

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

UNDER SECTION 11(1) AND 11B OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH REGULATION 32 OF THE SECURITIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 2011.

IN THE MATTER OF XCHANGING SOLUTIONS LIMITED.

Brief Background –

1. Appeal No. 183 of 2018 was filed before Hon'ble Securities Appellate Tribunal ("**SAT**") by Mr. Pawan Kumar Saraf ("**Complainant**") praying for quashing of the order dated May 02, 2018 passed by Securities and Exchange Board of India ("**SEBI**") and seeking a direction to SEBI to direct the acquirer – Xchanging Technology Services India Private Limited ("**Acquirer**") and other respondents, viz. Xchanging Solutions Ltd ("**XSL**" / "**Target Company**"), Computer Science Corporation India Private Limited ("**CSC**" / "**PAC1**"), DXC Technology Company ("**DXC**" / "**PAC2**") and JM Financial Limited ("**JM Financial**" / "**Merchant Banker**") to revise the offer price from Rs.55.22 per share to Rs.79.58 per share along with interest.

2. SAT, vide order dated September 19, 2019 (“**SAT Order**”), inter-alia, directed the Complainant to file a consolidated representation afresh with SEBI within four weeks and also directed SEBI to decide on the representation by a reasoned and speaking order within three months, after hearing all the parties. The relevant extract of the SAT order is reproduced below:

“6. Having heard the learned counsel for the parties, the question whether the amended definition of Regulation 2(1)(j) would be applicable or the old definition would be applicable has to be considered and decided by some authority. In the instant case, we do not find as to how the offer price of Rs.55.22 was arrived at by the merchant banker as approved by SEBI. Further, the question that the offer price should be considered as on the date the public announcement of the offer was made i.e. on November 17, 2017 or on the date when the Merger Agreement on May 24, 2016 was made is also required to be considered. Since, we find that the authority has not considered these aspects it will not be appropriate for this Tribunal to consider these propositions at this stage.

7. In this regard, we find that the appellant had written several emails to SEBI intimating them that the offer price was required to be calculated as per the unamended definition of frequently traded shares. It seems that SEBI has not dealt with the objections raised by the appellant while finalizing the offer price of the acquirer.

8. For the reasons stated aforesaid, we dispose of this appeal directing the appellant to file a consolidated representation afresh annexing the earlier emails. Such representation shall be filed within four weeks from today. The representation filled by the appellant shall be decided by a reasoned and speaking order by SEBI after hearing all parties concerned within three months from the date when the representation is filed along with the certified copy of this order.”

Representation by the Complainant

3. Accordingly, the Complainant filed a representation dated October 15, 2019 (“**Representation**”) which was received in SEBI on October 17, 2019. The Complainant was also given an opportunity of hearing in the matter on

December 17, 2019, wherein certain additional submissions were made followed by detailed written submission vide letter dated December 23, 2019. The gist of the major submissions made in the Representation, during the hearing and the written submissions made thereafter, is given below:

- a. The Complainant was holding 23,000 equity shares of the Target Company.
- b. The Acquirer was required to make a Public Announcement (“**PA**”) by May 30, 2016 but the PA was finally made only in November 2017.
- c. The Acquirer and PACs, vide a PA dated November 17, 2017 and Draft Letter of Offer dated November 30, 2017, proposed to acquire up to 2,36,49,767 equity shares at an offer price of Rs.55.22 per share.
- d. Another open offer announcement had already been made in December 2015 and was completed in January 2017;
- e. The Acquirer, in the Letter of Offer in respect of previous open offer, used disclosures indicating that the frequency of trading in shares was determined based on 12 months preceding the calendar month in which the PA was made.
- f. The Complainant had sent various emails to SEBI pointing out the error in calculation of the offer price, wherein it was, inter-alia, stated that for the determination of frequently traded shares, Regulation 2(1)(j) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (“**SAST Regulations**”) to be referred to and thereafter, the parameters laid down in Regulation 8 of SAST Regulations must be looked upon.
- g. SEBI Observations Letter dated May 02, 2018, effectively rejected the complainant’s submissions in respect of the revision of the offer price and is contrary to law as well as past consistent practices.

