BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OFINDIA

ADJUDICATION ORDER NO. EAD-7/BD/NR/2019-20/5281

UNDER SECTION15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT,1992 READ WITH RULE 5 OF SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES,1995

In respect of

Corporate Professionals Capital Pvt., Ltd.,
(PAN: AABCC7247B)
D-28, South Extension Part-I
New Delhi – 110049.

In the matter of ECE Industries Ltd.,

BACKGROUND

1. Securities and Exchange Board of India (hereinafter referred to as **'SEBI'**) conducted examination into the alleged irregularity in the matter of ECE Industries Ltd., to ascertain any possible violation of the provisions of the SEBI Act and the various Rules and Regulations made thereunder, during the period December 26, 2016 and January 13, 2017 *(Examination Period)*

2. It was observed that Mr. Prakash Kumar Mohta along with persons acting in concert {Promoter(s)/Acquirer (s)} came out with a delisting offer of ECE Industries Ltd., in December 2016 through reverse book building process in accordance with SEBI (Delisting of Equity Shares) Regulations, for which Corporate Professionals Capital Pvt., Ltd., SEBI registered Merchant Banker *(**hereinafter referred to as "CPCPL" / "Noticee"**)*, was appointed as the Manager to the Offer, by the Issuer Company.

3. It was observed that ECE Industries Ltd., notified The National Stock Exchange (NSE) of its Board meeting in which the delisting proposal was to be considered, on July 19, 2016 (i.e., the reference date). In the letter of offer dated December 14, 2016, the volume weighted average market price for 60 trading days immediately preceding the reference date was calculated from April 26,

2016 to July 19, 2016. Accordingly, the floor price of ₹ 202.56 was computed by the Noticee**.** The bids opened on December 26, 2016 and closed on December 30, 2016. In terms of the post offer public announcement (PA) issued by the Promoter and the Manager to the Offer on January 4, 2017, the delisting offer was deemed to be successful and exit price was determined to be ₹ 204 as against the floor price of ₹ 202.56.

4. However, upon analysis of the floor price, it was observed that for the purpose of calculating floor price, the Noticee had taken the average market price for each trading day and then did simple average of such daily price for 60 trading days, as against the volume weight to be given for each and every trade during the last 60 trading days period. The incorrect floor price computed by the Noticee had resulted into delisting offer price of ₹ 204, which was lower than the correct floor price of ₹ 233.66 as per the SEBI (Delisting of Equity Shares) Regulations.

5. Thus, it was found that CPCPL had incorrectly calculated the floor price in the delisting offer of ECE Industries Ltd., and accordingly made incorrect disclosures in the delisting letter of offer and subsequent public announcement, which is in violation of the provisions of Regulation 15 (2) of SEBI (Delisting of Equity Shares) Regulations, 2009 read with Regulation 8 (2) (d) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

APPOINTMENT OF ADJUDICATING OFFICER

6. Pursuant to investigation, SEBI initiated Adjudication Proceedings against the Noticee and appointed the undersigned as the Adjudicating Officer vide Order dated February 15, 2019 under Section 19 of SEBI Act read with Sub-section (1) of Section 15-I of the SEBI Act, 1992 and Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as **"Adjudication Rules"**) to inquire into and adjudge under Section 15 HB of SEBI Act for the alleged violation of the provisions of SEBI (Delisting of Equity Shares) Regulations, 2009 and SEBI (SAST) Regulations, 2011, committed by the Noticee.

SHOW CAUSE NOTICE, REPLY AND HEARING

7. A Show Cause Notice (hereinafter referred to as "SCN") bearing ref. no. EAD-7/BJD/NJMR/5776/2019 dated March 5, 2019 was served on the Noticee, under Rule 4 of SEBI Adjudication Rules to show cause as to why an inquiry be not held against it in terms of Rule 4 of the SEBI Adjudication Rules and penalty be not imposed under Section 15HB of SEBI Act, 1992 for the violations alleged to have been committed by it.

8. The Noticee vide email dated March 25, 2019 sought extension of 3 weeks for submitting its reply to the charges alleged in the SCN. The Noticee was granted extension of time till April 12, 2019 to submit its reply, which was communicated vide email dated March 27, 2019.

9. The Noticee vide letter dated April 12, 2019 submitted its reply, which was subsequently revised and submitted vide letter dated April 15, 2019. A summary of the submissions made by the Noticee are furnished hereunder:

    a) *Law was ambiguous, yielded more than one possible views: At the relevant time when floor price was being determined, the position under Delisting Regulations read with SAST Regulations w.r.t determination of floor price, were ambiguous and the law yielded more than one possible views, recourse or interpretations, of which the Noticee chose one for arriving at the floor price.*

    b) *VWAP made available by NSE was relied by the Noticee under bonafide and with caution: It is a matter of record that the VWAP was made available by NSE and this VWAP was required for determination of flor price in case of delisting. Hence, the Noticee relied on said VWAP and determined floor price. It is the case of Noticee that when the VWAP was specifically made available by NSE, Noticee could have not taken into account 'turnover' because the regulation 2 (1)(zb) under which VWAP was being determined did not prescribe use of turnover. That the Noticee acted under bonafide and with caution, in relying upon the VWAP made available by NSE.*

