BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER No.: Order/GR/KG/2020-21/11259]

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992.

In respect of:

Swallow Associates LLP

(erstwhile RPG Cellular Investments and Holdings Limited)

(LLPIN: AAB-1953)

In the matter of Zensar Technologies Ltd.

BRIEF FACTS OF THE CASE

1. Securities and Exchange Board of India (hereinafter referred to as "**SEBI**") had conducted investigation into the trading in the scrip of Zensar Technologies Limited (hereinafter referred to as "**ZTL**"/ "**Zensar**") and into the possible violation of the SEBI Act and regulations framed thereunder. The investigation had *prima facie* revealed that **Swallow Associates LLP** (erstwhile RPG Cellular Investments and Holdings Limited) (hereinafter referred to as the "**Noticee**") was a promoter group entity in ZTL and held 14.41% of the shares of ZTL as on December 2009. The said shareholding had increased to 27.92% indicating that the Noticee was steadily increasing its shareholding in ZTL. It was *prima facie* observed that in the process of increasing its shareholding, the Noticee had triggered open offer obligation under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations,

1997 (hereinafter referred to as the "**SAST Regulations 1997**") and disclosure obligations under SAST Regulations 1997 and the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as "**PIT Regulations**").

APPOINTMENT OF THE ADJUDICATING OFFICER

2. Earlier, Shri Satya Ranjan Prasad, General Manager (as he then was) was appointed as the Adjudicating Officer ("**AO**") by the competent authority. Pursuant to his transfer, Shri P.K. Kuriachen, General Manager (as he then was) was appointed as the AO. He had issued a notice dated May 30, 2012 (no. EAD-2/SC/11978/2012) (hereinafter referred to as the "**1st SCN**"), asking the Noticee to show cause as to why adjudication proceedings should not be conducted *qua* the Noticee and penalty not be imposed under section 15A(b) of the SEBI Act for the alleged violation of Regulations 7(1) and 7(1A) of the SAST Regulations 1997 and Regulation 13(3) read with Regulation 13(5) of the PIT Regulations. Thereafter, another notice dated May 16, 2013 (hereinafter referred to as the "**2nd SCN**"), was issued by the AO asking the Noticee to show cause as to why adjudication proceedings should not be conducted and penalty not be levied under section 15H of the SEBI Act for the alleged violation of Regulation 10 of SAST Regulations 1997. Thereafter, Ms. Anita Kenkare, General Manager, Shri D. Sura Reddy, General Manager, Shri Prasad Jagadale, General Manager and Shri Sahil Malik, General Manager, Shri V.S Sundaresan, Chief General Manager, were appointed as AOs in the present case. Subsequent to their transfers, the undersigned has been appointed as the Adjudicating Officer on December 26, 2019.

SHOW CAUSE NOTICE, REPLY AND HEARING

3. The Noticee had replied to the 1st SCN vide letter dated December 31, 2012. The contents of the said reply are summarised as below:

   a) the SCN proceed upon an erroneous interpretation of the relevant provisions of the SAST Regulations 1997 and no disclosure obligations would arise under the said Regulations in the present case. One of the fundamental concepts on which the SAST regulations is based is that of *"persons acting in concert"*. Every obligation under the SAST Regulations is premised on aggregating the holdings of all persons acting in concert and regardless of individual shareholding of any person, the holdings of all persons acting in concert has to be reckoned as a collective aggregated shareholding of voting power.

      In support of this argument, the Noticee has cited portions of the Bhagwati Committee Report dated January 18, 1997, which had contributed towards the legislation of the SAST Regulations 1997 as well as several case laws.

   b) prior to the acquisition, the collective shareholding of the persons comprising the promoter group in ZTL for the quarter ending December 2009 was 53.09%. While the Noticee, a promoter group entity, did acquire 14,30,000 shares constituting 5.96% of the paid up capital of ZTL between January 4, 2010 and January 12, 2010, on the floor of the stock exchange, it is pertinent to note that shares were acquired from another promoter group entity, a material fact that the SCN fails to take note of.

c) Accordingly, after the acquisition, whether the individual shareholding of the Noticee in ZTL had crossed 15% is entirely irrelevant. The collective shareholding of the promoter group who are persons acting in concert in ZTL, prior to and subsequent to the acquisition continued to remain the same.

d) Both the Noticee and the seller of the shares have at all relevant times always been disclosed as forming part of the promoter group. Therefore, they collectively exercised control over ZTL and therefore had a common objective or purpose of exercise of control and consequently, were deemed to be persons acting in concert along with other entities comprising of the promoter group for the purposes of the SAST Regulations 1997.

e) The SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011, for the first time contained an express provision under Regulation 3(3) that contemplated individual acquisitions by an acquirer to be reckoned (ignoring the collective entitlement of persons acting in concert) for determining whether the threshold for an open offer was triggered. This shows that the requirement of considering the individual shareholding of the acquirer disregarding the shareholding of the persons acting in concert was not envisaged under the SAST Regulations 1997 and therefore such provision cannot be given a retrospective effect.

f) Without prejudice to the aforementioned stand point of the Noticee, it had made an appropriate disclosure of the acquisition on July 27, 2012 under Regulations 7(1) and 7(1A) of the SAST Regulations 1997.

g) As regards the alleged non-disclosure of the Acquisition under Regulation 13(3) read with Regulation 13 (5) of the PIT Regulations, the Noticee submitted that it was under a *bona fide* belief that that it was not required to make a disclosure as the aggregate shareholding of the promoter group had remained unchanged. Subsequently, upon being notified of the discrepancy by SEBI, on July 27, 2012, it had made appropriate disclosures of the acquisition.

4. The Noticee had replied to the 2nd SCN vide letter dated August 14, 2013. The submissions of the Noticee with respect to the 2nd SCN is summarized as follows:

a) No open offer obligation at all arose with respect to the said acquisition of 1.79% of the shareholding of ZTL by the Noticee on January 4, 2010, which had led to the increase in individual shareholding of the Noticee from 14.41% to 16.20% although the collective shareholding of the Noticee and the persons acting in concert with it had remained unchanged at 53.09%, i.e., the aggregate shareholding of the promoter group had not changed pursuant to the *inter se* transfer of shares between two entities belonging to the promoter group.

