPS Regulations?

    ISSUE II: Does the violation, if any, on part of the Noticee attract penalty under Section 15HB of the SEBI Act?

ISSUE III: If so, how much penalty should be imposed on the Noticee taking into consideration the factors mentioned in Section 15J of the SEBI Act?

17. Before moving forward it is pertinent to refer to the relevant provisions of NCRPS Regulations which read as under:

<u>SEBI NCRPS Regulations, 2013</u>

General Conditions.

4. (2) No issuer shall make a public issue of non-convertible redeemable preference shares unless the following conditions are satisfied, as on the date of filing of draft offer document and final offer document as provided in these regulations,-

(a) it has made an application to one or more recognized stock exchanges for listing of such securities therein:

Provided that where the application is made to more than one recognized stock exchanges, the issuer shall choose one of them as the designated stock exchange:

Provided further that where any of such stock exchanges have nationwide trading terminals, the issuer shall choose one of them as the designated stock exchange;

Explanation: For any subsequent public issue, the issuer may choose a different stock exchange as a designated stock exchange subject to the requirements of this regulation;

(b) it has obtained in-principle approval for listing of its non-convertible redeemable preference shares on the recognized stock exchanges where the application for listing has been made;

(c) it has obtained a credit rating from at least one credit rating agency registered with the Board and is disclosed in the offer document:Provided that where credit

ratings are obtained from more than one credit rating agencies, all the ratings, including the unaccepted ratings, shall be disclosed in the offer document;

(d) it has entered into an arrangement with a depository registered with the Board for dematerialization of the non-convertible redeemable preference shares that are proposed to be issued to the public, in accordance with the Depositories Act, 1996 and regulations made thereunder;

(5) In case of publicissue of non-convertible redeemable preference shares, the issuer shall appoint one or more merchant bankers registered with the Board at least one of whom shall be a lead merchant banker.

Disclosures in the offer document.

5. (1) The offer document shall contain all material disclosures which are 7necessar y for the subscribers of the non-convertible redeemable preference shares to take an informed investment decision.

(2) Without prejudice to the generality of sub-regulation (1), the issuer and the lead merchant banker shall ensure that the offer document contains the following:

(a)the disclosures specified in Schedule II of the Companies Act, 1956;

(b)disclosure specified in Schedule I of these regulations; and

(c)additional disclosures as may be specified by the Board.

Explanation: For the purpose of this regulation, ―material‖ means anything which is likely to impact an investor's investment decision. Filing of draft offer document.

6. *(1) No issuer shall make a public issue of' non-convertible redeemable preference shares unless a draft offer document has been filed with the designated stock exchange through the lead merchant banker.*

(2)The draft offer document filed with the designated stock exchange shall be made public by posting the same on the website of the designated stock exchange for seeking public comments for a period of seven working days from the date of filing the draft offer document with such exchange.

(3)The draft offer document may also be displayed on the website of the issuer, merchant bankers and the stock exchanges where the non-convertible redeemable preference shares are proposed to be listed.

(4)The lead merchant banker shall ensure that the draft offer document clearly specifies the names and contact particulars of the compliance officer of the lead merchant banker and the issuer including the postal and email address, telephone and fax numbers.

(5)The lead merchant banker shall ensure that all comments received on the draft offer document are suitably addressed prior to the filing of the offer document with the Registrar of Companies.

(6)A copy of draft and final offer document shall also be forwarded to the Board for its records, simultaneously with filing of these documents with designated stock exchange.

(7)The lead merchant banker shall, prior to filing of the offer document with the Registrar of Companies, furnish to the Board a due diligence certificate as per Schedule II of these regulations.

Mode of Disclosure of Offer Document.

7. *(1) The draft and final offer document shall be displayed on the websites of stock exchanges and shall be available for download in PDF /HTML formats.*

(2) The offer document shall be filed with the designated stock exchange, simultaneously with filing thereof with the Registrar of Companies, for dissemination on its website prior to the opening of the issue.