- h. The Acquirer was supposed to come out with a PA within 4 days from May 24, 2016 but the PA was made only on November 17, 2017, i.e. after a delay of approximately 18 months.
- i. Offer price of Rs.55.22 per share to acquire 2,36,49,767 equity shares of the Target Company was erroneously arrived at by the Acquirer and PACs by deviating from the provisions of the SAST Regulations.
- j. Despite repeated representations, no correction or revision in the open offer price was made.
- k. The offer price in the matter should have been the highest calculated price amongst the various parameters laid down in Regulation 8(3) of SAST Regulations. However, before computing the price under Regulation 8(3)(e), it is important to determine whether the shares are frequently traded in accordance with Regulation 2(1)(j) of SAST Regulations.
- l. As per Regulation 2(1)(j), whether shares of the Target Company were frequently traded or not, has to be determined by evaluating trading data of shares during the preceding 12 months from the month when a PA is made. In the given case, since the PA was made on November 17, 2017, the turnover data for 12 months from November 2016 to October 2017 ought to have been evaluated to determine whether shares of the Target Company were frequently traded. However, the Acquirer and PAC have considered the turnover data from May 01, 2015 to April 30, 2016 to determine whether the shares were frequently traded.
- m. The wordings of erstwhile Regulation 2(1)(j) are absolutely clear and hence, no other interpretation other than the literal meaning is required.

- n. The turnover data of the shares of the Target Company for the period from November 2016 to October 2017 demonstrates that the trading turnover during the 12 months preceding the date of PA was more than 10% of the total number of listed shares and hence the shares were frequently traded.
- o. The Acquirer and PAC ignored the position of law which is applicable in the present case and considered a definition which was never in existence until September 11, 2018.
- p. The amended definition of 'frequently traded shares' under Regulation 2(1)(j) came into effect only from September 11, 2018 whereas the tendering period in the extant matter was closed in May 2018 and the payment was also completed by June 2018.
- q. The amended regulation 2(1)(j) helps the case of the errant acquirers.
- r. The only inescapable reference that can be drawn is that until September 11, 2018, the month in which the PA is made alone could be held to be the reference month for the purpose of determining whether the shares were frequently traded or not.
- s. The framers of SAST Regulations have used different phrases and words in different regulations, while referring to PA, indicating their clear intent in respect of the different timings of the PA which they had in mind while drafting the said Regulations.
- t. Clear language of SAST Regulations was ignored and the trading data of the equity shares of the Target Company, during the 12 months preceding the month in which the PA ought to have been made, was wrongly used resulting in erroneous determination that the shares were infrequently traded.

- u. The change in definition of frequently traded shares vide the notification dated September 11, 2018 was actually a complete revision and not a mere clarification.
- v. If the interpretation taken by the Acquirers are allowed, it will lead to greater mischief and encourage delaying the public announcement.
- w. There are a number of case laws providing that literal interpretation of law has to be followed even if the same could result in hardships.
- x. There have been multiple precedents where 'frequently traded' definition has been taken on the basis of actual PA date.
- y. The earlier Draft Letter of Offer of the Target Company, which was submitted to SEBI for approval on September 09, 2016, adopted the exact language of Regulation 2(1)(j) as it then stood.
- z. The reference to the date of PA mentioned in Regulation 13 and Regulation 8 of the Takeover code have different connotations and Regulation 8(3)(e) may not be applicable in all cases where Regulation 13(2)(e) is applicable.
- aa. There is no requirement to match the 'frequently traded period' with the 'pricing period' and both are not inter-dependent.
- bb. FAQs on the above subject also reiterate that the month in which the PA is actually made is to be reckoned as the reference month for determination of the frequency of the shares.
- cc. Determining the offer price by taking into consideration the amended regulation has resulted in giving retrospective effect to the amendment, which is erroneous and misconceived.

dd. If the old definition of frequently traded shares is considered, then the price per share would be fixed at Rs.79.58 instead of Rs.55.22 resulting in a loss of approximately Rs.58 crore to the public shareholders.

ee. SEBI, in the past, in the matter of Polo Hotels Ltd, had directed fresh open offers with enhanced offer price.

ff. The material and price sensitive information about the open offer triggered on May 24, 2016, which was within the open offer period of earlier open offer, was not disclosed to the public in time.

