BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO.: Order/VV/NK/2022-23/16231-16242]

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

In respect of:

Noticee No.	Name of Noticee	PAN of Noticee
1.	Alok Electricals Pvt. Ltd.	AADCA2701J
2.	Antique Texfab Pvt. Ltd.	AAGCA7223G
3.	Balaji Texfab Pvt. Ltd.	AACCB8369A
4.	Coronation Builders & Engineers Pvt. Ltd.	AABCC8667R
5.	Durga Fabricators and Engg Pvt. Ltd.	AACCD5661P
6.	Florid Infrastructure Pvt. Ltd.	AABCF0518L
7.	Mahima Developers and Builders Ltd.	AADCM6501C
8.	Olive Vinimay Pvt. Ltd.	AABCO0690G
9.	Pensive Agencies Pvt. Ltd.	AAECP6720H
10.	Salasar Texfab Ltd.	AAJCS8123L
11.	Tanvi Fincap Pvt. Ltd.	AAACT6871B
12.	Vibhut Builders & Engg Pvt. Ltd.	AACCV7326D

In the matter of M/s Era Infra Engineering Limited

BACKGROUND

1. Securities and Exchange Board of India (**SEBI**) conducted investigation into the trading activities of certain entities in the scrip of M/s Era Infra Adjudication Order

in the matter of Era Infra Engineering Limited Page 2 of 14 Engineering Limited (hereinafter referred to as "**EIEL / Company**") for the period January 1, 2008 to April 30, 2009. It revealed that Alok Electricals Pvt. Ltd., Antique Texfab Pvt. Ltd., Balaji Texfab Pvt. Ltd., Coronation Builders & Engineers Pvt. Ltd., Durga Fabricators and Engg Pvt. Ltd., Florid Infrastructure Pvt. Ltd., Mahima Developers & Builders Ltd., Olive Vinimay Pvt. Ltd., Pensive Agencies Pvt. Ltd., Salasar Texfab Pvt. Ltd., Tanvi Fincap Pvt. Ltd. and Vibhut Builders & Engg Pvt. Ltd. (hereinafter individually referred to as "**Noticee no. 1, 2, 3 & so on and collectively** as "N**oticees**") are inter-connected on the basis of common address, common directorship and common contact numbers. All the Noticees are part of the members of Kiran Group who were disclosed as „Persons Acting in Concert" (**PACs**) to stock exchanges in terms of Regulation 7(1) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations,1997 (hereinafter referred to as "**SAST Regulations, 1997**").

2. The total number of shares of EIEL as on February 27, 2009 (hereinafter referred to as "**acquisition day**") was 14,30,17,760 and the collective shareholding of Noticees increased from 71,18,046 (i.e. 4.977% of total share capital EIEL) to 72,67,549 (i.e. 5.082% of total share capital of EIEL) as on the said date.

3. As the collective shareholding of the Noticees in EIEL crossed the threshold limit of 5% on February 27, 2009, they were required to make the statutory disclosure within 2 days of transaction to the company and to the stock exchange/s where the shares of the company are listed regarding such acquisition as stipulated by Regulation 7(1) read with Regulation 7(2) of SAST Regulations, 1997. However, no disclosure in terms of the aforementioned regulations was made by the Noticees.

4. Adjudicating Officer of SEBI (hereinafter referred to as **'erstwhile AO'**) had passed an Adjudication Order No. SVKM/AO/35-46/2015-16 dated December 30,

2015 (hereinafter be referred to as "**Then Adjudication Order/AO order**") against Noticees wherein, a penalty of Rs. 1,00,00,000/- (Rupees One Crore only) under Section 15A(b) for violation of regulation 7(1) read with regulation 7(2) of SAST Regulations, 1997; read with Regulation 35 of SAST Regulations, 2011 by following the judgment of the Apex Court in the case of SEBI vs. Roofit Industries Limited reported in (2016) 12 SCC 125 was imposed on the Noticees. Aggrieved by the said Adjudication Order, the Noticees filed an Appeal No. 77 of 2016 before the Hon'ble Securities Appellate Tribunal (hereinafter be referred to as, the "**Hon'ble SAT**").

5. The Hon'ble SAT vide Order dated April 20, 2017 (hereinafter referred to as **'SAT Order'**) remanded the matter back to SEBI for fresh decision on merit in accordance with law against the Noticee with the following observation:

"3. Although the appellants in their reply to the show-cause notice had not disputed that when their shareholding in Era Infra Engineering Ltd. exceeded 5% on 27/2/2009 they were the Persons Acting in Concert ("PAC" for short) with Kiran Group, appellants in their memo of appeal have contended on the basis of documentary evidence that they could be considered as PACs only with effect from 1st July, 2009. Since we are inclined to set aside the impugned order and restore it for fresh decision, we direct that the AO while passing the fresh order shall take into consideration the plea of the appellants that they could be considered as PACs only with effect from 1st July, 2009 and if so, what would be the consequences on the penalty that may be imposed against the appellants.

APPOINTMENT OF ADJUDICATING OFFICER

6. Upon remand back of the said matter, the undersigned was appointed as Adjudicating Officer, vide communiqué dated February 18, 2021 under section 15-I of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as

"SEBI Act") and Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as "Rules") to enquire into and adjudge under section 15A(b) of the SEBI Act 1992 for the alleged violations.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

7. With respect to violation of aforesaid regulations, I note that, a Show Cause Notice dated June 29, 2015 (hereinafter referred to as "**SCN**") was served upon the Noticees by erstwhile AO under rule 4 of the Adjudication Rules to show cause as to why an inquiry should not be initiated and penalty be not imposed under section 15A(b) of the SEBI Act, 1992 for the aforesaid allegations specified in the SCN.