(3) Where any person makes a request for a physical copy of the offer document, the same shall be provided to him by the issuer or lead merchant banker.

Advertisements for Public issues.

8. (1)The issuer shall make an advertisement in one English national daily newspaper and one Hindi national daily newspaper with wide circulation at the place where the registered office of the issuer is situated, on or before the issue opening date and such advertisement shall, amongst other things, contain the disclosures as per Schedule I.

(2)No issuer shall issue an advertisement which is misleading in material particulars or which contains any information in a distorted manner or which is manipulative or deceptive.

(3)The advertisement shall be truthful, fair and clear and shall not contain a statement, promise or forecast which is untrue or misleading.

(4)The credit rating shallbe prominently displayed in the advertisement.

(5)Any advertisement issued by the issuer shall not contain any matters which are extraneous to the contents of the offer document.

(6)The advertisement shall urge the investors to invest only on the basis of information contained in the offer document.

(7)Any corporate or product advertisement issued by the issuer during the subscription period shall not make any reference to the issue of non-convertible redeemable preference shares or be used for solicitation.

Abridged Prospectus and application forms.

***9**.(1)The issuer and lead merchant banker shall ensure that:*

(a)every application form issued by the issuer is accompanied by a copy of the abridged prospectus;

(b)the abridged prospectus shall not contain matters which are extraneous to the contents of the prospectus;

(c)adequate space shall be provided in the application form to enable the investors to fill in various details like name, address, etc.

(2)The issuer may provide the facility for subscription of application in electronic mode.

Minimum subscription.

13. *(1)The issuer may decide the amount of minimum subscription which it seeks to raise by public issue of non-convertible redeemable preference shares in accordance with the provisions of Companies Act, 1956 and disclose the same in the offer document.*

(2)In the event of non-receipt of minimum subscription, all application moneys received in the public issue shall be refunded forthwith to the applicants. In the event the application monies are refunded beyond eight days from the last day of the offer, then such amounts shall be refunded together with interest at such rate as may be set out in the offer document which shall not be less than fifteen per cent per annum.

Prohibitions of mis-statements in the offer document.

15. *(1)The offer document shall not omit disclosure of any material fact which may make the statements made therein, in light of the circumstances under which they are made, misleading.*

(2)The offer document or abridged prospectus or any advertisement issued by an issuer in connection with a public issue of non-convertible redeemable preference shares shall not contain any false or misleading statement.

Mandatory listing.

16. *(1)An issuer desirous of making an offer of non-convertible redeemable preference shares to the public shall make an application for listing to one or more recognized stock exchanges in terms of sub-section (1) of section 73 of the Companies Act, 1956.*

(2)The issuer shall comply with conditions of listing of such non-convertible redeemable preference shares as specified in the Listing Agreement with the stock

exchange where such non-convertible redeemable preference shares are sought to be listed.

(3)Where the issuer has disclosed the intention to seek listing of non-convertible redeemable preference shares issued on private placement basis, the issuer shall forward the listing application along with the disclosures specified in Schedule I to the recognized stock exchange within fifteen days from the date of allotment of such non-convertible redeemable preference shares.

Security Deposit.

16B.*(1) The issuer shall deposit, before the opening of subscription list, and keep deposited with the stock exchange(s) an amount calculated at the rate of one per cent. of the amount of securities offered for subscription to the public.*

Obligations of the Issuer, Lead Merchant Banker, etc.

22. *(1)The issuer shall disclose all the material facts in the offer documents issued or distributed to the public and shall ensure that all the disclosures made in the offer document are true, fair and adequate and there is no mis-leading or untrue statements or mis-statement in the offer document.*

(2)The Merchant Banker shall verify and confirm that the disclosures made in the offer documents are true, fair and adequate and ensure that the issuer is in compliance with these regulations as well as all transaction specific disclosures required in Schedule I of these regulations and Schedule II of the Companies Act, 1956.