In support of this argument, the Noticee has cited portions of the Bhagwati Committee Reports dated January 18, 1997, which had contributed towards the legislation of the SAST Regulations 1997 as well as several case laws.

b) Prior to the acquisition, the collective shareholding of the persons comprising the promoter group in ZTL for the quarter ending December 2009 was 53.09%. While the Noticee, an entity belonging to the promoter group of ZTL, did acquire 4,30,000 shares constituting 1.79% of the paid up capital of ZTL on January 4, 2010, it is pertinent to note that the said shares were acquired from another promoter group entity. Therefore, there had been no change in the aggregate shareholding of the promoter group in ZTL.

c) The individual shareholding of the Noticee in ZTL was entirely irrelevant. The collective shareholding of the promoter group, who were in fact persons acting in concert prior to and subsequent to the said acquisition, continued to remained the same.

d) Both the Noticee and the seller of the shares in question have always been disclosed as forming part of the promoter group. Therefore, they collectively exercised control over ZTL and therefore, had a common objective or purpose of exercise of control, and consequently, were deemed to be persons acting in concert along with other entities comprising of the promoter group for the purposes of the SAST Regulations 1997.

e) Even under the SAST Regulations 2011, an inter se transfer of shares between persons belonging to the promoter group of the target company is exempted from making open offers.

5. Subsequent to the transfer of the proceedings to the undersigned, an opportunity of personal hearing was provided to the Noticee on February 24, 2021, which was attended by the authorised representative of the Noticee. During the said hearing, the contents of the aforesaid replies dated December 31, 2012 and August 14, 2013 were reiterated. Vide letter dated March 5, 2021, the Noticee largely reiterated its earlier submissions with certain more recent rulings of the Hon'ble SAT in support of its submissions.

6. Thereafter, vide an email dated March 16, 2021, the Noticee was asked to inform (with documentary evidence) if it was a part of the promoter group of Zensar during the Financial Years 2006-07, 2007-08 and 2008-09, i.e, during the three years preceding the date of the said transaction. The Noticee replied to this query vide its email dated March 23, 2021, the contents whereof is reproduced herein below:

"2. The erstwhile RPG Cellular Investments and Holdings Limited (now Swallow Associates LLP) ("RCIHPL") was disclosed a constituent of the promoter and promoter group of Zensar Technologies Limited ("Target Company") in 2009 pursuant to a scheme of arrangement inter-alia amongst – RCIHPL and entities that then were part of the promoter group of the Target Company, viz - Kocilim Breweries Private Limited and Jubilee Investments & Industries Limited. The schemes were sanctioned vide orders passed by Hon'ble High Courts of Bombay, Calcutta and Delhi in the year 2009. All these entities are owned and controlled by the same promoter – the Harsh Vardhan Goenka family.

3. Therefore, in December 2009, when RCIHPL came to hold 14.41% of the shares and voting rights in the Target Company, it was disclosed as a part of the promoter group, prior to the impugned inter-se transfers between Pedriano Investments Limited and RCIHPL.

4. <u>Accordingly as stated in point no. 2 above, RCIHPL was not disclosed as part of the promoter group of the Target Company for three years prior to the inter-se transfers in question, as it did not hold any shares in the Target Company prior to the aforementioned scheme of arrangement.</u> The requirement that persons should be disclosed as promoters of the target company for a period of three years prior to the proposed transaction, is a requirement under Regulation 3 of the erstwhile 1997 Takeover Regulation, that deals with the conditions for seeking exemptions from the application *of provisions of Regulations 10, 11 and 12 of the 1997 Takeover Regulations.*

5. Regulation 3 has no application in the facts of the present case where none of the charging provisions of the 1997 Takeover Regulations have been triggered. Put differently, it is only when the charging provisions are triggered, that one must examine whether the transaction is eligible for an exemption under Regulation 3.

6. The ratio of the judgements of the Hon'ble Tribunal in Sunil Krishna Khaitan and Madhuri S. Pitti, is that the provisions of Regulation 10 of the 1997 Takeover Regulations are attracted only when there is a change in the collective holding of the acquirer and persons acting in concert with him. It does not depend on whether they are disclosed as promoters, whether for a period of three years or otherwise. Admittedly, both the transferor and transferee were persons acting in concert not only with each other but with other members of the promoter group as they were all controlled by the same promoter.

7. Therefore, once it is clear that the charging provision of Regulation 10 is not triggered since there is no change in the collective holding, the question of provisions for exemption under Regulation 3 and the need for disclosure of RCHIPL for a period of three years, does not arise at all. Your attention is drawn to the following judicial precedents that make this position abundantly clear.

a. The Hon'ble SAT's decision in BB Singal v. SEBI (Appeal No. 131 of 2004, Order dated January 27, 2005), where the Hon'ble tribunal held:

> *"Regulation 3 provides exemption from public announcement necessitated under Regulation 10, 11 or 12 in certain categories of acquisitions which include all acquisitions achieved through inter-se transfer of shares amongst promoters. We are therefore in agreement with the Appellants that before imposition of any penalty under Regulation 3 a prima facie case has to be established for violation of Regulation 10, 11, and 12. Unfortunately, however, the impugned order does not even remotely allege any violation of Regulation 10 or 11 or 12 which would have necessitated a public announcement by the acquirers. Thus, if there is no requirement of a public announcement, Regulation 3 is not at all attracted and there is no question of imposition of any penalty."*

b. Order of an adjudicating officer of SEBI in the matter of Transgene Biotek Limited against Koteshwara Rao (Order dated June 24, 2008), applying the decision of the Hon'ble Tribunal in BB Singal, above held that:

> *"I am of the view that Regulation 3 will come into play only if any of the substantive clauses. i.e. regulations 10, 11 or 12 of the SAST is / are first attached [sic]. Further on a careful reading of Regulation 3(3) of SAST, I find that acquisitions falling under regulations 3(1)(e), (h) and (i) of SAST needs to be notified by the acquirer to the stock exchanges in case the acquisition exceeds*

5% of the voting capital of the company. Though, in the instant case, the acquisition exceeded 5%, there is nothing on record to show that the noticee had sought exemption from the applicability of the provisions of regulation 11(1) under Regulation 3 of SAST. Since the noticee had not submitted himself under Regulation 3 and sought exemption from the applicability of Regulation 11(1), I am of the view that Regulation 3(3) of SAST was not attracted and therefore, I hold that there was no requirements to disclose the said acquisition under Regulation 3(3) of SAST. When Regulation 3(3) does not apply, the question of its violation cannot arise."