4. In view of the above, the Complainant has requested SEBI to revise the offer price from Rs.55.22 per share to Rs.79.58 per share along with interest in accordance with the provisions of SAST Regulations. The Complainant has also sought direction from SEBI to set aside the Observation letter dated May 02, 2018, to the limited extent of approving the open offer price of Rs.55.22 per share, to direct the Acquirers / PACs/ Merchant Banker to revise the Offer price from Rs.55.22 per share to Rs.79.58 per share and to direct payment of differential amount of Rs.24.36 per share along with interest, in respect of the 1,33,98,299 shares tendered in the open offer.

5. A copy of the Representation made by the Complainant was forwarded to other respondents in the matter viz. the Acquirer, PACs and the Merchant Banker to the offer and the parties submitted replies thereto.

Submissions by the Merchant Banker, Acquirer and the Persons Acting in Concert (“PACs”)

6. The Acquirer and the PACs have submitted a combined reply vide letter dated November 18, 2019. The Merchant Banker has submitted a separate reply dated November 18, 2019. The parties were also given an opportunity of hearing in the matter on December 17, 2019, wherein certain additional submissions were made by their representatives followed by detailed written submissions made vide letters dated December 24, 2019. The gist of the major submissions made in the reply, during the hearing and the written submissions made thereafter, is given below:

- a. A merger agreement was executed on May 24, 2016 between Hewlett Packard Enterprise Company, CSC, DXC and certain other entities and the transactions contemplated therein were completed on April 01, 2017. Pursuant to this, DXC became the ultimate parent company of the Target Company, thereby indirectly acquiring 78.77% of its voting share capital.
- b. The execution of the merger agreement triggered an indirect open offer and the Acquirer, along with the PACs, was required to make an open offer. While the PA was required to be made within 4 days of the reference date in terms of Regulation 13(2)(e) of SAST Regulations, the PA was actually made on November 17, 2017.
- c. The core issue that has to be decided by SEBI is whether the offer price for the open offer is to be calculated based on the pricing parameters applicable to frequently traded shares or infrequently traded shares.
- d. The definition of ‘frequently traded shares’, as provided for in Regulation 2(1)(j) has to be read in the context of Regulation 8(3) and Regulation

13(2)(e) of SAST Regulations, which are the charging provisions where the term ‘frequently traded shares’ is used.

- e. The definition of ‘frequently traded shares’ in Takeover Code has to be interpreted keeping in mind the context involved.
- f. The words “unless the context otherwise requires” is to be given due consideration while interpreting the definitions provided under Regulation 2 of the Takeover Code.
- g. Hon’ble Supreme Court, in *Pushpa Devi and Ors. Vs. Milkhi Ram (1990 2 SCC 134)*, inter-alia, held that in view of the words “unless there is anything repugnant in the subject or context”, a definition provided in the Act need not be applied rigidly throughout in the Act and different meanings can be ascribed depending upon the subject or context.
- h. Since the Volume Weighted Average Price (VWAP) of the equity shares under Regulation 8(3)(e) is to be ascertained with reference to the ‘reference date’, whether the equity shares are frequently traded or not would also have to be determined with reference to the same ‘reference date’.
- i. It will be illogical to determine whether shares are frequently traded or not with reference to a specific period but compute the VWAP for an altogether different period.
- j. The purpose of ascertaining ‘frequently traded shares’ is to determine whether the historical average prices should be taken as a relevant parameter for arriving at the offer price and accordingly, the frequency test and the historical market price are connected provisions and one provision cannot be read in isolation of the other.