(3)The issuer shall treat the applicants in a public issue of non-convertible redeemable preference shares in a fair and equitable manner as per the procedures as may be specified by the Board.

(4)The intermediaries shall be responsible for the due diligence in respect of assignments undertaken by them in respect of issue, offer and distribution of securities to the public.

(5)No person shall employ any device, scheme or artifice to defraud in connection with issue or subscription or distribution of non-convertible redeemable preference shares which are listed or proposed to be listed on a recognized stock exchange.

FINDINGS

18. On perusal of the material available on record and giving regard to the facts and circumstances of the case and submissions of the Noticee, I record my findings hereunder:

ISSUE I. Whether Noticee has violated provisions of regulations 4(2)(a), (b), (c), (d), regulation 4(5), regulations 5, 6, 7, 8, 9, 13, 15, 16, 16B(1) and 22 of NCRPS Regulations?

19. It is an admitted fact that ISML received funds from total 21,814 (10,924+10,890) investors in multiple tranches amounting Rs. 26.21 crore during FYs 2010-11 to FY 2012-13. Out of this, share application money from 10,890 investors amounting ₹12,17,79,000 was refunded to the applicants due to the non-allotment of securities to such investors through banks. Thus, allotment of NCRPS was made to 10924 investors, i.e. more than 49 persons.

20. Noticee, in its reply, submitted that as per Section 67(3) of the Companies Act, 1956, allotment shall be restricted to only 49 persons per resolution and accordingly allotments were made to 10,924 investors over multiple tranches under multiple resolutions.

21. In this regard, I note that Hon'ble Supreme Court held in the Sahara Order that even the issue which satisfies the requirements of sections 67(3)(a) and (b) would be treated as an issue to the public if it is made to fifty or more persons. The following observations of the Hon’ble Supreme Court made in the Sahara Order in this regard are noteworthy.

"…. after the amendment to the Companies Act, 1956 on 13.12.2000, every private placement made to fifty or more persons becomes an offer intended for the public and attracts the listing requirements under Section 73(1). Even those issues which satisfy Sections 67(3)(a) and (b) would be treated as an issue to the public if it is issued to fifty or more persons, as per the proviso to Section 67(3) and as per Section 73(1), an application for listing becomes mandatory and a legal requirement. Reading of the proviso to Section 67(3) and Section 73(1) conjointly indicates that any public company which intends to issue shares or debentures to fifty persons or more is legally obliged to make an application for listing its securities on a recognized stock exchange."

22. A reading of Section 67(3) along with the Sahara Order makes it clear that if an offer is made to the public by inviting subscription publicly, then it is a public offer irrespective of number of allottees, and has to follow all requirements prescribed for public offers. If an offer is made to pre-identified persons only and persons other than such identified persons cannot apply for the offer, then it is a private offer. However, if a private offer is made to 50 or more persons, then it is deemed to be a public offer in terms of first proviso to Section 67(3) and consequently, all requirements prescribed for public offers have to be followed. Even in case where the allotments are considered separately, reference may be made to Sahara case wherein it was held that under 67(3)of the Companies Act, 1956, the '*Burden of proof is entirely on Saharas to show that the investors are/were their employees/ workers or associated with them in any other capacity which they have not discharged. Fact finding authorities have clearly held that Saharas had not discharged their burden which is purely a question of fact.*' In the instant case, the Noticee has not placed any document on record that the allotments made by it were in satisfaction of Section 67(3)(a) or 67(3)(b) of the Companies Act, 1956, i.e. it was made to the known associated persons or domestic concerns. Therefore I conclude that the said issuance cannot be private placement.