8. Pursuant to the order dated April 20, 2017 of the Hon'ble SAT for passing fresh order on merits and in accordance with law, the Noticees were provided with an opportunity for submitting additional replies and an opportunity of personal hearing through WEBEX considering the ongoing COVID-19 Pandemic in the interest of natural justice and in order to conduct inquiry as per Rule 4 of the Adjudication Rules.

9. In this regard, Hearing Notices dated August 02, 2021 was sent to Noticees through SPAD, which was duly delivered to Noticees to appear for hearing on August 25, 2021. Noticees, vide letter dated August 24, 2021, authorized its representatives to attend the personal hearing. The Authorized Representatives ("**ARs**") of the Noticees appeared before me on August 25, 2021 and undertook to make written submissions within three weeks' time ending September 15, 2021 on behalf of the abovementioned Noticees and was also granted one more opportunity of Hearing through virtual meeting through Webex on September 28, 2021.

10. Vide letter dated September 15, 2021, Noticees made the written submissions and provided the documents evidencing that Noticees to be considered as PACs only with effect from 1st July, 2009.

11. ARs of the Noticees appeared before me on scheduled date and time of hearing i.e., on September 28, 2021 at 11.00 AM and reiterated the written submission made in their letter dated September 15, 2021 on behalf of the Noticees. Noticees have *inter-alia* made the following submissions:

"***1.*** *The Security Exchange Board of India (SEBI) had issued a Show Cause Notice dated 20.05.2013 to 26 companies (including present 12 Respondents) and alleged that these entities belong to Kiran Group. The allegation in the Show Cause Notice was that in the normal course, certain companies belonging to Kiran Group acquired the shares of Era Infra Engineering Ltd. (EIEL), a company whose shares are listed on BSE and NSE. The total shares acquired by Kiran Group exceeded the threshold limit of 10% on 29.07.2009 and the same was not disclosed by Kiran Group to BSE and NSE due to unintentional lapse.*

2*.* *SEBI issued a Show Cause Notice in this regard on 20.05.2013 to 26 companies alleged by them to belong to Kiran Group and finally Shri. Piyooush Gupta, the Ld Adjudicating Officer passed Adjudication Order No. PG/AK/AO/67-92/2013 dated 20.08.2013 wherein he observed that 8 entities did not fulfill the criteria of 'acquirer' and thus dropped the charges against them and imposed a penalty of Rs. 5 Lakhs on the remaining 18 entities / persons including the Respondents. A copy of the above order is enclosed as* ***Annexure 1****. Kiran Group paid the above penalty amount to SEBI vide DD No. 000737 dated 16.9.2013. Meanwhile, the Kiran Group also informed BSE and NSE on 12.8.2013 that the acquisition made by them exceeded the threshold limit of 10% on 29.07.2009.*

3*.* *On 29.6.2015, the previous Adjudicating Officer Shri. S.V. Krishnamohan, CGM, SEBI issued a second Show Cause Notice (SCN) to the Respondents no. 1 to 12 for violation of the provisions of Regulation 7 (1) and 7 (2) of SAST Regulations, 1997 as Kiran Group had not disclosed to the Stock Exchanges when their acquisition of shares in EIEL had exceeded the threshold limit of 5% on 27.02.2009. A copy of the Show Cause Notice dated 29.06.2015 is enclosed as* ***Annexure 2.***

*4. After hearing the submissions made by the Respondents on 17.11.2015 and also considering their replies dated 25.09.2015 and 16.11.2015 field on behalf of the Noticees, the Ld. Adjudicating Officer passed an order /directions vide Adjudication Order No. SVKM/AO/35-46/2015-16 dated 30.12.2015 imposing a penalty of Rs.1 Cr. on the Respondents under Sec 15A(b) of the SEBI Act for violation of Regulation 7 (1) read with Regulation 7 (2) of SAST Regulations, 1997 and also Regulation 35 of SAST Regulations, 2011. The copies of replies dated 25.09.2015, 16.11.2015 and the above order dated 30.12.2015 are enclosed at **Annexures 3, 4 & 5 respectively**.*

5. The Respondents have filed an Appeal before Hon'ble Securities Appellate Tribunal (SAT), Mumbai vide Appeal no. 77 of 2016, under section 15T of the Securities and Exchange Board of India, Act 1992 against the order and directions dated 30.12.2015 passed by the previous Adjudicating Officer Shri. S.V. Krishnamohan, Chief General Manager, SEBI under Section 15–I of the SEBI Act, 1992 read with Rule 5 of SEBI (Procedure For Holding Inquiry And Imposing Penalties By Adjudicating Officer) Rules, 1995 for violation of the provisions of Regulation 7(1) & 7(2) of the SAST Regulations, 1997 and imposed a penalty of Rs.1 Crore on all the 12 Respondents who are jointly and severally liable to pay the said monetary penalty. The Hon'ble SAT vide Judgment / order dated 20.04.2017 set aside the above order passed by the previous Adjudicating Officer and remanded back the matter.

*6. The submissions of the Respondents are that the previous Adjudicating Officer was fully aware that the threshold limit of 5% had been reached earlier as may be observed from para 11 recorded under findings in the Adjudication order dated 20.08.2013 (**Annexure 1 hereto**) which is reproduced below:-*

" Upon perusal of the documents available on record, I find that the shareholding pattern of Kiran Group in EIEL as on March 31, 2009 was 79,37,520 shares, i.e. 5.53 % of total share capital of EIEL."