    c) *It is important to note that the Company made an application dated 26.11.2016 seeking in-principle approval from NSE for delisting of its* *equity shares, it is very significant to note that the application of in-principle approval made by the Company also disclosed the floor price. Furthermore, it is a matter of record that the application of in-principle approval was reviewed by the NSE for a good period of 13 working days, however, no query or issue was raised on the floor price and the NSE granted in-principle approval on 14.12.2016 to delisting of ECE's equity shares*

d) *Penalties are not justified if more than one interpretation is possible under law: It is a settled principle of law that if an act or omission is attributable to the ambiguity in law, giving rise to more than one possible view or interpretation, of which one is adopted, penalties are not justified. In the case of Excel Crop Care Limited vs. Competition Commission of India, AIR 2017 SC 2734, the Hon'ble Supreme Court held that:*

> *"if two interpretations are possible, one that leans in favour of infringer has to be adopted, on the principle of strict interpretation that needs to be given to such statutes."*

e) *No penalty should be levied if mandate of law is unclear: Violation of law, occurs, only if there is a failure to comply with the clear mandate or provisions of the law. However, if a law does not clearly state the requirements of compliance or is susceptible to more than one possible view or interpretation or recourse, out of which one is chosen, the same cannot be considered as violation of a law.*

f) *If a law does not specify a particular manner, no penalty can be levied on account that a different manner is followed: Penalty is attracted when the law specifies for doing a particular thing in a particular manner and there is a failure or omission to act in said manner. However, when the law does not specify a particular manner, and is rather ambiguous on the aspect of manner and methodology. Penalty cannot be imposed, merely on the ground that a particular methodology was not followed. It is relevant to note that here Regulation 15(2) of Amended Delisting Regulations read with Regulation 8(2)(d) of SAST Regulations did not specify a methodology or manner for determination of floor price and in absence of any such methodology or manner under law, Noticee ought not to be punished.*

g) *Penalizing Noticee would result in retrospective application of FAQs dated 03.05.2017: It is also a settled principle of law that a provision of law cannot, unless provided specifically, cannot be applied retrospectively. Courts of the nation has upheld that a law if applied* *retrospectively, without any authority under law, would impinge upon the fundamental rights protected under Constitution, hence, would be invalid. In light of this principle, it must be noted that when the ambiguities in Delisting Regulations and SAST Regulations were removed by SEBI on 03.05.2017 vide FAQs. Therefore, it is only from 03.05.2017 that any deviation from the methodology (as specified in the FAQ dated 03.05.2017) can be termed as violation of law. However, in the present case, the Noticee had determined floor price during July 2016 i.e. much before the issuance of FAQ, hence, the Noticee may please not be held liable for such prior period, when the applicable law was ambiguous and was susceptible to more than one possible view or recourse. Doing so would be a retrospective application of the FAQs, and would run contrary to the principles established by Constitution of India.*

h) Procedural law must be clear and unambiguous: It is a settled principle of law that a procedural law must be clear and unambiguous in laying a procedure methodology, especially in those cases where determination of value is required to be made. In the present case Regulation 15(2) of Amended Delisting Regulations, read with Regulation 2(1) (zb) and 8(2)(d) of SAST Regulations ought to lay down a clear and unambiguous procedure for arriving at floor price. However, the submissions made in this reply manifest that the provisions of law were unclear and yielded more than one possible interpretation(s), views or recourses and out of such, one was chosen by the Noticee. Therefore, in the facts and circumstances of the present case no penalty or any regulatory intervention is warranted on Noticee.

i) Law which borrows a concept, must be harmonized and provide clear guidance: Without prejudice to the foregoing submissions, Noticee humbly submits at the outset that the Regulation 15(2) of the Amended Delisting Regulations, for the purpose of determination of floor price, borrowed elements from Regulation 8(2)(d) and 2(1)(zb) of the SAST Regulations. However, Amended Delisting Regulations and SAST Regulations were not harmonized and thus yielded to the ambiguities as already explained in the foregoing submissions and gave rise to more than one possible view or interpretation. Further, the Noticee also submits before your good office that the concept of VWAP is a technical concept borrowed from finance and introduced in law. Therefore, the law ought to have provided a clear guidance or methodology (as has been provided for the first time on 03.05.2017 vide FAQs) for application of the concept VWAP in case of determination of floor price in case of delisting.

j) In case of ambiguous law, desirable measure is to remove the ambiguity: Noticee submits that if a law is ambiguous, or gives rise to more than one view(s) or interpretation or recourse(s) on account of non-clarity innate in the law, a person who either acts under such law or is subject to such law would naturally be susceptible to take any of the possible view(s) or interpretation(s) or recourse(s), so available. And even if at a later date, such ambiguity under law (giving rise to more than one view or interpretation or recourse) is removed, by either a legislative or administrative prescription, the person who acted or omitted to act, in a particular manner, on account of such ambiguity (when it existed), cannot be penalized for acting or omitting to act in such manner. It is a settled principle of law that the bonafide act or omission of a person, which is attributable to the ambiguity in law, are not punished. Rather, the desirable measure, in such situation, would be to remove such ambiguity from the law. That in the present case the ambiguity in law has been removed by SEBI vide FAQs dated 03.05.2017.