23. On the contention of Noticee that each allotment was restricted to 49 persons, I note that the allotments were made on various days in the year 2013-14, and in all instances to not more than 49 persons i.e. just below the number 50, so as to be seen to be in compliance with the stipulation in Section 67(3) of Companies Act, 1956. While on the face of it, each allotment is to less than 50 persons, the manner of allotments was made in such a way as to circumvent the requirement to make a public offer. Taken together, the allotments of 14,04,000 shares were made to 10924 persons in financial year 2013-14. The pre-ponderance of probability suggests that the manner of allotment was engineered so as to show compliance to the limit of less than 50 persons in one offer. In substance, however, it is clear that such offer and allotments were part of a single exercise and therefore, the offer has to rightly be regarded as a single offer, even if it is done in multiple tranches authorized by separate Board Resolutions.

24. In this regard, it is important to mention that Hon'ble SAT in the case of Neesa Technologies Limited (Appeal 311 of 2016) vide Order dated April 28, 2017 upheld Ld. Whole Time Member's Order dated June 02, 2016 and noted that *"the impugned order has considered all these contentions made by the appellant before the Ld. WTM of SEBI. It is held in the impugned order that various Sections of Companies Act, 1956 is violated because the company issued the securities to more than 49 persons and hence it is a public issue and the provisions of Section 56 were not followed. 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."*

25. In view of the above, the said allotments of NCRPS made by Noticee during FY 2013-14 is established to be public offer/issue in terms of Section 67 of Companies

Act, 1956 and would attract the provisions of the public issue norms prescribed in Companies Act, 1956.

26. Vide letter dated July 26, 2019, ISML expressed its willingness to comply with SEBI Circular No. CIR/CFD/DIL3/18/2015 dated December 31, 2015, which allows companies to avoid penal action if they provide the investors with an option to surrender the securities and get the refund amount at a price not less than the amount of subscription money paid along with 15% interest p.a. thereon or such higher return as promised to investors.

27. Vide letter dated December 10, 2020, ISML was advised to:
    i. Confirm whether the money is refunded along with the interest @15% per annum
    ii. 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.
    iii. Apply for compounding of violation with NCLT and submit evidence for the same with SEBI.

28. Vide its email dated July 30, 2021, ISML provided a certificate from peer reviewed CS (Mr. Raghavendra J Joshi) and list of investors to whom the exit option was offered by the company. As per the certificate issued by CS, none of the NCRPS holders opted to surrender the securities. Thus, the company was not required to issue the refund. Further, company also submitted copy of compounding application under section 56, 60, 67(3) and 73 of the Companies Act, 1956 along with the fee payment receipt for applying to the NCLT for compounding of aforesaid sections. Hence, no action was initiated under the SEBI Act/Regulations for the violation of Companies Act, 1956.

29. However, the Noticee had not filed any prospectus, circulated any abridged prospectus or made any listing application to Stock Exchange regarding the said allotments or made any other compliances relating to public issue under NCRPS Regulations, 2013. Hence, Noticee was alleged to have violated provisions of regulations 4(2)(a), (b), (c), (d), regulation 4(5), regulations 5, 6, 7, 8, 9, 13, 15, 16, 16B(1) and 22 of NCRPS Regulations.

30. Noticee has submitted that the issue was made even before the notification of NCRPS Regulations, 2013 on June 12, 2013. Therefore it was contended that the said regulations were not applicable to the Noticee as the issue of NCRPS was made during the period 2010 to March 31, 2013. From the submissions made by Noticee vide email dated October 27, 2022, I note that allotments of NCRPS were made to 49 different persons on a daily basis between August 21, 2013 till March 31, 2014. Thus, 223 tranches of allotments were made to 10924 persons in the FY 2013-14.

31. In my opinion, Noticee seems trying to take advantage of the provisions of law, instead of recognising their intent, by making distinction between the words 'issue' and 'allotment' of shares by arguing that they are two separate stages of issuance of shares/ NCRPS and that issuance of NCRPS was made before the notification of NCRPS Regulations. I observe that allotment of shares is one of the constituents of issuance of shares. There are several steps which culminate in the issue of the shares to the shareholders, and allotment of shares is one of such integral steps in the issuance of shares. Allotment of shares means appropriation of unissued shares to a specified number of persons. It results in the ownership of the shares by the new/ existing shareholders. Till allotment of shares is made, the shares do not exist as such, and only upon allotment that the shares come into existence. Thus, issuance of shares is complete only after allotment has been made to subscribers of the issue. Issuance and allotment cannot be segregated as allotment culminates into the issuance of shares. Noticee has tried to segregate

the issuance and allotment and circumvent the applicability of the NCRPS Regulations. Had the Noticee refunded the funds to applicants of NCRPS issue after the notification of NCRPS Regulations, it could have been understood that there was no non-compliance with the extant provisions by the Noticee. However, Noticee continued with the allotment in multiple tranches even after the notification of NCRPS Regulations and made allotments to 10924 investors in 223 tranches. Thus, I find that provisions of NCRPS Regulations become applicable to the Noticee. I find that Noticee's contention that NCRPS were not issued after notification of NCRPS Regulations and consequently NCRPS regulations were not attracted is incorrect and thus, not tenable.

32. As already mentioned before, the Noticee did not file any prospectus, circulated any abridged prospectus or made any listing application to Stock Exchange regarding the said allotments or made any other compliances relating to public issue under NCRPS Regulations, 2013.

33. Based on the above findings, I conclude that the Noticee has violated provisions of regulations 4(2)(a), (b), (c), (d), regulation 4(5), regulations 5, 6, 7, 8, 9, 13, 15, 16, 16B(1) and 22 of NCRPS Regulations.

ISSUE II: Does the violation, if any, on part of the Noticee attract penalty under Section 15HB of the SEBI Act?

34. The provisions of Section 15HB of the SEBI Act read as under:

SEBI Act, 1992

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.*

35. I further note that, the Hon'ble Supreme Court of India in the matter of Chairman, SEBI Vs Shriram Mutual Fund {[2006]5 SCC 361} has 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 and hence the intention of the parties committing such violation becomes wholly irrelevant..............."

I am therefore of the view that it is a fit case for imposition of penalty.

ISSUE III: If so, how much penalty should be imposed on the Noticee taking into consideration the factors mentioned in Section 15J of the SEBI Act?

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

15J -Factors to be taken into account by the adjudicating officer

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 investor/+s as a result of the default;

(c) the repetitive nature of the default.

37. I note that the material available on record has not quantified the amount of disproportionate gain or unfair advantage, if any, made by the Noticee and the loss, if any, and suffered by the investors as a result of the Noticee failure. I also note that no prior default of the Noticee is available on record. I observe that case pertains to 2013-2014 i.e. 8-9 years old. Further, Noticee has complied with SEBI Circular dated December 31, 2015 and offered the allottees an option to take

refund of their invested value along with interest at 15% per annum, and it is noted that none of the investors availed refund. I would consider this as the mitigating factors while imposing penalty on the Noticee.

ORDER

38. Having considered all the facts and circumstances of the case, the material available on record, the submissions made by Noticee, the mitigating factors as stated above and also the factors mentioned in Section 15J of the SEBI Act, I, in exercise of the powers conferred upon me under Section 15-I of the SEBI Act and Rule 5 of the Adjudication Rules, hereby impose a penalty of ₹ 5,00,000/- (Rupees Five Lakhs Only) on the Noticee for violation of provisions of regulations 4(2)(a), (b), (c), (d), regulation 4(5), regulations 5, 6, 7, 8, 9, 13, 15, 16, 16B(1) and 22 of NCRPS Regulations.

39. 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.

40. The said confirmation of e-payment made in the format as given in table below should be sent to "The Division Chief, EFD – DRA - 4, 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)	

41. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this Order, SEBI may initiate consequential actions including but not limited to recovery proceedings 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.

42. In terms of the provisions of Rule 6 of the Adjudication Rules, a copy of this order is being sent to Noticee i.e. Indreshwar Sugar Mills Limited, and also to the Securities and Exchange Board of India.

Place: Mumbai **BARNALI MUKHERJEE**

Date: October 28, 2022 **ADJUDICATING OFFICER**