ISSUES AND FINDINGS

7. The issues for consideration in the present case are:

   a. Whether the Noticee has violated Regulations 7, 7(1A) and 10 of the SAST Regulations 1997 and Regulations 13(3) and 13(5) of the PIT Regulations, 1992??

   b. if the answer to the question raised above is in the affirmative, then whether the said violation attracts penalty under sections 15A(b) and 15H of the SEBI Act, 1992?

   c. If the answers to the above is in the affirmative, what should be the quantum of penalty?

8. I have perused and considered the submissions of the Noticee. Before proceeding further, I consider it important to reproduce the contents of the relevant legal provisions.

<u>SAST Regulations, 1997</u>

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.]*

[Explanation—For the purposes of sub-regulations (1) and (1A), the term 'acquirer' shall include a pledgee, other than a bank or a financial institution

and such pledgee shall make disclosure to the target company and the stock exchange within two days of creation of pledge.]

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*.

PIT Regulations, 1992

Continual disclosure.

13 (3) *Any person who holds more than 5% shares for voting rights in any listed company shall disclose to the company [in Form C] the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below 5%, if there has been change in such holdings from the last disclosure made under sub-regulation (1) or under this sub-regulation; and such change exceeds 2% of total shareholding or voting rights in the company.*

13 (5) *The disclosure mentioned in sub-regulations (3) and (4) shall be made within [two] working days of: (a) the receipts of intimation of allotment of* *shares, or (b) the acquisition or sale of shares or voting rights, as the case may be.*

Whether the Noticee has violated Regulation 10 of SAST Regulations 1997 by not making an open offer pursuant to its acquisition of shares which had led to the increase in its shareholding of ZTL from 14.41% to 16.20% on January 4, 2010?

9. In order to determine the question posed above, it is important to note the contents of Regulation 3 of SAST Regulations 1997, which provided exemption from the applicability of Regulations 10, 11 and 12 of the SAST Regulations 1997.

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—

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

(b) [qualifying promoters]:

<u>*[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.]*</u>

[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;

[(iv) the acquirer and persons acting in concert with him, where such transfer of shares takes place three years after the date of closure of the public offer made by them under these regulations.]

Similar provisions exist under the SAST Regulations, 2011:

General exemptions.

10. (1) The following acquisitions shall be exempt from the obligation to make an open offer under regulation 3 and regulation 4 subject to fulfilment of the conditions stipulated therefor,—

(a) acquisition pursuant to inter se transfer of shares amongst qualifying persons, being,—

(i) immediate relatives;

(ii) <u>persons named as promoters in the shareholding pattern filed by the target company in terms of the listing agreement or these regulations for not less than three years prior to the proposed acquisition;</u> [emphasis supplied]

10. From a reading of the aforesaid legal provision it becomes clear that *inter se* transfer of shares amongst the entities belonging to the promoter group for the

three years preceding the given transaction and who have been named as a part of the promoter group for the said period, is exempted from the obligation to make an open offer.

11. In this regard, I note that the Noticee has strenuously argued that it was a part of the promoter group of Zensar and therefore, the change in its individual shareholding cannot be considered without considering the collective shareholding of the entire promoter group. It is understood that that the overall shareholding of the promoter group had remained unchanged even while the Noticee individually had crossed the benchmark of 15% of shareholding through its acquisition of 4,30,000 shares on January 4, 2010. In this regard, I note that "*inter se*" transfer of shares amongst the promoters clearly means and refers to a change of the ownership of certain amount of shares from one entity to another belonging to the same group of promoters. Therefore, the very phrase *"inter se*" would clearly and unmistakably mean that the aggregate shareholding of the promoter group shall remain unchanged when the shares are transferred between two entities of the promoter group. In this regard, I have perused and considered the case laws cited by the Noticee in its replies to emphasize that the obligation of open offer cannot trigger unless there has been a change in the aggregate shareholding of the promoter group, who among them, were persons acting in concert.

12. I note that nowhere in the 2nd SCN it has been charged that the aggregate shareholding of the promoter group of Zensar had changed pursuant to the aforesaid acquisition of shares by the Noticee on January 4, 2010. The charge

is limited to the increase in shareholding of the Noticee beyond the benchmark of 15%. The Noticee's submissions in this regard is that this event had never triggered the obligations under Regulation 10 of the SAST Regulations 1997. On a plain reading of Regulation 10 of the SAST Regulations 1997 unmistakably shows that it creates an obligation on an acquirer to make an open offer whenever the acquisition crosses the benchmarks provided therein. In this regard, it is observed that the language of the said legal provision is couched in negative. In other words, the said provision expressly prohibits acquisition of shares without making an open offer whenever the limits as mentioned therein, are breached. The said provision itself does not provide any exemption from the rule contained therein, for *any* acquirer.

13. The exceptions to the strict stipulation of Regulation 10, is provided under Regulation 3 of SAST Regulations 1997. In this regard, I cannot accept the contention of the Noticee that Regulation 3 has no role to play in the present case since there is no *prima facie* case attracting regulation 10 in the factual matrix of the present case. Regulation 10 contains an overarching principle of the SAST Regulations 1997, i.e., any attempt at substantial acquisition of shares (by acquiring in excess of certain benchmarks) can only be made in conjunction with an open offer to the existing shareholders to exit from the target company. Therefore, any breach of any of the benchmarks laid down under Regulation 10, creates an obligation for making an open offer. This obligation does not distinguish between an individual acquirer or a collective of entities jointly acting as acquirers and does not talk about any post-acquisition scenario, i.e., whether the aggregate shareholding of the promoters or a 'group'

(as defined under MRTP Act) changes or not subsequent to the acquisition. The disjunctive phrase "or" used in *"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).."* clearly means that whenever the acquisition of an acquirer in his/her/its individual capacity or as a part of a larger group exceeds the thresholds laid down therein, the obligation to make an open offer gets triggered. The said provision does not at all deal with any change or otherwise in aggregate shareholding of the group that the acquirer may belong.