k) Standard of compliance has to emanate from law only and not from popular practices: Noticee also humbly submits that the requirement and standard of compliance under a law has to emanate from the law only and not from the views taken or interpretation followed by different persons/individuals. In this respect it may please be noted that in the facts and circumstances of present matter, as detailed above, it cannot by any analogy, be permissible under law, to penalize a person, merely because he did not follow the popular interpretation or view or recourse.

l) No penalty is attracted under Section 15HB of the SEBI Act: Section 15HB reads "whoever fails to comply", the opening para of 15HB makes it a condition precedent that the law must be clear and must clearly lay down the requirements of compliance and the manner and methodology of such compliance. In a situation like the present case, where the law was ambiguous on the aspect of determination of floor price until 03.05.2017, there can be no failure to comply on part of Noticee at the relevant time i.e. July 2016, when the law was ambiguous and susceptible to more than one possible view or interpretation or recourse, hence, in the present case, Noticee cannot be said to have violated provisions of Section 15HB of the SEBI Act.

m) FAQs are interpretation of regulator and SEBI supplies gaps in law through FAQs: It may please be noted that the FAQs are the interpretation of Regulator. When the law contains ambiguity, FAQs are one of the tool to remove ambiguity and bring standardization. Issuance of FAQs w.r.t determination of floor price, directly corroborates the *existence of ambiguity and possibility of diverse practices or views or interpretation being taken in the law. The very opening paragraph in any FAQ issued by SEBI states that the FAQs are not law but they are only clarification or supplement to the law. Therefore, unless they are contrary to the law, society is entitled to rely on the FAQ as SEBI's view on the law. Noticee have already submitted in earlier part of these submissions that at many occasions, SEBI has supplied gaps in law through FAQs. In this respect following observation made by the Hon'ble Whole Time Member of SEBI in its order dated 30.10.2014, in respect of representations made by Mr. Ashok Banwarilal Gupta in the matter of Open Offer made by Lorgan Lifestyle Limited to acquire shares of SVC Resources Limited is relevant to be noted—*

> *"The question before me is whether SEBI can interpret its own regulations, which it has done in the form of FAQs. <u>I am of the</u> <u>opinion that it can and it should, otherwise doubts raised about</u> <u>the effect of regulations would bring the entire business to a halt.</u> <u>I am of the opinion that such interpretations are valid so long as</u> <u>these are transparent and applied consistently without</u> <u>discrimination</u>."*

n) *Reasonable diligence is expected even from expert: It is a settled principle upheld by catena of judgments that the law expects only reasonable diligence, due care and skill from the experts. The standard under law, is that even an expert is expected to know reasonable things and not everything. Further, the law does not expect an expert to take the most accurate view, especially in a situation like present case, where the law was ambiguous and gave rise to more than one possible interpretation or view. In the present matter, it is not the case under SCN that the Noticee did not act diligently or lacked due care or skill. This also vindicates the fact that despite acting diligently and with due care and skill, difference in floor price occurred, which is directly attributable to the VWAP made available by NSE and ambiguities abound in law w.r.t determination of floor price.*

o) *ECE was the first case of delisting at NSE under the Amended Delisting Regulations: ECE's case was the first case of delisting at NSE after the Amended Delisting Regulations came into force. It is again placed on record that all other cases of delisting at NSE, had occurred either prior to the said Amendment or after 03.05.2017 (i.e. the ambiguities in Amended Delisting Regulations and SAST Regulations were removed by the SEBI). It is the case of Noticee that the facts, circumstances and position of law amid which the Noticee acted were unclear w.r.t* *determination of floor price and it is only vide FAQs dated 03.05.2017 that clarity w.r.t determination of floor price was provided by SEBI for the first time*.

p) *Notice ensured compliance with delisting Regulations: It is a matter of record that Noticee had acted diligently and with due care & skill in performance of its duties and compliance with Delisting Regulations in the matter of delisting of ECE. The verity of Noticee's diligence and discharge of duties is also corroborated from the fact that except for determination of floor price (which is replied in the present submissions), no other remark has been made on the Noticee.*

q) *Presumption of innocence is in favour of Noticee: It is a cardinal rule of law that innocence is presumed unless guilt is established in accordance with law. In the present case, Section 15HB read with Section 15 I of the SEBI Act, under which present adjudication is initiated, does not overturn the rule of presumption of innocence. That the Noticee has already submitted in detail that it acted amid facts, circumstances and ambiguous law giving rise to more than one possible interpretation or view or recourse. Submissions made by Noticee signify its innocence and bonafide. Hence, the above-said rule of law is in the favour of Noticee.*