While the Respondents do not agree that they had reached the limit of 5% on 27.2.2009 for the reasons furnished in the subsequent paras below, for the sake of argument, it may be stated that it is not a new finding alleged in the SCN that the acquisition of shares in EIEL by Kiran Group had exceeded the threshold limit of 5 % on 27.2.2009 as the breach of said threshold limit was already in the knowledge of the then Adjudicating Officer. Therefore, it can be easily inferred that the penalty of Rs. 5 lakhs imposed by the Adjudicating Officer on 20.8.2013 for not disclosing to the Stock Exchanges about the breach of threshold limit of 10% by the Respondents and some other entities /

persons also covered the non disclosure which should have been made on breaching the limit of 5%.

7. *That the Show Cause Notice (SCN) for alleged non disclosure by Kiran Group to the Stock Exchanges on reaching the threshold limit of 5% was issued after a delay of more than 6 years after occurrence of the specified event in February 2009 and that the Respondents had already been penalised by SEBI in August 2013 for the subsequent non disclosure to the Stock Exchange on reaching the threshold limit of 10% in July 2009.*

8. *Without prejudice it is stated that in fact, as per SEBI, the alleged violation had taken place in February 2009 and the Respondents had already been penalised for the subsequent violation which took place in July 2009. As such the alleged violation which took place in February 2009 has come to the notice of SEBI now and SEBI issued the show cause notice in June 2015 and the penalty was imposed on 30.12.2015 by the previous adjudicating officer under the section which existed prior to the amendment which changed Sec 15A w.e.f 08.09.2014. Thus, after the above amendment, the quantum of penalty as per Sec 15 A is as under:-*

   b) To furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees each day during which such failure continues subject to a maximum of one crore rupees.

   Without prejudice it is stated that as the violation was detected subsequent to the above amendment, in the fitness of things, penalty should have been imposed as per the law in existence at present.

9. *That the Respondent No. 7 and 8 did not belong to Kiran group. Further, fund flow between Respondent No. 8 and Respondent No. 11 had no connection whatsoever, when Respondent No. 8 was not part of Kiran Group. There were no common Directors between Respondent No. 8 and Respondent No. 11. Hence Respondents No. 7, 8 and 11 could not be treated as 'Persons Acting in Concert' (PAC).*

10. *The Adjudicating Officer's observation in this regard as recorded in his order dated 30.12.2015 is furnished below:-*

    Para 1 *"SEBI conducted investigation into the trading activities of certain entities in the scrip of Era Infra Engineering Ltd for the period Jan 1, 2008 to April 30, 2009. It revealed that the 12 Noticees (present Appellants) are interconnected on the basis of* ***common address****,*

common directorship and common contact numbers. *All the Noticees are part of the members of Kiran Group who were disclosed as 'Persons Acting in Concert' (PACs) to Stock Exchanges in terms of Regulation 7 (1) of SAST Regulations,1997."*

*" **Para 13**. Noticees have further submitted that 3 noticees, namely notice no. 7,8 and 11, do not belong to 'Kiran Group' as stated in the SCN as these three entities have different address and directors. Merely because some of the noticees have different address and directors, does it mean they can never be considered as PAC if the facts point out otherwise? Whether or not two or more persons are acting in concert is a question of fact and is to be answered on the facts and circumstances of each case. As it is difficult to prove acting in concert by direct evidence, the circumstantial evidence has to be taken into consideration including nearness of relationship, etc. while proving the concert. Further, the circumstantial evidence should be sufficient to raise a presumption in its favour with regard to the existence of a fact sought to be proved. Since it is exceedingly difficult to prove facts which are especially within the knowledge of parties concerned, the legal proof in such circumstances partakes the character of a prudent man's estimate, as to the probabilities of the case. The law in SAST Regulations also presumes certain categories of people as 'Persons deemed to be Acting in Concert' though it is a rebuttable presumption."*

*" **Para 15** – In the Adjudication order dated 20.8.2013, it was noted that these 3 noticees namely, Mahima Developers & Builders Ltd (Appellant No.7) , Tanvi Fincap Pvt Ltd (Appellant No.11) and Olive Vinimay Pvt. Ltd. (Appellant No. 8) were simultaneously acquiring shares when other noticees were acquiring shares. Further all the noticees including these 3 noticees had themselves declared as PACs in the letters dated August 12, 2013 to the Stock Exchanges. Therefore, by their own declaration and conduct they acted as PACs. They are now estopped from claiming otherwise. Moreover when I peruse the relationship of the noticees as furnished to the noticees along with the SCN, I find a web of connection amongst them when one noticee is connected with another which in turn is connected with other and so on and the same has not been disputed by the noticees. For example, Sheenu Banerjee was the common director between noticee no.1, 7 and 8 and there was fund flow between noticee no.11 with noticee no.8 and Compact Texfab Pvt Ltd. (another member of the 'Kiran group'). Further, Compact Texfab Pvt Ltd in turn is connected with noticee no.2, 4, 6 and 10 as one of their directors is common. Further, when I see the day wise holding statement of the members of the 'Kiran Group' including the noticees in the EIEL for the period January 01, 2009 to April 30, 2009, I find that there is consistent change in the shareholding of the members of the 'Kiran Group' including the noticees and on February 27,2009 their combined shareholding in EIEL touched 5.082 % of the total share capital of EIEL.*

11. *The Respondents submit that they had informed BSE and NSE on 12.8.2013 that as on 29.07.2009, they as PACs had exceeded the limit of 10%. Copy of the above letter is furnished at* ***<u>Annexure 6 (colly).</u>*** *The Respondents never informed BSE and NSE that as on 27.02.2009 they had exceeded the limit of 5% as it was not factually correct. Therefore, an erroneous inference has been drawn against the Respondents in SCN that they had reached the limit of 5% as the same is without any valid basis and merely based on surmise.*

12. *Certainly on 27.02.2009 Respondents No. 7 and 8 could not be treated as PACs because appointment of common Director in these companies took place subsequently on 01.07.2009 as may be seen below:-*

Ms. Sheenu Banerjee was appointed as an Independent Director on 01.07.2009 on the Board of Mahima Developers & Builders Ltd (Appellant No. 7) and Olive Vinimay Pvt. Ltd. (Appellant No. 8). Copies of Form 32 filed with the concerned ROC with respect to her appointment on the Boards of Respondent No. 7 and 8 are furnished at ***<u>Annexure 7 and 8 respectively.</u>*** *Further Ms. Sheenu Banerjee did not hold any shares in Respondents No. 7 and 8. Thus the assumption that Respondents No. 7 and 8 belong to Kiran Group based on common Director, Ms. Sheenu Banerjee as mentioned in the show cause notice dated 29.06.2015 is erroneous and factually incorrect.*

13. *That the Respondent No. 7, 8 & 11 viz. Mahima Developers & Builders, Tanvi Fincap Pvt. Ltd. and Olive Vinimay Pvt. Ltd. joined the Kiran Group only in July 2009. The disclosure of acquisition of shares exceeding the threshold limit of 5% on 27th February 2009 was not met because of the fact that the Kiran Group did not exceed the said threshold limit on 27th February 2009. Hence, in the circumstances the Kiran Group was not liable / required to make the disclosure.*

14. *In addition, the assumption that on account of major fund flow between Respondents No. 8 and 11, they are PACs is also incorrect. The funds were in the nature of inter corporate loans by virtue of which alone these entities could not be treated as PACs as there were no common Directors among themselves and also with other 9 Respondents. Thus the allegation that all 12 entities were PACs on 27.2.2009 is without any basis and invalid and the same is against the provisions clearly laid down in (2e) of SAST Regulations, 1997 which are reproduced below:-*

"Persons acting in concert comprises

1) *Persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company.*

2) Without prejudice to the generality of this definition the following persons will be deemed to be persons acting in concert with other persons in the same category, unless the contrary is established.

i) a company, its holding company, or subsidiary of such company or company under the same management either individually or together with each other.

ii) a company with any of its directors, or any person entrusted with the management of the funds of the company

iii) directors of companies referred to in sub clause (i) of clause 2 and their associates

iv) to x) -----------------------------------

15. *The allegations in the SCN is totally against the SAST Regulations, 1997 and against the law as laid down by the Supreme Court in its order dated 08.07.2010 in Daiichi Sankyo Company Vs Jayaram Chigurupati & Ors as given below:-*

" 43. ------ Two or more persons may join hands together with the shared common objective or purpose of any kind but so long as the common object and purpose is not substantial acquisition of shares of a target company they would not comprise " persons acting in concert."

44. -----------There can be no " persons acting in concert" unless there is a shared common objective or purpose between two or more persons for substantial acquisition of shares, etc of the target company. -------------- The idea of person 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 or 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 co-operate in actual acquisition of shares, or they may agree to co-operate in such acquisition. ***Nevertheless, the element of the shared common objective or purpose is the sine qua non for the relationship of "person acting in concert" to come into being.****"*

"48. It needs further to be noted that the presumption created by virtue of the deeming provision is expressly left open for rebuttal as indicated by the concluding words " unless the contrary is established."--- "Regulation 2(1)(e)(2) defines "person acting in concert". It is a deeming provision. It has to be read in conjunction with regulation 2(1)(e)(1) which states that person acting in concert comprises of persons who in furtherance of a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or to acquire control over the target company. The word "comprises" in regulation 2(1)(e) is significant. It applies to regulation 2(1)(e)(2) as much as regulation 2(1)(e)(1). A fortiori, a person deemed to be acting in concert with others is also a person acting in concert. In other words, persons who are deemed to be acting in concert must have the intention or the aim of acquisition of shares of a target company. It is the conduct of the parties that determines their identity. Whether a person is or is not acting in concert with the acquirer would depend upon the facts of each case. In order to hold that a person is acting in concert with the acquirer or with another person it must be established that the two share the common intention of acquisition of shares of some target company. Whether in a given case an FII and his sub account(s) have a common objective of making investment in India to earn profits in unit holders or whether they have a common objective of acquiring substantial stakes or control in some target company would depend on the facts of each case. In the former case regulation 2(1)(e)(2)(v) would not apply whereas in the latter case the said regulation would apply. ***The above illustration brings out the true purport of the expression "unless the contrary is established" which expression finds place in regulation 2(1)(e)(2).***

49. ***Something else that is of utmost importance is to understand that the deeming provision under sub regulation (2) can only operate prospectively and not retrospectively.*** *That is to say the deeming provision would give rise to the presumption, as explained above, only from the date two or more persons come together in one of the specified relationships and not from any earlier date. Thus, in the case in hand, the deeming provision under sub regulation (2) would give rise to the presumption that Daiichi and Ranbaxy were "persons acting in concert" provided of course the other conditions as explained above were also satisfied, only from Oct 20, 2008, the date on which Ranbaxy became a subsidiary of Daiichi and not before that."*

16. Taking the above judgment into account, it is clear that as Ms. Sheenu Banerjee became an Independent Director on the Board of Appellants No. 7 and 8 on 01.07.2009, Respondent

No. 7 and 8 could be treated as part of Kiran Group and also as PACs after that date and not retrospectively on 27.02.2009. Therefore, they are not PACs as laid down under SAST Regulations, 1997. Similarly, just because of fund flow between Respondents No. 8 and 11, they could not be treated as PACs more so when there was no common Director. As such, there was no shared common objective among Respondents No. 7, 8 and 11 to acquire substantial control of the target company.