- k. VWAP is relevant only in case the trading in such shares in the proximate period is of sufficient volume.
- l. The framework for computation of the offer price is provided in the SAST Regulations on the basis that the public announcement is made in accordance with the timelines set out therein. A regulation cannot be interpreted on the presumption of violation.
- m. To test frequency of the trading of shares of a target company for a particular period and then to take average of the share prices of such target company for an altogether different period would defeat the very purpose of determining the offer price based on the average prices of the target company.
- n. It is settled law that definitions are in aid of the charging provisions of any legislation and can even be ignored or adapted where the context so requires. Thus, reading the definition provisions i.e. Regulation 2(1)(j) of the SAST Regulations in isolation and without reference to the charging provisions will invariably lead to an absurd and unintended interpretation of the provisions.
- o. It is evident from the TRAC Report that the intention of the reform effected in the SAST Regulations was to ensure that the price of an indirect open offer is crystallized as on the date of the primary acquisition.
- p. The case laws / examples cited by the appellant in respect of SQS India and Sharp India are not comparable / relevant in the extant matter as the facts and circumstances in those matters are different.

- q. SAST Regulations do not contemplate a situation where the price / volume impacted due to the news of impending offer is required to be considered for determining the offer price.
- r. VWAP, as one of the parameters for computing offer price, is relevant only where the shares of a target company are frequently traded during the same period for which the share price data is used to compute the VWAP.
- s. SEBI, vide a clarificatory amendment dated September 11, 2018, amended the definition of 'frequently traded shares' to provide that the reference month for determining the 12 month period to test frequency would be the month in which the PA is required to be made. It is a settled principle that clarificatory amendments lead to existing provisions being interpreted in the manner that the legislature desires them to be interpreted and have retrospective applicability.
- t. The offer price has been calculated in due compliance with the provisions of SAST Regulations and does not warrant any interference.
- u. If the complainant's contention is upheld, it would lead to a situation where an acquirer could dictate / control the frequency, by merely selecting to delay the public announcement, opening doors for abuse by certain acquirers and would be detrimental to investors.
- v. Complainant's reliance on previous Letters of Offers is misplaced and the cases referred are clearly distinguishable.
- w. The complainant's interpretation, if upheld, would have wide and far reaching consequences, contrary to the purpose and context of the Regulations, detrimental to the interest of the investors in the securities market.

Relevant facts for consideration

7. A merger agreement was executed on May 24, 2016 between Hewlett Packard Enterprise Company, CSC, DXC and certain other entities and pursuant to the completion of these transactions, DXC became the ultimate parent company of the Target Company, thereby indirectly acquiring 8,77,53,949 equity shares of the Target Company representing 78.77% of its voting share capital.
8. The execution of the merger agreement on May 24, 2016 triggered an indirect open offer and the Acquirer along with the PACs, was required to make an open offer to the public shareholders of the Target Company under Regulations 3, 4 and 5 of the SAST Regulations. While the PA in relation to the open offer was required to be issued within 4 working days from the date of execution of the merger agreement in terms of Regulation 13(2)(e), the PA was made only on November 17, 2017.
9. The Acquirers have considered May 30, 2016, the date on which the PA ought to have been made under Regulation 13(2)(e) of SAST Regulations, as the reference date for determining whether the shares of the company were frequently traded. Since the trading turnover in the shares of the Target Company was less than 10% both in NSE and BSE during the during 12 calendar months preceding the month when the public announcement ought to have been made (May 01, 2015 to April 30, 2016), the offer price was calculated in accordance with the provisions of Regulation 8(4) after including interest for the delay as per Regulation 8(12) of the SAST Regulations. As per the said calculations, the offer price per share amounted to Rs.55.22 per share.

10. The Complainant, vide various correspondences, raised objection to the manner of computation of the offer price. According to him, the shares of the Target company were frequently traded during the 12 months period preceding the date on which the PA was actually made, i.e. November 17, 2017 and hence, the offer price should have been Rs.79.58 per share, computed in accordance with Regulations 8(3)(e) read with Regulation 8(12) of SAST Regulations.
11. Since the open offer was made by the Acquirer along with PACs with an offer price of Rs.55.22 per share, the Complainant filed Appeal No. 183 of 2018 before SAT, inter-alia, seeking to set aside the observations letter of SEBI dated May 02, 2018 in respect of the open offer price of Rs.55.22 per share and to direct SEBI to pass an order directing the Acquirer and the PACs to revise the offer price from Rs.55.22 per share to Rs.79.58 per share, along with interest.