r) *Noticee further places on record that after a lapse of more than 2 years from the above-said email dated 01.02.2017 of the Noticee, SEBI has sent a letter dated 19.03.2019 bearing no. SEBI/HO/CFD/DCR1/OW/P/2019/7220/3, to the promoter(s) of ECE and Noticee, directing the Company to pay Rs. 29.66 per share to the shareholders and instructing Noticee to release the payment from the Escrow Account to the shareholders. That immediately on receipt of the above-said letter from SEBI, the Noticee informed the promoter of Company to deposit money in the Escrow account for payment of additional amount of Rs. 6,20,17,608.24 (at the rate of Rs. 29.66 per share, including an interest @10% p.a.) to the shareholders who tendered their equity shares in the Delisting Offer of the Company. The Noticee further places on record that the payment of above-said differential amount has been done on 02.04.2019 and 09.04.2019 by the promoters of the Company.*

s) *The Noticee humbly submits that it is apparent form a plain perusal of the SCN that the entire examination in the aspect of determination of floor price in the present matter has been made on the basis of FAQs dated 03.05.2017, issued under SAST Regulations. However, as already stated above, the facts, circumstances and position under*

Delisting Regulations read with SAST Regulations that existed at the relevant time i.e. during July 2016, when the floor price was actually determined, were completely different from the facts, circumstances and position under law after the above-said FAQs. It is again emphasized before your good office that this reply explains the relevant facts, circumstances and position of law that actually existed at the time when floor price in respect of ECE's delisting was being determined and that such facts, circumstances and position of law has a significant bearing on the case of Noticee. Therefore, the Noticee most humbly prays in the interest of justice, that the present case and the actions of Noticee must be considered in light of the contemporaneous facts, circumstances and position of law and not in light of the prescriptions made by SEBI via above-said FAQs which came on 03.05.2017.

10. In the interest of natural justice and in terms of Rule 4 (3) of SEBI Adjudication Rules, vide Email dated April 16, 2019 the Noticee was given an opportunity of personal hearing before me, on May 2, 2019. The Noticee vide letter dated April 29, 2019 authorized Ms. Deepika Vijay Sawhney, Advocate and Mr. Ravi Prakash, Advocate from Corporate Professionals Advisors & Advocates (*hereinafter referred to as Authorized Representatives - ARs)* to appear on its behalf, before me on the scheduled date of hearing.

11. The ARs appeared before me on May 2, 2019 and undertook to make additional submissions by May 15, 2019. Vide email dated May 14, 2019, the Noticee informed that it had filed an application for settlement on May 9, 2019. Accordingly, the instant Adjudication proceedings were kept in abeyance. The Noticee vide email dated June 11, 2019 and August 12, 2019 sought information / reasons / materials recorded by SEBI for insertion of FAQs No. 70 on May 3, 2017 into the FAQs on Takeover Regulations, 2011. Vide email dated August 14, 2019, the Noticee was informed that consequent upon filing of settlement application by it, the instant Adjudication proceedings were kept in abeyance. Further, the Noticee was informed that all the documents which are relevant and relied upon were already provided along with SCN. For the purpose of carrying out inspection of documents, the Noticee was informed to get in touch with the concerned department of SEBI. I note from the records that the one of the ARs carried out inspection of documents on August 28, 2019.

12. I note that the settlement application filed by the Noticee was rejected by the Panel of Whole Time Members, SEBI, which was informed to me by an internal communication dated September 11, 2019. Accordingly, the instant Adjudication proceedings have been revived.

13. Thereafter, the Noticee vide communique dated September 23, 2019 while reiterating the earlier submissions made vide letter dated April 15, 2019, had made the additional submissions, which are summarized hereunder:

(a) *Delisting of ECE was first case of delisting at NSE after the amended Delisting Regulations came into force on March 24, 2015. Further, it was also the first case of delisting at NSE for the Noticee.*

(b) *At the relevant time, there was no prescription under Delisting Regulations w.r.t. reckoning the reference date for arriving at floor price. Any prescription regarding the "reference date" was made by SEBI through FAQs only, which shows that the amended Delisting Regulations contained ambiguities and/or gaps and the same was removed by SEBI through FAQs. It would be pertinence to note that the Noticee reckoned reference date by relying on the said FAQs only.*

(c) *The Noticee acted reasonably and in good faith, but the difference in floor price occurred owing to the ambiguity under Law. The good faith and bonafide of the Noticee is also evident from the fact that it sought advice of SEBI to take further action in the matter of ECE and preserved the amount lying in the escrow account in the interest of shareholders.*

(d) *The alleged irregularity in the floor price has been remedied by paying the difference amount to shareholders along with interest and delisting of ECE Industries Ltd., has already been approved by NSE on April 24, 2019.*

(e) *The Noticee places reliance on the Hon'ble SAT judgments in the case of Piramal Industries Ltd., Vs SEBI (Appeal No. 466, 467 of 2016) dated May 15, 2019, Corporate Strategic Allianz Ltd., Vs SEBI (Appeal No. 130 of 2017) dated March 29, 2019 in its defence.*

(f) *It is a matter of record that an inspection of the material / reasons behind issuance of FAQs was sought by the Noticee, which was not offered for inspection on August 28, 2019. In this connection, the Noticee would like to refer the Order of the Hon'ble SAT dated June 1, 2011 in the matter of*

Price Waterhouse Vs SEBI (Appeal No. 8 of 2011, Smitaben N Shah Vs SEBI (Appeal No. 37/2010) dated July 30, 2010 and Top Telemedia Ltd., Vs SEBI – Order dated November 11, 2007.

CONSIDERATION OF ISSUES AND FINDINGS

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

    I. Whether the Noticee has violated the provisions of Regulation 15 (2) of SEBI (Delisting of Equity Shares), 2009 read with Regulation 8 (2) of SEBI (SAST) Regulations, 2011?

    II. Whether the Noticee is liable for monetary penalty under Section 15HB of the SEBI Act?

    III. If so, what quantum of monetary penalty should be imposed on the Noticee?

FINDINGS

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

ISSUE I: Whether the Noticee has violated the provisions of Regulation 15 (2) of SEBI (Delisting of Equity Shares), 2009 read with Regulation 8 (2) of SEBI (SAST) Regulations, 2011?

16. Before moving forward, it is pertinent to refer to the relevant provisions of Regulation 15 (2) of SEBI (Delisting of Equity Shares), 2009 read with Regulation 8 (2) of SEBI (SAST) Regulations, 2011?

Regulation 15 (2) of SEBI (Delisting) Regulations, 2009

The floor price shall be determined in terms of regulation 8 of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, as may be applicable.

Regulation 8 (2) (d) of SEBI (SAST) Regulations, 2011

In the case of direct acquisition of shares or voting rights in, or control over the target company, and indirect acquisition of shares or voting rights in, or control over the target company where the parameters referred to in sub-regulation (2) of regulation 5 are met, the offer price shall be the highest of, —

(a) …….

(b) ……

(c) ……

(d) the volume-weighted average market price of such shares for a period of sixty trading days immediately preceding the date of the public announcement as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded;

(e) ……

(f) ……

17. It has been alleged that the Noticee incorrectly calculated the floor price in the delisting offer of ECE Industries Ltd., and accordingly incorrect disclosures were made in the delisting letter of offer and subsequent public announcement.

18. I note that ECE Industries Ltd., notified NSE of its Board meeting in which the delisting proposal was to be considered, on July 19, 2016 (i.e., the reference date). In the letter of offer dated December 14, 2016**,** the volume weighted average market price for 60 trading days immediately preceding the reference date was calculated from April 26, 2016 to July 19, 2016. Accordingly, the Noticee computed the floor price as under.

Date	Volume Weighted Average Market Price in ₹
26-Apr-16	170.70
27-Apr-16	168.87
28-Apr-16	169.19
29-Apr-16	169.84
02-May-16	169.34
03-May-16	170.12
04-May-16	169.58
05-May-16	172.62
06-May-16	169.76
09-May-16	170.23
10-May-16	170.29
11-May-16	170.58
12-May-16	170.58
13-May-16	169.23
16-May-16	169.16
17-May-16	169.99
18-May-16	169.20
19-May-16	171.69
20-May-16	172.56
23-May-16	168.53
24-May-16	170.04
25-May-16	169.99
26-May-16	171.81
27-May-16	175.95
30-May-16	210.65
31-May-16	202.59
01-Jun-16	201.68
02-Jun-16	199.05
03-Jun-16	197.43
06-Jun-16	193.16
07-Jun-16	188.67
08-Jun-16	181.80
09-Jun-16	181.73
10-Jun-16	185.45
13-Jun-16	177.17
14-Jun-16	170.54
15-Jun-16	178.49
16-Jun-16	180.99
17-Jun-16	180.05
20-Jun-16	179.86
21-Jun-16	180.94
22-Jun-16	180.27
23-Jun-16	181.10

24-Jun-16	170.49
27-Jun-16	184.38
28-Jun-16	198.31
29-Jun-16	225.11
30-Jun-16	210.91
01-Jul-16	207.84
04-Jul-16	207.67
05-Jul-16	244.64
07-Jul-16	292.07
08-Jul-16	327.67
11-Jul-16	336.37
12-Jul-16	303.93
13-Jul-16	327.17
14-Jul-16	324.10
15-Jul-16	317.64
18-Jul-16	318.77
19-Jul-16	314.96
Simple average for 60 trading days	**202.56**

19. I note from the above table that for the purpose of calculating floor price, the Noticee had taken the average market price for each trading day and then done simple average of such daily price for 600 trading days. Accordingly, the Noticee computed the floor price as ₹ 202.56

20. In this connection, I refer to the Regulation 15 (2) of SEBI (Delisting of Equity Shares) Regulations, 2009, which prescribes determination of floor price in accordance with Regulation 8 of SEBI (SAST) Regulations, 2011. Accordingly, the floor price in a delisting offer shall be the highest of various price points calculated as per parameters prescribed under Regulations 8 (2) (a) to (f) of SEBI (SAST) Regulations, 2011. I note that the Noticee had determined calculation of floor price under Regulation 8 (2) (d) of SEBI (SAST) Regulations, 2011, which is not disputed, but the methodology followed by it in computing the price under the aforesaid Regulation was incorrect. In this connection, the contents of Regulation 8 (2) (d) of SEBI (SAST) Regulations, are reproduced hereunder, for ease of reference.