17. On excluding the shares acquired by the Respondents No. 7, 8 and 11, the shareholding acquired by the remaining 9 PACs worked out to 2.127 % as on 27.02.2009 and as such there was no breach of the threshold limit of 5%. Hence, there was no violation of Regulation 7 (1) and 7 (2) of SAST Regulations, 1997 as alleged in the SCN.

18. That the default alleged in the Show Cause Notice dated 29th June 2015 was already considered in previous adjudication in 20th August 2013. It is submitted that Mahima Developers & Builders Ltd., Tanvi Fincap Pvt. Ltd. and Olive Vinimay Pvt. Ltd. did not belong to Kiran Group as on 27th February 2009. Further, in the Adjudication order dated 20.08.2013 upon perusal of the records the Adjudicating officer had observed in Para 11 of the said order

"I find that the shareholding pattern of Kiran Group in EIEL as on 31st March 2009 was 79,37,520 shares i.e. 5.53 % of the total share capital of EIEL".

This shows that the Adjudicating Officer had the knowledge of the shareholding exceeding 5% of the total Share capital of EIEL as on 31.03.2009. Hence it is assumed that this issue was covered in the said Adjudication Order. The adjudication Order has been passed on 20th August 2013 after giving due consideration to this fact. It would be erroneous and bad in law to take the non- disclosure of 5% into consideration again in the present adjudication as the Respondents have already paid the penalty in compliance of Adjudication Order dated 20.08.2013.

19. It is submitted that the penalty of Rs. 5 Lakhs imposed by the Adjudicating Officer vide order dated 20th August 2013 for non–disclosure to the Stock Exchanges about the breach of threshold limit of 10% by the Respondents and some other entities / persons also included the exceeding the limit of 5% as that event had occurred prior to the breach of the 10% limit and was in the knowledge of the Adjudicating Authority. Hence, it is clear and evident that the penalty imposed vide Adjudication Order dated 20.08.2013 covered the breach of the 5% threshold limit also, if any.

20. *It is submitted that it may be appreciated that the Show Cause Notice dated 29.06.2015 has been issued after lapse of over 6 years after occurrence of the event on 27th February 2009 and the Respondents had already been penalized by way of penalty of Rs. 5 lakhs vide Order dated 20.08.2013. Even considering the issue being in the knowledge of Adjudicating Authority as on 20.08.2013, the Show Cause Notice dated 29.06.2015 being issued after approx. 2 years are liable to be set aside/withdrawn. Further, the Show Cause Notice dated 29.06.2015 being issued after a delay of over 6 year is issued by way of afterthought and only as means to harass the Respondents, with intention to take undue advantage of the penal provisions of Sec. 15A (b) of the SEBI ACT.*

21. *That as stated above the Respondents no. 7, 8 & 11 were not the part of Kiran Group as on 27.02.2009. Further it is stated that the investigation conducted under SCN dated 29.06.2015 is in relation with the trading activities in the scrip of EIEL for the period 01.01.2009 to 30.04.2009. However, all the aforesaid entities were not a part of Kiran Group during the relevant period and 1) M/s.Mahima Developers & Builders Ltd., 2) M/s. Olive Vinimay Pvt. Ltd. and 3) M/s. Tanvi Fincarp Pvt. Ltd. have become part of the Kiran Group only in July 2009 after being Ms. Sheenu Banerjee as Director of Respondent No. 1, who was appointed as Independent Director in Respondent No. 7 & 8 and became a common Director.*

22. *It is pertinent to note that, the above three entities have admitted themselves to be PAC in letter dated 20.08.2013, the same was with reference to the period after July 2009 when Ms. Sheenu Banerjee became a common Director. The said Admission cannot be made applicable to the period prior to July 2009 as the SCN is pertaining to period up to April 2009.*

23. *The fund flow between the Respondent No. 8 & 11 has no connection whatsoever and the Respondent No. 7, 8 & 11 cannot be treated as PAC. The fund flow between the Respondent no. 8 & 11 may be by way of personal relationship or other commercial business transaction or loan transaction and it is not essential that they must be regarded as PAC. Chart giving the details of Directors and fund flows makes it clear that the above entities were no way connected to each other prior to 1st July, 2009 and the said Chart is furnished as* ***ANNEXURE -9****.*

24. *It is submitted that Ms. Sheenu Banerjee, the common Independent director between Respondent No. 1, 7 & 8, has joined the Kiran Group only on 1st July 2009. Thus, the assumption that Respondent No. 7 & 8 belong to Kiran Group based on common director*

Ms. Sheenu Banerjee as mentioned in the SCN dated 29.06.2015 is erroneous and factually incorrect. Ms. Sheenu Banerjee did not hold any shares in Respondent No. 7 and 8 and as such she had no financial or personal interest or any role in acquision of shares of the target company. She was not even paid any remuneration as Independent Director and was brought on Board of the Respondent nos. 7 & 8 only as a Independent Director in order to ensure statutory Compliances under the Companies Act. There were no common Directors between Respondent No. 8 and Respondent No. 11. Further the assumption that on account of major fund flows between Respondent no. 8 & 11 they are PACs is also incorrect and even if there were fund flow the same was prior to July 2009 i.e. before Ms. Sheenu Banerjee was appointed as Independent Director of Respondent no. 7 & 8. The funds were in the nature of inter corporate loans by virtue of which alone these entities could not be treated as PACs as there were no common directors amongst them and also with other 9 Respondents. Thus, the contention in the SCN that all the 12 entities were PACs as on 27.02.2009 is not correct and against the provisions laid down in (2e) of SAST Regulations, 1997. It is submitted that Regulation 2(1)(e)(2) defining "Person Acting in Concert" r/w Regulation 2(1)(e)(1) is a deeming provision and can operate prospectively and not retrospectively. The allegation in the SCN are totally against the SAST Regulations, 1997 and the law laid down by the Supreme Court in its order dated 08.07.2010 in Daiichi Sankyo Company Vs. Jayaram Chigurupati & Ors., where it has been observed that:-

The element of the shared common objective or purpose is the sine qua non for the relationship of "Person Acting in Concert" to come into being.

Taking the above judgment into account, it is clear that Ms. Sheenu Banerjee became an Independent Director on the Board of Respondent no. 7 & 8 on 01.07.2009, Respondent no. 7 & 8 could be treated as part of Kiran Group and as PAC only prospectively i.e. after that date 01.7.2009 and not retrospectively i.e. as on 27.02.2009. As such there was no shared common objective which is a mandatory requirement of PAC, amongst Respondent no. 7, 8 & 11 to acquire substantial control of the target company.

25. It is submitted that the Respondent nos. 7, 8 & 11, who were having different addresses and directors as on 27.02.2009, cannot be treated as PACs with the other Respondents for exceeding the threshold limit of 5% under the provisions of Regulation 7(1) and 7 (2) of SAST Regulations, 1997. The question as to whether they are PACs is a rebuttable presumption and must be based on some evidence at least and not merely on surmises and presumptions. The circumstantial evidence should be sufficient to raise a presumption in favor of the Respondents.

26. *It is submitted that if the shares acquired by the Respondents no. 7, 8 & 11 were to be excluded then the shareholding of the remaining 9 entities works out to be 2.127% as on 27.02.2009 and as such there was no violation of Regulation 7 (1) and 7(2) of SAST Regulations 1997. If the shares of Mahima Developers & Builders Ltd. which has no fund flow or any connection with Respondent no. 11, 1 & 8 as on 27.02.2009 acquired on 27th February 2009 are not considered / taken into account / not clubbed with the Kiran Group, in such situation the shareholding of Kiran Group in EIEL would not exceed the threshold limit of 5%, and Kiran Group would not be liable to make disclosure under Sec. 7(1) and 7(2) of SEBI Act.*

PRAYER

In the facts and circumstances of the case, it is most respectfully prayed that the Show Cause Notice may pleased be dropped against the Respondents no. 1 to 12 for the reasons stated above.

12. Noticees were provided an opportunity to make additional written submissions if any by April 09, 2022 on March 28, 2022 considering the elapse of more than 6 months since the conclusion of hearing. However, no additional submissions have been made by Noticees

13. As hearing / inquiry in this matter is concluded, therefore, after taking into account the allegations, submissions of the Noticees and evidences / material available on record, I hereby proceed to decide the case on merit.

ISSUES FOR CONSIDERATION AND FINDINGS

14. I have carefully perused the oral and written submissions of the Noticees, Direction of Hon'ble SAT and the documents available on record. The issues that arise for consideration in the present case are:

   I. **Whether Noticees have violated the provisions of regulation 7(1) read with regulation 7(2) of the SAST Regulations, 1997?**

   II. **Whether the Noticees are liable for imposition of monetary penalty under Section 15 A (b) of the SEBI Act?**

III. If yes, then what should be the quantum of monetary penalty?

15. Before proceeding further, I would like to refer to the relevant provisions alleged to have been violated by the Noticees as mentioned in SCN, which are reproduced below:

SAST Regulations, 1997

***"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).........

(2) The disclosures mentioned in sub-regulations (1) and (1A) shall be made within two days of,— (a) the receipt of intimation of allotment of shares; or (b) the acquisition of shares or voting rights, as the case may be."

ISSUE I: Whether Noticees have violated the provisions of regulation 7(1) read with regulation 7(2) of the SAST Regulations, 1997?

16. Hon'ble SAT vide its order dated April 20, 2017 against the appeal to AO order dated December 30, 2015 in the captioned matter held that:

" 2*. On perusal of the impugned order, it is seen that the AO has imposed maximum penalty of Rs.1 crore imposable under Section 15A(b) of SEBI Act by following the judgment of the Apex Court in the case of SEBI vs. Roofit Industries Limited reported in (2016) 12 SCC 125. It is not in dispute that in the Finance Act, 2017, Parliament has sought to render the decision of the Apex Court in case of SEBI vs. Roofit Industries Ltd. (supra) nugatory by inserting an Explanation to*

Section 15J of SEBI Act. As a result, the penalty imposed against the appellants without exercising any discretion cannot be sustained.