14. The exception to the broad rule of Regulation 10 is therefore, only provided under Regulation 3 of the SASt Regulations 1997. The said Regulation *inter alia* provides exemption from the general rule of Regulation 10 in a host of scenarios, one of them being an inter se transfer of shares between the promoters, under Regulation 3(1)(e) therein. The said exemption however, is not "automatic" as the proviso to the said Regulation stipulates that "*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*". This, therefore, is a condition precedent for availing the exemption under Regulation 3(1)(e). Admittedly, the Noticee does not fulfil this criterion as it was not declared to be a part of the promoter group of the target company in the three preceding financial years prior to the acquisition of shares on January 4, 2010. In this context, I refer to the judgment of the Hon'ble SAT in *Big Star Films Limited and Ors. vs. Securities and Exchange Board of India and Ors.* (SAT) : (MANU/SB/0104/2003), wherein it was *inter alia* held that:

"2. The main issue in the appeal is that whether or not the acquisition of 64.38% shares of the company by the Appellants is an acquisition covered under regulation 3(1)(c) enjoying exemption from the purview of regulation 10. Regulation 3 of the 1997 Regulations exempts certain acquisitions from the purview of regulation 10, 11 and 12. Regulation 10, 11 and 12 requires the acquirer to make a public announcement to acquire shares from the other shareholders of the target company on the acquisition of shares or voting rights in a company crossing certain limits/or acquiring control over the company, as per the Regulations. But the acquirers are not obliged to make such public announcement to acquire shares if the acquisition is one falling under the exempted categories provided under regulation.

3. ….. But the exemption is not automatic. It is subject to fulfilment of the conditions provided in clause (i) and (ii) of regulation 3 (1) (c). These conditions are:

*(i) *******

*(ii) *****"*

The aforesaid judgment clearly establishes that wherever conditions are specified for grant of exemptions under Regulation 3 of SAST Regulations 1997, such conditions must be fulfilled in order to avail the exemption. This position is further supported by the in the matter of *Proposed acquisition of equity shares of M/s South Asian Enterprises Limited – Exemption application filed under regulation 4(2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997,* wherein it was *inter alia* held that:

The aforesaid application dated 23.2.2006 was forwarded to the Takeover Panel in terms of sub-regulation (4) of Regulation 4 of the Takeover Regulations. The Takeover Panel provided its report dated 9.03.2006 by which the Panel has recommended as under –

> *"The Acquirers are wholly owned subsidiaries of VLS Finance Ltd., the transferors of equity shares proposed to be acquired. The Transferor and Acquirers are covered within the definition of 'group' as given in regulation 3(1)(e)(i) of the Takeover Code read with Section 2(ef) of the MRTP Act, 1969. The proposed transfer of shares is an inter se transfer amongst group as defined in Regulation 3(1)(e)(i) of the Takeover Code and would ordinarily be covered under the exemption category stated in the Takeover Code. However, the 'group' is not disclosed in the previous annual report for the year 2004-05 of the target company and as such, exemption is sought from the applicability of Regulation 10 of the Takeover Code as automatic exemption under Regulation 3 (1)(e)(i) is not available.*

4.3 In the present case, admittedly, though the acquirers and the transferor are part of the 'group' for the purposes of regulation 3 (1) (e) (i) of the Takeover Regulations they have not been shown as 'group' in the last published Annual Report of the target company. Therefore, the proposed acquisition is not eligible for automatic exemption from applicability of regulation 10 of the Takeover Regulations since the condition regarding disclosure of acquirers and the transferor as 'group' in the last published Annual Report of the target company has not been fulfilled. [emphasis supplied]

15. With respect to the grant of exemption under Regulation 3(1)(e) of SAST Regulations 1997, I note that in the matter of *Mega Resources Limited Vs Securities & Exchange Board of India* (Appeal No. 438 of 2015) (decided on 7 September, 2017), the Hon'ble SAT had held as provided herein under:

"30. Next, we turn to the <u>contention of the appellant that the said acquisition was an inter se transfer amongst the promoters and, therefore, exempted from the provisions of Regulations 7(1) read with 7(2) and 11(1) read with 14(1) of the SAST Regulations, 1997.</u> It is pertinent to note that prior to the acquisition in 2001, the Appellant was not a promoter of the Company but a part of the A. K. Bajoria Group of companies which controlled the Company. The companies forming part of the Bajoria Group which held shares of Target Company were shown as Promoters of Target Company. It, therefore, follows that the Appellant, not being a shareholder of the Company prior to the said acquisition, could not be a promoter of the Company. The appellant became a promotor of the Company only after the acquisition of 25000 equity shares in question. Therefore, in our considered opinion, the said acquisition by the Appellant cannot be termed as an 'inter se' transfer of shares between different entities forming part of promoter group and therefore cannot be said to be exempt from the requirement of making a mandatory open offer.

<u>31. In any event, the exemption claimed by the appellant on the basis of inter se transfer amongst promoters under Regulation 3(1)(e) of the SAST Regulation, 1997, is not an automatic exemption but is subject to</u>

conditions. One such condition is that both the transferor and the transferee have to hold at least 5% of the shares in the Company for at least three years prior to the proposed acquisition. It is a fact that the appellant was not even a shareholder of the Company prior to the said acquisition. It is noted from Exhibit-C to the appeal, viz., particulars of share transfers made by the Appellant on 12.02.2001, that the appellant was not a shareholder of the Company before the said date. Therefore, it follows that the Appellant could not have held shares in the Company for three years prior to the Acquisition. Consequently, the provision of Regulation 3(1)(e)(iii) of SAST Regulation 1997 cannot said to have been complied with.

32. Another such condition is that a notification/report under regulation 3(3) of the SAST Regulation, 1997 is mandatorily required to be made to the stock exchange in question. It is a matter of fact that no such notification was made to the Calcutta Stock Exchange by the Appellant, as mandated, 4 days prior to the proposed inter se acquisition of shares between promoters. Thirdly, no disclosures were made by the Appellant under Regulation 7(1) and 7(2) of the SAST Regulations, 1997 as required under explanation to the Regulation 3(1)(e) of the SAST Regulation,1997. Fourth, a report was required to be filed within 21 days of the said acquisition with SEBI. Since no such report has been filed with SEBI, the said condition under Regulation 3(4) of the SAST Regulation 1997 has also not been complied with amongst others. Consequently, the appellant can seek no exemption from the applicability of Regulation 11 of the SAST Regulation, 1997.

33. Even assuming that the Appellant was a Promoter of the Company and had acquired the said shares as Promoter of the Company, the appellant having not complied with the aforesaid conditions, was not entitled to be exempted from making an Open Offer. As held by this Tribunal in Prem Chand Shah Vs. SEBI [Appeal No 192 of 2010] decided on 21.02.2011, even where an acquirer is exempted from making an Open Offer, the said exemption would not exempt the acquirer from making the necessary declaration under Regulation 7(1) and 7(2) of the SAST Regulation, 1997, as disclosures under the latter are mandatory.