"the volume-weighted average market price of such shares for a period of sixty trading days immediately preceding the date of the public announcement as

traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded".

21. In this connection, I draw reference to the phrase "volume weighted average market price" which is defined under Regulation 2(1)(zb) of SEBI (SAST) Regulations, which means "*the product of the number of equity shares traded on a stock exchange and the price of each equity share divided by the total number of equity shares traded on the stock exchange*".

22. I note that the volume weighted average market price as per the Regulation 2(1)(zb) of SEBI (SAST) Regulations, means that the volume weight has to be given for each and every trade during this 60 trading days period, which would be as per the following methodology.

Date	Daily Turnover (A)	Daily Volume (B)
26-Apr-16	2541900.15	14891
27-Apr-16	1833889.60	10860
28-Apr-16	298790.10	1766
29-Apr-16	1182613.95	6963
02-May-16	639930.80	3779
03-May-16	1509311.95	8872
04-May-16	44600.80	263
05-May-16	1720521.85	9967
06-May-16	1618818.95	9536
09-May-16	132099.40	776
10-May-16	1329620.40	7808
11-May-16	935466.65	5484
12-May-16	1303922.85	7644
13-May-16	1726837.00	10204
16-May-16	1197631.95	7080
17-May-16	448430.75	2638
18-May-16	1989276.95	11757
19-May-16	210491.50	1226
20-May-16	3399281.85	19699
23-May-16	756519.00	4489
24-May-16	1110368.35	6530
25-May-16	189878.35	1117
26-May-16	227129.55	1322
27-May-16	330792.55	1880
30-May-16	9814602.90	46592

31-May-16	2686381.10	13260
01-Jun-16	551391.35	2734
02-Jun-16	6951649.45	34925
03-Jun-16	611847.70	3099
06-Jun-16	122852.80	636
07-Jun-16	383753.85	2034
08-Jun-16	181976.85	1001
09-Jun-16	1627073.10	8953
10-Jun-16	736057.50	3969
13-Jun-16	2217340.55	12515
14-Jun-16	12912738.10	75718
15-Jun-16	1389028.25	7782
16-Jun-16	3381354.85	18683
17-Jun-16	607835.35	3376
20-Jun-16	923053.45	5132
21-Jun-16	294029.55	1625
22-Jun-16	188922.35	1048
23-Jun-16	47447.00	262
24-Jun-16	43889858.55	257429
27-Jun-16	264029.90	1432
28-Jun-16	1092462.70	5509
29-Jun-16	16202003.45	71975
30-Jun-16	4874940.85	23114
01-Jul-16	1257873.90	6052
04-Jul-16	579395.75	2790
05-Jul-16	15976780.15	65308
07-Jul-16	36114897.55	123651
08-Jul-16	27405750.20	83639
11-Jul-16	41703980.55	123981
12-Jul-16	19317189.80	63558
13-Jul-16	11060541.15	33807
14-Jul-16	4482361.20	13830
15-Jul-16	3070285.00	9666
18-Jul-16	2343611.10	7352
19-Jul-16	682194.50	2166
Total	302625617.60	1295154.00
Volume Weighted Average Market Price (VWAP) =A/B	**233.66**	

23. In line with the aforesaid Regulation, I note that the actual floor price should have been ₹ 233.66 and not ₹ 202.56, as computed by the Noticee. I note that the incorrect floor price calculated by the Noticee has led to delisting offer price

of ₹ 204, which is lower than the correct floor price of ₹ 233.66 as per the SEBI (Delisting) Regulations.

24. I note from the plain reading of applicable Regulations that there are two ingredients required for computing volume weighted average market price. First, number of equity shares traded on stock exchanges and the traded price of such equity shares. The main issue before me is to examine whether the Noticee was having reasonable access to the above data sets either on the NSE website or directly from NSE. I note that data regarding daily turnover and daily volume data pertaining to ECE Industries Ltd., along with VWAP were available on NSE website during the relevant period as all historical data pertaining to a scrip are displayed on NSE website. Besides, I also note that the Noticee being a Manager to the Offer for the purpose of delisting was already authorised and in touch with NSE. Therefore, there was no constraint on the part of the Noticee to seek desired data from NSE as a channel of communication between then was already open and available. Thus, I find that the Noticee had access to both data sets which are essential ingredients as mentioned above were available. In common parlance there are two methods of computing average, one is simple average and another is volume weighted average, which assigns greater weightage to volumes. Being a professional intermediary, the difference between simple and volume should be unambiguous and clear. I am of the opinion that Regulations clearly mentions of volume weighted average market price and also mentions how to compute the same. Therefore, there is no ambiguity in the type of average and the methodology of computing volume weighted average market price. In the absence of any mention of simple average in Regulations, taking simple average of VWAP of daily prices is clearly against the spirit of regulations. From the facts before me, I see that there is no ambiguity in the Regulations. Even if it is assumed there was any ambiguity, I am of the opinion that it would happen only when there are two or more alternatives. In the instant case the two methodologies of computing market price was either simple average of VWAP for each day or VWAP for entire period taken together. The choice of selecting the alternative should always be ones which are in the interests of investors not

otherwise. It is thus implicit that the Noticee was fully aware of the two alternatives during the relevant period and yet without seeking clarification from SEBI / NSE had decided to finalise such market price which was favourable to the Company and against the mandate of protecting the interest of investors. The difference in price arrived by employing two methodologies has already been mentioned in above paras. I note that the discrepancy in floor price computed by the Noticee is arising not because of ambiguities over applicable Regulatory provisions, but because of computation methodology followed by it in computing the floor price. In view of the above, I find no merit in the contentions raised by the Noticee that there was an ambiguity in Law in computation of floor price.

25. Considering above observations, I am of the view that the had Noticee failed to exercise due care and caution while discharging its functions as a registered Merchant Banker and consequently acted against the interest of investors. In view of above, I am not inclined to accept the submission that there was any ambiguity in interpretation of Regulations and therefore Noticee is not eligible for any benefit of doubt.

26. Further, I deem it appropriate to understand what due diligence means and the activities involved in discharging the same. The expression "Due Diligence" has been interpreted by Hon'ble Supreme Court of India, in the matter of Chander Kanta Bansal V. Rajinder Singh Anand (2008) 5 SCC 117. The relevant extract of the judgment reads as: *"……According to Oxford Dictionary (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's law Dictionary (18th Edn), "Due Diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Pharses by Drain-Dyspnea (Permanent Edn. 13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due Diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs….."*

27. Bearing in mind these principles governing 'due diligence', the merchant banker is expected not to passively or mechanically disclose whatever is given to it, but to exercise reasonable diligence to ensure adequate, true and fair disclosures in the RHP/Prospectus/Letter of Offer.

28. Further, the Noticee in its submissions stated that pursuant to filing an application dated November 26, 2016 seeking in-principle approval from NSE for delisting of its shares, no query or issue was raised by NSE on the floor price and the NSE granted in-principle approval on December 14, 2016 to delist ECE'S equity shares. In this connection, I am of the view that, in case of no action by Stock Exchange for any wrongdoing by a Listed Company, it does not preclude from taking any action against the Listed Company by SEBI. Therefore, I find no merit in the arguments put forth by the Noticee.

29. The Noticee further contended that a clear guidance or methodology for computation of floor price was provided by SEBI on its website through FAQs on May 3, 2017 and accordingly, any penalty on the Noticee would result into retrospective application of the FAQs. In this connection, I deem it appropriate to refer to the disclaimer clause in the FAQs on SEBI website, which reads as under:

> *"FAQs offer only a simplistic explanation/clarification of terms/concepts related to the SEBI (Delisting of Equity Shares) Regulations, 2009 ["Delisting Regulations, 2009"]. Any such explanation/clarification that is provided herein should not be regarded as an interpretation of law nor be treated as a binding opinion/guidance from the Securities and Exchange Board of India ["SEBI"]. For full particulars of laws governing the delisting of equity shares, please refer to actual text of the Acts/Regulations/Circulars appearing under the Legal Framework Section on the SEBI website".*

30. From the plain reading of the aforesaid disclaimer, issuance of FAQs by SEBI, is only for the purpose of ease of understanding, which does not supersede / overlap the Regulatory provisions governing therein, under the relevant Regulation / Acts / Circulars. Therefore, the Noticee being a Merchant Banker, is expected to be aware of the Regulatory provisions for computation of floor

price, rather than trying to take shelter under the guise of FAQs issued by SEBI. Therefore, I find the contentions raised by the Noticee devoid of any merit.

31. The Noticee submitted that the difference in offer price of ₹ 29.66 i.e., difference in actual floor price and the floor price computed by the Noticee (₹ 233.66- ₹ 204) along with interest was paid by the Issuer Company to the shareholders who tendered their equity shares in the delisting offer of the Company on April 2 & 9, 2019. Since, the differential amount was paid by the Issuer Company, the Noticee should not be held liable for any penalty. I note from the records that upon specific directions from SEBI only, the Issuer Company paid the difference in offer price to the shareholders. Accordingly, the Noticee cannot absolve itself from the liability of failing to discharge its duties as a Merchant Banker, which resulted into incorrect calculation of floor price and incorrect disclosures made in the delisting letter of offer and public announcement. If the wrong calculation methodology adopted by the Noticee is unnoticed, the same would have been continued to be followed by the Noticee. Therefore, I find no merit in the submissions made by the Noticee.

32. The Noticee in its reply dated September 23, 2019 while quoting the various Orders passed by the Hon'ble SAT, had sought copy of the material / reasons behind issuance of FAQs. In this connection, I would like to emphasize that all the documents which were relevant and relied upon in the SCN were provided to the Noticee, which are detailed hereunder:

33. In this connection, I would like to refer to the observations of the Hon'ble SAT in the matter of Mayrose Capfin Private Limited Vs SEBI (decided on 30.03.2012) wherein SAT observed that:*"....................the principles of natural justice require that the inquiry officer should make available such document and material to the delinquent on which reliance is being placed in the inquiry. It is not necessary for the inquiry officer to make available all the material that might have been collected during the course of investigation but has not been relied upon for proving charge against the delinquent. No prejudice can, therefore, be said to have been caused to the appellant on this count...."*

34. The Hon'ble Supreme Court in the matter of Chandrama Tewari Vs. Union of India, Through General Manager, Eastern Railways, (1988) 1 SCR 1102, held that *"it is not necessary that each and every document must be supplied to the delinquent facing charges. Only material and relevant documents are necessary to be supplied to him. If a document, even though mentioned in the Memo of charges, is not relevant to the charges, or if it is not referred to or relied upon by the enquiry officer or the punishing authority in holding the charges, no exception can be taken to the validity of the proceedings or the order passed on the ground of non- supply of the copy of the order"*.

35. In view of the above, since all the documents which were relevant and relied upon in the instant proceedings have been provided to the Noticee along with the SCN, I am of the opinion that principles of natural justice have been duly complied with in the instant proceedings and no prejudice has been caused to the Noticee.

36. The Noticee in its submissions relied upon Orders of the Hon'ble SAT and Hon'ble WTM in its defence. I have perused the case laws referred to and relied upon by the Noticee and I note that the same are totally distinguishable with the instant case.

37. In view of the foregoing, I conclude that the Noticee had incorrectly calculated the floor price in the delisting offer of ECE Industries Ltd., and accordingly made incorrect disclosures in the delisting letter of offer and subsequent public announcement. Therefore, I hold the Noticee for violating the provisions of Regulation 15 (2) of SEBI (Delisting of Equity Shares), 2009 read with Regulation 8 (2) of SEBI (SAST) Regulations, 2011

ISSUE -II: Does the violation, if any, attract monetary penalty under Section 15HB of SEBI Act.?

38. In view of the facts mentioned above, it is established that the Noticee has violated the provisions of Regulation 15 (2) of SEBI (Delisting of Equity Shares), 2009 read with Regulation 8 (2) of SEBI (SAST) Regulations, 2011, which is

liable for monetary penalty under Section 15HB of SEBI Act. The provisions of Section 15HB are reproduced hereunder.

Section 15HB of SEBI Act - *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 shall not be less than one lakh rupees but which may extend to one crore rupees.

39. In this connection, I draw reference to the observations of the Hon'ble SAT in the matter of Corporate Strategic Allianz Ltd., Vs SEBI (Appeal No. 224 of 2017) dated March 29, 2019, which reads as under:

> *"By not furnishing full disclosures and in fact allowing false information to creep in the disclosures has misled the investors. Thus, we are of the opinion that the appellant did not exercise due diligence and did not disclose fairly in the offer document. We are, thus, of the opinion that the imposition of penalty which could extend up to Rs.1 crore under Section 15HB imposed by the Adjudicating Officer in the given facts is just and reasonable".*

40. In view of the above observations of the Hon'ble SAT and the fact that the incorrect computation of floor price by the Noticee and incorrect disclosures made by the Noticee in the Letter of Offer and the subsequent public announcement, has misled the investors, I am not inclined to take a different view and deem it necessary to impose monetary penalty.

ISSUE – III: If so, what would be the monetary penalty that can be imposed taking into consideration the factors mentioned in Section 15J of SEBI Act?

41. While determining the quantum of monetary penalty under Section 15HB of SEBI Act, I have considered the factors stipulated in Section 15-J of SEBI Act, which reads as under:

Section 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 investors as a result of the default;

(c) the repetitive nature of the default.

42. The material made available on record has not quantified the amount of disproportionate gain or unfair advantage made by the Noticees and the loss suffered by the investors as a result of the Noticees' default. There is also no material made available on record to assess the amount of loss caused to investors or the amount of disproportionate gain or unfair advantage made by the Noticees as a result of default.

43. I note that the incorrect calculation of the floor price by the Noticee had misled the investors in arriving at actual offer price due to which some investors would not have even participated in the delisting process. Therefore, the acts of the Noticee being a SEBI registered intermediary in the capacity of Merchant Banker cannot be taken leniently and hence I consider it a fit case for imposition of penalty.

ORDER

44. After taking into consideration the nature and gravity of the violations established in the preceding paragraphs and 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, 1995, I hereby impose a penalty of ₹ 10,00,000/- (Rupees Ten Lakhs only) on the Noticee i.e., Corporate Professionals Capital Pvt., Ltd.,

45. The said penalty imposed on the Noticee, as mentioned above, shall commensurate with the violation committed and acts as a deterrent factor for the Noticee and others in protecting the interest of investors.

46. 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

47. The Noticee shall forward said Demand Draft or the details / confirmation of penalty so paid through e-payment to the Division Chief, Enforcement Department-I, DRA-III, SEBI, in the format as given in table below:

Case Name	
Name of Payee	
Date of payment	
Amount Paid	
Transaction No	
Bank Details in which payment is made	
Payment is made for	Penalty

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

49. In terms of Rule 6 of the SEBI Adjudication Rules, copies of this order are sent to the Noticee i.e., Corporate Professionals Capital Pvt., Ltd., and also to SEBI.

Date: October 31, 2019 **B J DILIP**

Place: Mumbai **Adjudicating Officer**