Consideration of Issues

12. The main issue that arises for consideration in this case is as under:
- In case of a delay in making a PA, which of the two dates should be reckoned for the purpose of determining if the shares are frequently traded – date when PA is required to be made as per SAST Regulations or date when PA is actually made with a delay?***
13. According to the Complainant, the reference date for determining whether the shares were frequently traded or not, should be the date on which the PA was actually made, i.e. November 17, 2017. According to the Acquirer, PACs and JM Financial, the reference date for determining whether the shares were frequently traded or not should be the date on which the PA ought to have been

made, i.e. May 30, 2016. The primary contention of the Complainant in the matter is that the Acquirer and PACs have erroneously considered that the shares of the company were infrequently traded, taking an incorrect reference period and accordingly, the offer price was wrongly computed disregarding the market price, thereby causing loss to public shareholders.

14. The facts of the instant case relate to an indirect acquisition as a fallout of a global transaction. As such, the PA in such a case has to be made in accordance with Regulation 13(2)(e), within 4 working days from earlier of the date on which the primary acquisition is contracted and the date on which the intention or the decision to make the primary acquisition is announced in public domain. Further, the offer price in this case needs to be calculated in terms of Regulation 8(3) having regard to various criteria specified therein including Volume Weighted Average Price (VWAP) of the shares to be computed on the basis of the earlier of the dates mentioned above, provided such shares are frequently traded.

15. Before delving further into the matter, I would like to refer to the provisions of law relevant in the matter:

SEBI SAST Regulations 2011

Regulations 2 (1)(j) (as it stood prior to the amendment dated September 11, 2018)

“Definitions

2. (1) In these regulations, unless the context otherwise requires, the terms defined herein shall bear the meanings assigned to them below, and their cognate expressions and variations shall be construed accordingly,—

.....

(j) “frequently traded shares” means shares of a target company, in which the traded turnover on any stock exchange during the twelve calendar months preceding the calendar month in which the public announcement is made, is at

least ten per cent of the total number of shares of such class of the target company.”

Regulations 2 (1)(j) as amended w.e.f. September 11, 2018

“Definitions

2. (1) In these regulations, unless the context otherwise requires, the terms defined herein shall bear the meanings assigned to them below, and their cognate expressions and variations shall be construed accordingly,—

.....

(j) “frequently traded shares” means shares of a target company, in which the traded turnover on any stock exchange during the twelve calendar months preceding the calendar month in which the public announcement is required to be made under these regulations, is at least ten per cent of the total number of shares of such class of the target company.”

Regulation 8

“Offer Price.

8.(1) The open offer for acquiring shares under regulation 3, regulation 4, regulation 5 or regulation 6 shall be made at a price not lower than the price determined in accordance with sub-regulation (2) or sub-regulation (3), as the case may be.

.....

(3) In the case of an indirect acquisition of shares or voting rights in, or control over the target company, where the parameter referred to in sub-regulation (2) of regulation 5 are not met, the offer price shall be the highest of,—

(a) the highest negotiated price per share, if any, of the target company for any acquisition under the agreement attracting the obligation to make a public announcement of an open offer;

(b) the volume-weighted average price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the fifty-two weeks immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;

(c) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the twenty-six weeks immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;

(d) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, between the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the

public domain, and the date of the public announcement of the open offer for shares of the target company made under these regulations;

(e) the volume-weighted average market price of the shares for a period of sixty trading days immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, 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; and

(f) the per share value computed under sub-regulation (5).

(4) In the event the offer price is incapable of being determined under any of the parameters specified in sub-regulation (3), without prejudice to the requirements of sub-regulation (5), the offer price shall be the fair price of shares of the target company to be determined by the acquirer and the manager to the open offer taking into account valuation parameters including, book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such companies.”

Regulation 13

“Timing.