16. In this context, I note that heavy reliance has been placed by the Noticee on the judgments of the Hon'ble SAT in *Sunil Khaitan Vs SEBI* (Appeal No. 23 of 2013, decided on June 19, 2013) and *Smt. Madhuri S. Pitti Vs SEBI* (Appeal No. 2 of 2013, decided on October 31, 2013). In *Sunil Khaitan*, it was not in dispute that the appellants therein were in control of the target company since its inception and there was no change in control despite conversion of the warrants, in question, into equity shares of the company. This fact is clearly distinguishable in the present case. As already held in the preceding paragraphs, it is an admitted fact that the Noticee was not a part of the promoter group of the company during the past three years prior to the impugned acquisition on January 4, 2010 and therefore, the exemption available for *inter se* transfer of shares between the promoter group, shall not be applicable to it. Further, in *Sunil Khaitan* case, requisite disclosures were made by the appellants in compliance with the SAST Regulations, 1997 and PIT Regulations, 1992, which is yet another distinguishing feature from the present

case. For availing the exemption under Regulation 3 of SAST Regulations, 1997, the disclosure provisions under Regulation 7 of SAST is necessary to be complied with. In this regard, I refer to the order of the Adjudicating Officer, SEBI in the matter of *Sungold Capital Limited and Ors* (decided on May 18,2020), wherein it was *inter alia* held by the concerned Adjudicating Officer that:

> *28. Noticee No. 2 in its reply submitted that Regulation 10 of SAST Regulations does not trigger as the acquirer and promoter group was already holding 17.94% holding from the year 2005 till 2008. I note that the acquisition of the Notice No. 2 is from other promoters and thus is an inter-se transfer, not resulting in any change of control, and in terms of Regulation 3(1)(e) would be exempt from complying with Regulation 10.*
>
> *29. I further note that Regulation 7 requires any acquirer, who acquires shares or voting rights which 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.*
>
> *30. Noticee No. 2 has not refuted the allegation that he failed to make the necessary disclosures required under regulation 7 and failed to submit a report to SEBI under 3(4) of the SAST Regulations, 1997.*

31. I note that as per Explanation (2) to Regulation 3(1)(e), 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.

Further, I note that in *Sunil Khaitan*, it was not a case of *inter se* transfer of shares amongst the promoters, but an increase in shareholding due to the preferential allotment of the shares by the target company.

17. In fact, in the said judgment of *Sunil Khaitan*, a reference has been made by the Hon'ble SAT to the case of *Ushdev Trade Ltd. vs. SEBI* (Appeal No.106 of 2010, decided on September 14, 2010) which I find to be relatable to the factual situation in the present case. In that case, one promoter group company had transferred its entire shareholding of 18.74% in the target company to another promoter group company. The said transfer of shares however did not lead to any change in control over the target company. SEBI, after investigating the transaction, held the Appellant guilty of violating Regulation 10 of the SAST Regulation, 1997, i.e., acquiring more than 15% stake in the target company without making an open offer. The Appellant submitted that the purchase of shares was an inter-se transfer between two promoter group companies and the open offer was not made owing to a genuine belief that the obligation to do so had not accrued. This Tribunal, while upholding the impugned order of the Adjudicating Officer on merits, *inter alia* held as under:

4. We have heard the learned counsel for the parties who have taken us through the records. The fact that Ushdev Commercial transferred 18.74 per cent of the equity share capital of the target company to the appellant in an off market transaction is not in dispute. It is also not in issue that Ushdev Commercial and the appellant are promoters of the target company. It is, thus, clear that the transfer of shares was from one promoter to the other. Regulation 10 of the takeover code which is said to have been violated by the appellant (shorn of the unnecessary details) provides that no acquirer shall acquire shares or voting rights which entitle the acquirer to exercise fifteen per cent or more of the voting right in a company unless the acquirer makes a public announcement to acquire shares of that company in accordance with the takeover code. The primary object of this provision is to give an exit opportunity to the existing shareholders of the target company in such an eventuality. <u>However, Regulation 3 exempts certain transfers of shares from the provisions of Regulation 10 and one such exemption relates to inter se transfer of shares amongst promoters</u>. Regulation 3 (1)(e)(iii)(b) as it stood at the relevant time read as under:-

> *"**Applicability of the regulation.***
>
> *3(1) Nothing contained in regulations 10, 11 and 12 of these regulations shall apply to:*
>
> *(a) xxx*
>
> *(b) xxx*
>
> *(c) xxx*

(d) xxx

(e) inter se transfer of shares amongst –

(i) xxx

(ii) xxx

(iii) (a) xxx

(b) 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.

……………………………”

Since the acquisition by the appellant was by way of transfer of shares from one promoter to another, it would have been exempt from the provisions of Regulation 10 provided that the transferor and the transferee fulfilled the requirements of the proviso to Regulation 3(1)(e)(iii) reproduced above. The proviso requires that the transferor and the transferee should have held the shares for a period of three years which they did not. Even though the transfer in the instant case was not strictly covered by the exemption clause, it could, nevertheless, be exempted by the Board under Regulation 3(l) of the takeover code had the appellant filed an application in this regard. [emphasis supplied]

The aforesaid observation is in principle squarely applicable in the present case and in fact demolishes the stand of the Noticee that it never required to seek an exemption from the obligation to make an open offer or that it had never triggered the open offer obligation under Regulation 10 of SAST Regulations, 1997.

In *Madhuri S. Pitti* the Hon'ble SAT had applied the ratio of *Sunil Khaitan* finding them to be factually analogous on the point of acquisition of shares, i.e., through preferential allotment of shares by the target company to a promoter group entity who has been declared since long to be a part of such group. No issue of inter se transfer of shares between entities purportedly belonging to the promoter group of the target company was involved in the said case as well and therefore is also distinguishable from the present case.

On the contrary, I find that in the cases of *Hemant S. Sonawala Vs Chairman, SEBI* (decided on October 29, 2002) and *Shin-Ho Petrochemical Company Limited Vs SEBI* [(2001) 31 SCL 29], the Hon'ble SAT had observed that all requirements under the proviso to the exemption clauses under Regulation 3(1)(e) of the SAST Regulations 1997 must be complied with for availing the exemption from making an open offer and Regulations 6,7 and 8 must be complied with by the acquirer for availing such exemption. This position is also being followed in the observation of the Hon'ble SAT in *Ushdev case* cited above.

18. Without prejudice to what has already been observed in the preceding paragraphs, I find that there is one issue pertaining to the triggering of Regulation 10 of SAST Regulations, 1997, which needs to be clearly answered. I note that the Noticee has strenuously argued that the acquisition of shares on

January 4, 2010, cannot be reckoned against it on an individual basis but should be reckoned with respect to the entire promoter group's holding which was around 53% at that point in time, for the reason that all other co-promoters were PACs and therefore the said acquisition of January 4, 2010, needs to be viewed as an acquisition of the PACs together. Further, according to the Noticee, since the aggregate shareholding of Noticee taken together with such PACs (co-promoters in the target company) had remained unchanged subsequent to the said acquisition, Regulation 10 was not triggered at all.

19. As already brought out above, the present case is one of an inter se transfer of shares amongst entities belonging to the promoter group of the target company. Therefore, it is obvious that the aggregate shareholding of the group shall remain unchanged pursuant to such transfer of shares. However, I find that the transferor and the transferee were two entities belonging to the promoter group who were standing on two opposite directions of the said transaction. One was selling while the other was buying and the same cannot be considered to be done "*with a common objective*" as stated in the SAST Regulations, 1997. In this regard, I find it relevant to refer to the order of SEBI in *Patels Airtemp (India) Ltd.* (Order No. WTM/GM/EFD/42/2018-19, decided on July 25, 2018) passed under sections 11 and 11B of the SEBI Act, 1992, wherein it was *inter alia* observed as reproduced herein below:

> *16. From the above provisions, it emerges that for qualifying as being "person acting in concert" under regulation 2(1)(q)(1), the persons must have a common objective or purpose of acquisition of shares or voting*

rights. However, I note that in the instant case, the acquisition in question was an inter se transfer of shares from one promoter entity (i.e. Shri Prakashbhai N. Patel) to another promoter entity (i.e. the Noticee), which implies that the promoter entities, including the Noticee, did not have a common objective or purpose of acquisition but were rather acting in opposite directions, where one promoter entity had purchased the shares and another entity had sold the same shares. Further, I note that even the deeming provision provided under regulation 2(1)(q)(2) does not make the Noticee and the other promoter entities "persons acting in concert" as the opposite nature of transaction on part of the Noticee and the selling promoter entity clearly establishes the contrary. In this regard, it is relevant to refer to the judgment of the Hon'ble Supreme Court in the matter of Daiichi Sankyo Company Ltd. vs. Jayaram Chigurupati & Ors. (MANU/SC/0454/2010 : AIR 2010 SC 3089), where it has been held that-

> *"44. ... ... There can be no "persons acting in concert" unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares etc. of the target company. For, dehors the element of the shared common objective or purpose the idea of "person acting in concert" is as meaningless as criminal conspiracy without any agreement to commit a criminal offence. The idea of "persons acting in concert" is not about a fortuitous relationship coming into existence by accident or chance. The relationship can come into being only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose of*

acquisition of substantial acquisition of shares etc. of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement or an understanding, formal or informal; the acquisition of shares etc. may be direct or indirect or the persons acting in concert may cooperate in actual acquisition of shares etc. or they may agree to cooperate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the sin qua non for the relationship of "persons acting in concert" to come into being.

45. ... ...

46. ... ...

47. ... ...

48. It needs further to be noted that the presumption created by virtue of the deeming provision is expressly left open to rebuttal as indicated by the concluding words "unless the contrary is established" occurring in sub-regulation (2). ... ..."

17. Considering the above, I find that the Noticee's claim that it was acting in concert with other promoter entities, while acquiring the said shares cannot be sustained.

I note that the aforesaid cited order refers to the definition of "*Persons Acting in Concert"* under SAST Regulations, 2011, but the essence of the said observation is squarely applicable even to the present case applying the definition of "*Persons Acting in Concert*" as provided under SAST Regulations, 1997, in the context of *inter se* transfer of shares among the promoters.

20. I also note that an analogous issue was raised (prior to the impugned transaction of the Noticee in the present case), in the case of *Swedish Match AB and Ors. vs. Securities and Exchange Board of India* (MANU/SB/0025/2003) [decided on February 18, 2003], wherein it was observed by the Hon'ble SAT (at paragraph no. 43 of the order) as reproduced herein below:

> *"43. But it is difficult to hold that they were also acting in concert in the context of acquisition of 21.89% shares by Swedish Match Singapore in September, 2000. <u>It is noted that the public offer made in February 1998, was to acquire equity shares representing 20% of the fully paid up equity capital of the target company by Swedish Match Singapore Pte. Ltd. along with Plash and AVP acting in concert.</u> <u>At that point of time all the said entities were acquirers. But on 27.9.2000, the said Swedish Match Company acquired 21.89% shares from Plash and AVP. In the transaction their respective position was of buyer and seller and therefore it can not be said that they were acquirers or they were acting in concert as far as the said transaction is concerned. Swedish Match Singapore and Plash and AVP were not persons acting in concert at the time of the impugned</u>*

acquisition of shares by Swedish Match Singapore, for the reason that they had no common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company. In fact at that point of time the Jatia Group was giving up its joint control in the target company by divesting its shareholding. The Appellants' contention that once a person acted in concert (PAC) with the acquirer, for ever he is to be considered as a person acting in concert with the acquirer is not correct. It is not that once a PAC always a PAC. It is not a permanent relationship. It is the intent and action of the person that would decide as to whether that particular person is acting in concert with the acquirer. According to the Bhagwati Committee, (para 2.22 of the report). In the instant case of acquisition in the light of the facts it is difficult to conclude that Swedish Match Singapore Pte. Ltd. and Plash and AVP were acting in concert or for that matter Haravon and Seed acted in concert with the said Swedish Match Singapore at that particular juncture. It is noted that Swedish Match Singapore directly acquired 21.89% shares of the target company." [emphasis supplied]

21. Therefore, in light of what has been discussed in the preceding paragraphs, I hold that the Noticee had triggered the obligation to make an open offer under Regulation 10 of SAST Regulations 1997 when it had acquired shares exceeding the benchmark of 15% on January 4, 2010, and is not entitled for exemption under Regulation 3(1)(e) of SAST Regulations 1997, as it was admittedly not a part of the promoter group of the target company for the preceding three years. The Noticee having failed in making an open offer, is therefore, liable for penalty under 15H of the SEBI Act.

Whether the Noticee has violated Regulation 7(1) and 7(1A) of SAST REGULATIONS 1997 by not making a disclosure of its acquisition exceeding 15% on January 4, 2010 and increasing by 2% each time on January 8, 2010 and January 12, 2010? Whether these non-disclosures also amount to noncompliance of Regulation 13(3) read with Regulation 13(5) of the PIT Regulations, 1992?