3. Although the appellants in their reply to the show-cause notice had not disputed that when their shareholding in Era Infra Engineering Ltd. exceeded 5% on 27/2/2009 they were the Persons Acting in Concert ("PAC" for short) with Kiran Group, appellants in their memo of appeal have contended on the basis of documentary evidence that they could be considered as PACs only with effect from 1st July, 2009. Since we are inclined to set aside the impugned order and restore it for fresh decision, we direct that the AO while passing the fresh order shall take into consideration the plea of the appellants that they could be considered as PACs only with effect from 1st July, 2009 and if so, what would be the consequences on the penalty that may be imposed against the appellants"

17. I note that, Hon'ble SAT in its order dated April 20, 2017 has directed AO to pass fresh order taking into consideration the plea of the Noticees that they could be considered as PACs only with effect from 1st July, 2009 on the basis of documentary evidence provided in their memo of appeal and if so, what would be the consequences on the penalty that may be imposed against the Noticees. Thus, in view of the same, the limited issue before me is to only reconsider the penalty imposed on the Noticees in light of the documents furnished by Noticees evidencing that Noticees could be considered as PACs only with effect from 1st July, 2009.

18. Hence, in the instant order, I will only be dealing with the reconsideration of quantum of penalty, taking into account written explanations/Documents made/submitted by Noticees regarding Noticees being treated as 'Persons Acting in Concert' (PAC) only with effect from 1st July, 2009.

19. It has been stated in the SCN that, Noticees are inter-connected on the basis of common address, common directorship and common contact numbers. It was also

mentioned in the SCN that, All the Noticees are part of the members of Kiran Group who were disclosed as PACs to stock exchanges in terms of Regulation 7(1) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations,1997. Further, it is alleged in the SCN that, collective shareholding of the Noticees in EIEL crossed the threshold limit of 5% on February 27, 2009. therefore, they were required to make the statutory disclosure within 2 days of transaction to the company and to the stock exchange/s where the shares of the company are listed regarding such acquisition as stipulated by Regulation 7(1) read with Regulation 7(2) of SAST Regulations, 1997. However, no disclosure in terms of the aforementioned regulations was made by the Noticees. thus, in view of the same, it was alleged in the SCN that Noticees have violated regulation 7(1) read with regulation 7(2) of the SAST Regulations, 1997.

20. I note from the document available on record that depicts the "Kiran group of clients" (Annexure I to SCN) that, the relationship between Mahima, Alok and olive is solely Ms. Sheenu Banerjee being the common director on their board and connection of Tanvi with Mahima is solely on the basis of fund flow between them. Further, Erstwhile AO has relied upon the disclosure dated August 12, 2013 made by members of kiran group including Noticees to the Stock Exchanges in which all the Noticees along with other entities were disclosed as PACs to the Stock exchanges.

21. From the written submissions made by Noticees before me, I note that, Mahima Developers & Builders Ltd, Tanvi Fincap Pvt Ltd and Olive Vinimay Pvt. Ltd. were not PACs as on 27.02.2009. In this regard, Noticees in its reply have stated the following:

"*Certainly on 27.02.2009, Respondents No. 7 and 8 could not be treated as PACs because appointment of common Director in these companies took place subsequently on 01.07.2009 as may be seen below:-*

Ms. Sheenu Banerjee was appointed as an Independent Director on 01.07.2009 on the Board of Mahima Developers & Builders Ltd (Appellant No. 7) and Olive Vinimay Pvt. Ltd. (Appellant No. 8). Copies of Form 32 filed with the concerned ROC with respect to her appointment on the Boards of Respondent No. 7 and 8 are furnished at ***Annexure 7 and 8 respectively.*** *Further Ms. Sheenu Banerjee did not hold any shares in Respondents No. 7 and 8. Thus the assumption that Respondents No. 7 and 8 belong to Kiran Group based on common Director, Ms. Sheenu Banerjee as mentioned in the show cause notice dated 29.06.2015 is erroneous and factually incorrect.*

13. That the Respondent No. 7, 8 & 11 viz. Mahima Developers & Builders, Olive Vinimay Pvt. Ltd. and Tanvi Fincap Pvt. Ltd. joined the Kiran Group only in July 2009. The disclosure of acquisition of shares exceeding the threshold limit of 5% on 27th February 2009 was not met because of the fact that the Kiran Group did not exceed the said threshold limit on 27th February 2009. Hence, in the circumstances the Kiran Group was not liable / required to make the disclosure.

14. In addition, the assumption that on account of major fund flow between Respondents No. 8 and 11, they are PACs is also incorrect. The funds were in the nature of inter corporate loans by virtue of which alone these entities could not be treated as PACs as there were no common Directors among themselves and also with other 9 Respondents. Thus the allegation that all 12 entities were PACs on 27.2.2009 is without any basis and invalid and the same is against the provisions clearly laid down in (2e) of SAST Regulations, 1997"

22. I have perused the copies of Form 32 filed with the concerned ROC with respect to appointment of Ms. Sheenu Banerjee on the Boards of Mahima and Olive as furnished by Noticees in instant adjudication proceedings. on perusal of copies of FORM 32, there is no iota of doubt that, Ms. Sheenu Banerjee was appointed as independent/non-executive director on the board of Mahima and Olive on July 01, 2009.

23. From the perusal of copy of disclosure dated August 12, 2013 made by members of Kiran Group including Noticees to stock exchanges, I note that Noticees have been disclosed as members of Kiran Group along with other entities and thus, PACs for the acquisition made on July 29, 2009. I note that, as the said disclosure pertains to acquisition made on July 29, 2009, it cannot form the basis to hold Noticees as PACs as on February 27, 2009 in the instant adjudication proceeding. Further, the period of examination of disclosure violation by Kiran Group in the scrip of EIEL in the instant adjudication proceedings is January 1, 2008 to April 30, 2009.

24. In view of the aforesaid, I agree with the submission of Noticees that, Mahima and Olive can be considered as PACs with Kirna Group of members only after the appointment of Ms. Sheenu Banrejee as independent director on the board of Mahima and Olive i.e., July 01, 2009. Since Mahima is to be considered as PACs post July 01, 2009. thus, the question of Tanvi being part of kiran group as on February 27, 2009 does not arises as the relationship available on record of Tanvi with Mahima is the fund flow between them.

25. Though the Noticees in their submission before erstwhile AO has also submitted that, Mahima, Olive and Tanvi do not belong to "Kiran Group" on February 27, 2009 as these three entities have different address and directors. However, documents evidencing the fact that, a common director viz. Ms. Sheenu Banerjee was appointed as director on the board of Mahima and Olive on July 01, 2009 was not furnished to erstwhile AO which is sole basis of connection between them to hold them as PACs as per Annexure I of SCN. I also note that, the said date of appointment of Ms. Sheenu Banerjee was not mentioned in the investigation report which alleges that Mahima and Olive were PACs with Kiran group on the trigger date Viz. February 27, 2009.

26. Erstwhile AO in adjudication order dated December 30, 2015 whilst proving the concert among Noticees has taken into consideration the circumstantial evidence and has also *inter-alia* stated in the said order that, *“Further, the circumstantial evidence should be sufficient to raise a presumption in its favour with regard to the existence of a fact sought to be proved. Since it is exceedingly difficult to prove facts which are especially within the knowledge of parties concerned, the legal proof in such circumstances partakes the character of a prudent man's estimate as to the probabilities of the case. The law in SAST Regulations also presumes certain categories of people as „Persons deemed to be Acting in Concert“. Of course, it is a rebuttable presumption”.*

27. Erstwhile AO also imposed a Penalty of Rs. 1 (One) crore having regard to judgment of the Hon’ble Supreme Court of India in the matter of Civil Appeal No.1364 -1365 of 2005 in *SEBI vs. Roofit Industries Limited* dated November 26, 2015. wherein Hon’ble SC held that, Adjudicating Officer has no discretion in deciding quantum of penalty under Chapter VI A (except in u/s 15F (a) and 15HB of the SEBI Act). I find that this issue has been resolved as per “T*he Finance Act 2017”* (Notified for Part VIII of Chapters VI came into effect from April 26, 2017), *inter-alia* clarifying the following in respect of adjudication under SEBI Act:
147. In section 15J of the principal Act, the following Explanation shall be inserted, namely:- “Explanation- For the removal of the doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under section 15A to 15E and clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section.”.

In this regard, I note that, Hon’ble SAT in its order has *inter-alia* stated that*, “It is not in dispute that in the Finance Act, 2017, Parliament has sought to render the decision of the Apex Court in case of SEBI vs. Roofit Industries Ltd. (supra) nugatory by inserting an Explanation to Section 15J of SEBI Act. As a result, the* *penalty imposed against the appellants without exercising any discretion cannot be sustained."*

28. Further, with respect to document relied to hold Noticees as PACs during investigation viz. disclosure dated August 12, 2013 made by members of Kiran Group on crossing the threshold limit of 10% on July 29, 2009, I note that, SEBI vide adjudication order August 20, 2013 has already imposed a monetary penalty of Rs. 5,00,000/- (Rupees five lakhs only) under section 15A (b) of the SEBI Act on Noticees along with other entities and the said violation does not fall under the purview of instant adjudication proceedings as the period for the examination of disclosure violation by Kiran Group in the scrip of EIEL in the instant adjudication proceedings is January 01, 2008 to April 30, 2009.

29. Thus, in view of the facts and circumstances of case as mentioned above, I conclude that Mahima, Olive and Tanvi cannot be held as member of Kiran Group and thus, PACs with other Noticees before July 01, 2009 as the common director viz. Ms. Sheenu Banerjee was appointed as director on the board of Mahima and Olive on July 01, 2009 which is the basis of relationship available on record. Further, if the shareholding of Mahima, Olive and Tanvi is removed from the Kiran group of entities, then the shareholding of Kiran group on the alleged trigger date as mentioned in the SCN i.e., February 27, 2009 is 2.127%, which is much below the threshold limit of 5% as specified under the aforesaid SAST regulations which triggers the disclosure requirement to be made by Noticees to stock exchanges. From the material available on record, I also note that, the shareholding of Kiran group as on April 30, 2009 was 1.76%.

30. Thus, in view of the aforesaid, the requirement for disclosure to be made to Stock exchanges under the said SAST Regulations for crossing the threshold limit of 5% on February 27, 2009 cannot be cast on the Noticees. Therefore, in view of the

abovementioned facts of the case, I find that no violation of Regulation 7 (1) and 7(2) of SAST Regulations, 1997 is committed by the Noticees.

31. Since the alleged violations of Regulation 7 (1) and 7(2) of SAST Regulations, 1997 are not established against the Noticees, therefore consequent Issues II & III mentioned in paragraph 14 requires no examination.

ORDER

32. Accordingly, taking into account the aforesaid observations and in exercise of power conferred upon me under section 15 I of the SEBI Act read with rule 5 of the Rules, I am of the view that no penalty is warranted against the Noticees in the matter and accordingly the matter is disposed of.

33. In terms of Rule 6 of the Adjudication Rules, 1995, copy of this Order is sent to the Noticees and also to the Securities and Exchange Board of India.

Date : April 28, 2022	**Vijayant Kumar Verma**
Place : Mumbai	**Adjudicating Officer**