13.(1)The public announcement referred to in regulation 3 and regulation 4 shall be made in accordance with regulation 14 and regulation 15, on the date of agreeing to acquire shares or voting rights in, or control over the target company.

(2)Such public announcement,—

.....

(e) in the case of indirect acquisition of shares or voting rights in, or control over the target company where none of the parameters referred to in sub-regulation (2) of regulation 5 are met, may be made at any time within four working days from the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain.”

16. Prior to its amendment in September 2018, the term ‘frequently traded shares’, as defined in Regulation 2(1)(j) of the SAST Regulations, referred to shares of a target company, in which the traded turnover on any stock exchange during the twelve calendar months preceding the calendar month in which the public announcement is made, is at least ten per cent of the total number of shares of such class of the target company. The said definition has been

amended by SEBI with effect from September 11, 2018 by replacing the words 'is made' with the words 'is required to be made under these regulations'.

17. A careful reading of Regulation 8(3) would clearly reveal that the open offer shall be made at a price not lower than the price arrived at in any of the alternatives specified under this regulation. The sub-regulation (e) links the open offer price to the market price with the proviso that the share is frequently traded. Clearly, the intent of the regulation is to ensure that the market price, which is used to arrive at the open offer price, is determined in the backdrop of sufficient liquidity in the scrip and hence not subject to manipulation. In the circumstances, it is apposite that the regulation assesses liquidity in a share looking at how frequently the share is traded. This being the case, the frequency of trading in such shares has to be ascertained by co-relating it always to the period for which the market price is being referenced for the open offer purpose. The ultimate object of the definition of 'frequently traded shares' is to ensure that the investor gets the market price in the case of an open offer of a frequently traded share and in case the scrip is infrequently traded, the investor gets the fair value of shares as determined in accordance with Regulation 8(4). Thus the crucial date is the date when the offer is triggered and not when the Acquirer chose to make the PA. Hence, the definition of 'frequently traded shares' in Regulation 2(1)(j) has to be read along with the primary obligation cast on the Acquirer to determine the price as laid down in Regulation 8.
18. Adoption of the literal interpretation of the definition of 'frequently traded shares' in cases involving delayed PA, ignoring the context and purpose of the regulation, would lead to a dichotomy where the price and frequency of the

shares would be determined for totally unrelated periods. This could result in a scenario where the market prices of shares during the period when such shares were sparingly traded, are considered for determining open offer price. Adoption of such a view could seriously hamper the interest of public shareholders, whose rights could be adversely affected due to the acquirer's attempt to intentionally shift his obligation to make a PA, to a period when the shares were infrequently traded so as to avoid the market price being the offer price and vice versa, depending upon what suits him best.

19. It is also the settled position in law that any definition has to be read and understood in the context for which the definition is included. In other words, the definition cannot be used out of context or without reference to the object of the provisions for which such expression has been defined. In this context, I note that the Counsel for the Merchant Banker emphasized the opening words of Regulation 2 of SAST Regulations which contains definitions, viz., "unless the context otherwise requires", which would apply to all definitions. In this context reliance was placed on the judgment of the Hon'ble Supreme Court, in *Pushpa Devi and Ors. vs. Milkhi Ram* (1990 2 SCC 134) wherein it was held that definition need not be applied rigidly throughout in the Act and different meanings can be ascribed depending upon the subject or context. The relevant extracts from the said order are reproduced below:

"The opening sentence in the definition of the section states "unless there is anything repugnant in the subject or context". In view of this qualification, the court has not only to look at the words but also to examine the context and collocation in the light of the object of the Act and the purpose for which a particular provision was made by the legislature....."

.....Law as creative response should be so interpreted to meet the different fact situations coming before the court. For, Acts of Parliament were not drafted with divine prescience and perfect clarity. It is not possible for the legislators to foresee the manifold sets of facts and controversies which may arise while giving effect to a particular provision. When conflicting interests arise or defect appears from the language of the statute, the court by consideration of the legislative intent must supplement the written word with 'force and life'."