22. The Noticee has not refuted the allegation that it had not disclosed the change in its shareholding from January 4- January 12, 2010, to Zenser and the stock exchanges. It has sought to argue that since its acquisition of shares were in the nature of inter se transfer of shares between entities belonging to the promoter group, the same was not necessary to be disclosed under Regulations 7 and 7(1A) of the SAST Regulations 1997. For this purpose, it has relied upon case laws expounding on the concept of "*persons acting in concert*" ("PAC") to show that its act of acquiring shares must be reckoned as an act of the Noticee along with its PACs and as there has been no change in the aggregate shareholding of the promoter group pursuant to such acquisition, the same was not required to be disclosed. The concept of PAC in the context of this case has already been discussed in the preceding paragraphs.

23. Regulation 7(1) of SAST Regulations 1997 (already reproduced in the preceding paragraphs) begins with the words "*Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him)..*". Therefore, it is clear who is being addressed by the said Regulation, viz. 'any acquirer' irrespective of whether or not he/she/it was

already holding any shares in the target company. The said Regulation thereafter proceeds to lay down the thresholds which, when crossed, shall amount to ‘substantial acquisition’ necessitating disclosure. Similarly, disclosures pertaining to consolidation of shareholding is being regulated under Regulation 7(1A) of SAST Regulations 1997, wherein change in shareholding of an existing shareholder beyond two percent needs to be disclosed by the concerned shareholder. I note that none of the said provisions provide for any exemption from the requirement of making the disclosure. In fact, there are no exemptions under the entire SAST Regulations 1997, which provides any exemption from disclosure under Regulations 7(1) and 7(1A). The exemptions provided under Regulation 3 are confined to open offer obligations and do not pertain to disclosures. It is an established position in law that exemptions from a legal stipulation, must be provided for in the concerned law itself. Unless such an exemption from a legal obligation exists in clear terms, the same cannot be provided. I note that Regulation 7 of SAST Regulations does not exempt inter-se transfer among the promoters from making disclosures. In fact, the provisions of Regulation 7 have been held to be mandatory and not merely directory. Hence the claim of the Noticee that the transaction was inter-se acquisition of shares from promoter of the company and acquisition of shares from one promoter by another promoter does not warrant any disclosure requirement as there was effectively no change in the total promoter shareholding, is not acceptable. In *Mrs. Komal Nahata v. Securities and Exchange Board of India* [Appeal No. 5 /2014 decided on January 27, 2014], the Hon’ble SAT had *inter alia* held as reproduced herein below:

"13. Argument that erroneous transfer was without consideration and did not constitute trade is also without any merit because, <u>for purposes of 7 SAST Regulations what is relevant is acquisition of shares and once acquisition of shares exceeds the limits prescribed therein, provisions of SAST Regulations are triggered</u>." [emphasis supplied]

In the same order, the Hon'ble SAT had also observed that:

"10. Under regulation 7(1) and regulation 7(2) of SAST Regulations, 1997 any acquirer who acquires shares which (taken together with shares if any held by him) would entitle him to more than five percent or ten percent or fourteen percent or fifty four percent or seventy four percent shares in a company shall disclose at every stage the aggregate of his shareholding in that company to the company and to the stock exchanges where shares of the target company are listed within two days of acquisition of shares or voting rights as the case may be. Similarly, regulation 13(1) and regulation 13(3) read with regulation 13(5) of PIT Regulations, 1992 required any person who holds more than 5% shares or voting rights shall disclose to the company, the number of shares held by such persons within 2 days of acquisition of shares and make continual disclosure even when the shareholding falls below 5% within two working days. In the present case, admittedly 3,75,000 shares of Arvind International Limited were transferred to the demat account of the appellant on September 13, 2010. Admittedly, transfer of 3,75,000 shares of Arvind International Limited constituted holding more than 5.35% shares of Arvind International Limited. Since no

disclosure was made within 2 days of such acquisition, it was apparent that the appellant has violated regulation 7(1) and regulation 7(2) of SAST Regulations, 1997. Similarly, on effecting retransfer, since disclosures were not made, appellant violated regulation 13(1) and regulation 13(3) read with regulation 13(5) of PIT Regulations, 1992."

The Hon'ble SAT in the case of *Mega Resources Limited* (cited in the preceding paragraphs) has observed at paragraph no. 33 therein as reproduced herein below:

"As held by this Tribunal in Prem Chand Shah Vs. SEBI [Appeal No 192 of 2010] decided on 21.02.2011, even where an acquirer is exempted from making an Open Offer, <u>the said exemption would not exempt the acquirer from making the necessary declaration under Regulation 7(1) and 7(2) of the SAST Regulation, 1997, as disclosures under the latter are mandatory."</u>
[emphasis supplied]

Therefore, I hold that the Noticee has violated regulation 7(1) of SAST Regulations 1997 on January 4, 2010 and Regulation 7(1A) on January 8 and 12, 2010, as detailed in the Table at paragraph no. 3 in the first SCN.

24. I note that the allegation of the violation of Regulation 13(3) read with Regulation 13(5) has not been seriously disputed by the Noticee. The Noticee has submitted that it was under a bona fide belief that such a disclosure under

the said Regulations was not necessary in the present case. In this regard, it has been submitted that in reply dated March 5, 2021:

> "*the delayed reporting was inadvertent, bona-fide and the violation is only technical and venial.*
>
> *22. Regulations 13(3) of the 1992 PIT Regulations which requires reporting of trades by persons holding over 5%, whenever there is a change in their shareholding in excess of 2%, whether by way of purchase or sale, has been done away with under the current 2015 PIT Regulations, since it overlaps with the disclosures under the Takeover Regulations.*
>
> *23. Besides, the information was already available in the public domain in the shareholding pattern filed under the listing agreement and the annual disclosures of the promoter holding under the 1997 Takeover Regulations. Therefore, it is humbly submitted that no penalty is at all warranted*."

In the order in respect of *Shri. Sohesh Prakash Shah in the matter of DJS Shares and Stocks Ltd [*Adjudication Order No. BM/AO- 150/2013 dated May 8, 2013], it has been *inter alia* held by the concerned Adjudicating Officer that:

> *"Noticee has submitted that since the transaction was not only within the promoter group but also within the family, he was under the bonafide impression the no disclosure was required under 13(4) of PIT Regulations. I note that disclosure requirement under Regulation 13(4) of PIT*

Regulations does not exempt inter-se transfer among the promoters nor there is any exemption for shares transferred in form of gift deeds. Thus the submission of the Noticee is not acceptable. Hence, I conclude that by not making such disclosures under Regulation 13(4) read with 13(5) of PIT Regulations he has violated the said provision."

In the said order, it has also been held that:

"15. The object of the SAST and PIT Regulation mandating disclosure of acquisitions beyond certain quantity is to give equal treatment and opportunity to all shareholders and protect their interests. To translate this objective into reality, measures have been taken by SEBI to bring about transparency in the transactions and it is for this purpose that dissemination of such information is required. In this regard I would like to rely upon the findings of Hon'ble SAT in the matter of Milan Mahendra Securities Pvt. Ltd Vs. SEBI (Appeal No. 66 of 2003 and Order dated November 15, 2006) regarding the importance of disclosure in which SAT has observed that:

"the purpose of these disclosures is to bring about transparency in the transactions and assist Regulator to effectively monitor the transactions in the market".

25. In this regard, it is also important to note that it is a settled position of law that when an action is being stipulated to be done in a prescribed manner, the said action must be done in that exact manner/ format. Therefore, the submissions

of the Noticee in its aforesaid reply dated March 5, 2021 to the effect that the requirement under Regulations 13(3) and 13(5) overlapped with concurrent disclosure under SAST Regulations 1997, is not a ground for condoning the violation of Regulations 13(3) and 13(5) of the PIT Regulations, 1992. Therefore, I agree with the view as expressed in the order cited immediately above and hold the Noticee to be non-compliant with the requirements of Regulation 13(3) read with Regulation 13(5) of the PIT regulations, 1992.

I, therefore hold the Noticee to be non-compliant of Regulations 10, 7(1), 7(1A) of the SAST Regulations 1997 and Regulations 13(3) read with Regulation 13(5) of the PIT Regulations, 1992. In view of the foregoing, I am convinced that it is a fit case to impose monetary penalty under sections 15H and 15A(b) of the SEBI Act, which reads as under:

> ***Penalty for failure to furnish information, return, etc.***
>
> ***15A.****If any person, who is required under this Act or any rules or regulations made thereunder, —*
>
> *(a)* *******
>
> *(b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to [a penalty [which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees]];*

***Penalty for non-disclosure of acquisition of shares and takeovers**.*

15H.If any person, who is required under this Act or any rules or regulations made thereunder, fails to,—*

(i) disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or

(ii) make a public announcement to acquire shares at a minimum price; or

[(iii) make a public offer by sending letter of offer to the shareholders of the concerned company; or

(iv) make payment of consideration to the shareholders who sold their shares pursuant to letter of offer,]

he shall be liable to a penalty [which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher].

As per the dates of violations, Section 15H of SEBI Act, as it stood prior to the amendment, is applicable. Nevertheless, guided by the principle of rule of beneficial construction of even *ex post facto* law to mitigate the rigour of law, as was laid by the Hon'ble Supreme Court in *T. Barai vs. Henry Ah Hoe and Ors*. (07.12.1982 -SC): MANU/SC/0123/1982 [(1983)1SCC177], the amended version of section 15H of SEBI Act is being applied.

26. In this regard, the provisions of Section 15J of the SEBI Act, 1992, Rule 5 of the SEBI Adjudication Rules require that while adjudging the quantum of penalty, the adjudicating officer shall have due regard to the following factors namely; -

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused to an investor or group of investors as a result of the default;

(c) the repetitive nature of the default.

27. With regard to the above factors to be considered while determining the quantum of penalty, it may be noted that no quantifiable figures or data is available on record to assess the disproportionate gain or unfair advantage and amount of loss caused to an investor or group of investors as a result of the default of the Noticee. It is observed that while the open offer was not at all made for breaching the threshold of 15% on January 4, 2010, the disclosures under Regulations 7(1) and 7(1A) of the SAST Regulations 1997 was made only on July 27, 2012, i.e., almost after nineteen (19) months from the day when the said disclosures should have been made. It is also noted from a reading of the reply dated December 31, 2012 and March 5, 2021, that no disclosure under Regulations 13(3) read with Regulation 13(5) was at all made by the Noticee.

ORDER

28. After taking into consideration all the facts and circumstances of the case, gravity of violations and the material on record, and also the factors stipulated

in Section 15J of the SEBI Act, 1992, I, in exercise of the powers conferred upon me under Section 15-I of the SEBI Act, 1992 read with Rule 5 of the SEBI Adjudication Rules, hereby impose the following penalty on the Noticee:

Entity	Violation	Penal Provisions	Penalty (Rs.)
Swallow Associates LLP	Penalty imposed under Section 15H of the SEBI Act, 1992 for violation of the provisions of Regulation 10 of the SAST Regulations, 1997 Under Section 15A(b) of the SEBI Act, 1992 for the violation of Regulations 7(1) and 7(1A) of the SAST Regulations, 1997 and Regulation 13(3) read with Regulation 13(5) of the PIT Regulations, 1992		**Rs. 10,00,000 (Rupees Ten Lacs Only) under Section 15HA of the SEBI Act, 1992 and Rs. 2,00,000/- (Rupees Two Lacs Only) under Section 15A(b) of the SEBI Act, 1992, aggregating to Rs. 12,00,000/- (Rupees Twelve Lacs only).**

29. The Noticee shall remit / pay the said amount of penalty within 45 days of receipt of this order either by way of Demand Draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, OR through online payment facility available on the SEBI website www.sebi.gov.in on the following path, by clicking on the payment link.

ENFORCEMENT Orders Orders of AO PAY NOW

30. The Noticee shall forward said Demand Draft or the details / confirmation of penalty so paid to the Enforcement Department – Division of Regulatory Action – I of SEBI. The Noticee shall provide the following details while forwarding DD/ payment information:

a) Name and PAN of the entity (Noticee)
b) Name of the case / matter
c) Purpose of Payment – Payment of penalty under AO proceedings
d) Bank Name and Account Number
e) Transaction Number

31. 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, 1992 for realization of the said amount of penalty along with interest thereon, *inter alia,* by attachment and sale of movable and immovable properties.

32. In terms of the Rule 6 of the SEBI Adjudication Rules, copy of this order is sent to the Noticee and also to Securities and Exchange Board of India.

Place: Mumbai **G. Ramar**

Date: March 31, 2021 **Adjudicating Officer**