20. Thus, looking at the context of the definition of the expression 'frequently traded shares', I cannot ignore the fact that the very purpose of the definition is to determine the trading frequency to ascertain whether the market price of the shares could be considered for arriving at the Offer price or not. Since the frequency of trading of a scrip and the market price are both inter-linked and inter-dependent, an interpretation of the definition of 'frequently traded shares' to provide for its computation totally divorced from the period for which the market price is referenced to open offer price will, in my view, certainly defeat the regulatory intent.
21. I note that the said definition of 'frequently traded shares' in SAST Regulations has since been amended w.e.f. September 11, 2018 pursuant to the review of SAST Regulations undertaken for simplifying the language and removing inconsistencies in the said regulations. As always, the definition clause needs to be read with the operating clause providing for computation of the open offer price. Segregating the definition from the purport of the SAST Regulations would lead to absurd situations prejudicing the interest of investors, on the one hand and incentivizing the acquirers on the other. In this connection, I find it

appropriate to refer to the Discussion Paper dated March 28, 2018 seeking public comments on the proposed amendments, which clarified that the scope of the said review exercise was, inter-alia, to simplify the language, remove redundant provisions and inconsistencies, aligning with provisions of the latest Companies Act, 2013 or other new SEBI Regulations, and incorporating the circulars, FAQs and informal guidance in the regulations, without making any policy change, indicating that the amendments were of clarificatory nature. Thus, the said amendment was to emphasize the fact that the frequency of trading in shares will be determined with respect to the date on which the PA is required to be made and not the date on which it is actually made.

22. The Complainant has cited various case laws in support of his argument that literal interpretation of the definition of 'frequently traded shares' as it existed in Regulation 2(1)(j) of SAST Regulations, should be resorted to. I have considered all the arguments and find no merit in them as the case laws cited therein, inter-alia, provide for literal interpretation where the words of a statute were absolutely clear and unambiguous. I note that the said case laws are not relevant in the extant matter as the interpretation in the extant matter ignoring the context and purpose of the regulation would bring ambiguity and defeat the purpose of the provision, as already discussed above.
23. I have also examined the list of other 15 cases of open offer, cited by the complainant, in his submissions, where the date of actual PA was considered as a relevant date for determining frequency of trading in shares. I note that out of the 15 cases, 12 cases are not relevant in the matter as there was no difference in the due date for making the PA and the date on which the PA was

actually made. In the remaining 3 cases, (namely Multibase India Ltd., Sharp India Ltd. and Servotech Engineering Industries Ltd.) even though there was a delay in making PA, there was no occasion for interpreting the definition of 'frequently traded shares', as canvassed by the Complainant, since the shares continued to remain, during the period of delay, in the same category, i.e either in the category of 'frequently traded shares' or 'not frequently traded shares' and hence the determination of price was not affected because of the delay. Thus, the said cases do not bear any relevance to the present context as there was no change in the trading status of these scrips, from a frequency angle.

Conclusion

24. In view of the foregoing, I am of the considered view that the term 'frequently traded shares' in Regulation 2(1)(j) of SAST Regulations, has to be interpreted having regard to the context, to mean that the frequency of trading in shares of the target company has to be determined with reference to the date on which the PA is required to be made, as clarified vide the amendment dated September 11, 2018. The Acquirer, in the instant matter, has rightly considered the date on which the PA was due, for determining the frequency of trading in shares of the Target Company. Since the shares of the company were infrequently traded during the relevant period, the open offer price was determined based on the valuation report in accordance with Regulation 8(4) of SAST Regulations and the interest for the delay has also been provided in accordance with Regulation 8(12) of the SAST Regulations. Accordingly, I do not find any valid ground to interfere with the calculation of the open offer price of Rs.55.22 per share in the open offer of the Target Company viz. Xchanging

Solutions Limited and no other directions, as sought by the Complainant, is warranted in the matter.

25. This order is passed in compliance with the SAT order dated September 19, 2019 in Appeal No. 183 of 2018. The representation dated October 15, 2019 filed by the Complainant stands disposed of accordingly.

DATE: January 20, 2020

PLACE: Mumbai

G. MAHALINGAM

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA