BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO.AK/AO-74/2015]

UNDER SECTION 15-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

Inthe matter of

M/s.Khatau Exim Limited
(Now known as M/s. Velox Industries Limited. PAN No.AAACK2128C)

FACTS OF THE CASE

1. A letter of offer in compliance with Regulation 10 and 12 of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 1997 (hereinafter referred to as**'Takeover Regulations, 1997'**)was filed by Mr. Nav Rattan Munjal ('**Acquirer'**) to acquire 49,800 equity shares of Rs. 10/- each (representing 20% of the paid up and voting equity share capital) of M/s. Khatau Exim Ltd (hereinafter referred to as the**'Company/ Noticee')** at an offer price of Rs.27.34/-.The Public Announcement of the same was made on March 15, 2011 and the shares of the company were listed at Bombay Stock Exchange Ltd (hereinafter referred to as '**BSE'**) and Pune Stock Exchange Ltd. (hereinafter referred to as '**PSE'**).

2. While examining the letter of offer document of the Acquirer, Securities and Exchange Board of India (hereinafter referred to as '**SEBI'**) observed that the Noticeefailed to comply with theprovisions of Regulation8(3) of the Takeover Regulations, 1997within the due date for 7consecutive financial years from FY 1997-98 to FY 2003-04,again once for FY 2006, and again for 2 consecutive financial years from FY 2008-09 to FY 2009-2010.

3. Based on the aforesaid information with respect to the non-compliance of Takeover Regulations 1997, as applicable, Adjudication proceedings under Chapter VI-A of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act'**) were initiated against the Noticee under Section 15 A(b) of the SEBI Actto inquire into and adjudicate the alleged violation of the provisions of the Takeover Regulations, 1997.

APPOINTMENT OF ADJUDICATING OFFICER

4. The undersigned was appointed asthe Adjudicating Officer on September 02, 2013under section 15-I of SEBI Act read with rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as '**SEBI Rules'**) to inquire into and adjudge under Section 15A(b)of the SEBI Act for the alleged violation of the Takeover Regulations, 1997.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

5. Show Cause Notice (hereinafter referred to as '**SCN'**) Ref. No. EAD-6/AK/32367/2013 dated December 12, 2013 was issued to the Noticee under rule 4(1) of SEBI Rules communicating the alleged violation of the Takeover Regulations, 1997. The Noticee was also called upon to show cause as to why an inquiry should not be initiated against it and penalty be not imposed under Section 15A(b) of the SEBI Act for the alleged violations committed by it. The copy of the relevant pages of the letter of offer were also sent along with the SCN.

6. Since no reply was received in the matter, vide letter dated January 16, 2014, the Noticee was given time till January 20, 2014 to make its submission to the SCN. In the interest of natural justice and in terms of rule 4(3) of the SEBI Rules, the Noticee was also granted an opportunity of personal hearing on January 24, 2014. However, the Noticee failed to appear for the personal hearing on the given date.

7. Vide hearing notice dated August 26, 2014, the Noticee was granted another opportunity of personal hearing on September 09, 2014. Since no submissions to the SCN and reply to the hearing notice dated January 16, 2014 were received from the Noticee, a copy of the SCN dated December 12, 2013 and its annexures were sent along with the hearing notice dated August 26, 2014. Vide email dated September 03, 2014, a scanned copy of the hearing notice dated August 26, 2014 was also sent to the Noticee's email address.

8. The Noticee vide email dated September 05, 2015 *inter alia*informed that the name of the company has changed from M/s. Khatau Exim Ltd. to M/s. Velox Industries Ltd. and its Registered Office had shifted to Vile Parle (East), as such, they had not received the SCN dated December 12, 2013 which was issued at the old office address. Hence, the Noticee vide said email sought extension of time for filing written reply and for appearance by minimum of 15 days.

9. The Noticee's request for extension of time was acceded to and vide hearing notice dated September 08, 2014, the Noticee was granted time till September 19, 2014 to make submissionsto the SCN and was given an opportunity of personal hearing on September 23, 2014.Mr. Miten Chawda, appeared on behalf of the Noticee on the date of the personal hearing and *inter alia*submitted that the Noticee was desirous of making an application for consent proceeding,and further, sought to make a detailed reply to the SCN by October 01, 2014 in the matter.

10. Since no reply was received from the Noticee, vide emails dated April 20, 2015, May 11, 2015 and May 12, 2015the Noticee was advised to make their submissions to the SCN. Thereafter vide email dated May 13, 2015, the Noticee sought further extension of time to make its submission to the SCN citing that their Advocates in the matter were on leave.The Noticee's request was acceded to andvide email of the said date they were granted time till May 25, 2015 to make its submission in the matter.

11. Despite being granted several extensions to make the submissions to the SCN, the Noticee again failed to submit a reply to the SCN dated December 12, 2013. Vide email dated May 29, 2015,the Noticee was once again advised to make their submissions latest by June 01, 2015 and another opportunity of personal hearing was given on June 04, 2015.

12. A letter dated May 29, 2015 from M/s. Great View Properties Pvt. Ltd. to SCN dated December 12, 2013 issued to the Noticee was received on behalf of the Noticee. Mr. Paras Parikh, Mr. Dhaval Kothari and Mr. PH Udeshi appeared as authorized representative (hereinafter referred to as '**ARs'**) of the Noticee on the date of the hearing.The ARs submitted that the Noticee had independently based on the records available with itself and with the Registrar of the Company made disclosures under Regulation 8(3) of the Takeover Regulations, 1997 as per the compliance indicated in the letter of Offer for which the public announcement was made on March 15, 2011. The ARs stated that a detailed reply by the Noticee in the matter would be filed by June 08, 2015 and requested that the submission made by M/s. Great View Properties Pvt Ltd. dated May 29, 2015(emailed on June 03, 2015) may be ignored. The ARs sought to provide the copies of the actual filings made under Regulation 8(3) by the Noticee to the Exchange as per the disclosures made in the letter of Offer. The ARs further confirmed that there have been no past non-compliance of the SEBI Act and Regulations by the Noticee and no action have been taken by SEBI against the Noticee.

13. The ARs vide letter dated June 04, 2015, received by SEBI on July 02, 2015,*inter alia*submitted the following:

13.1 That apart from merely alleging non-compliance by the Noticee under Regulation 8(3) of the Takeover Regulation, 1997 and relying on the status of compliance with the provisions of Chapter II of the Takeover Regulations, 1997 by the then promoters of the Noticee given in the Open Offer Letter of offer dated June 29, 2011, SEBI does not have any independent findings of any investigation or inquiry in the matter to level such allegation;

13.2 That neither SEBI nor the Adjudication Officer had the benefit of looking into the matter or background facts and determine whether the alleged non-compliance arose out of any factors that would heighten or lessen the need for regulatory intervention, based on which a decision could have been taken as to whether regulatory proceedings should have at all been initiated;

13.3 That the inordinate delay in initiating the proceedings levelling allegations, dating back to 17 years ago at one extreme to 5 years ago at another, renders it impossible and unreasonable to prove or disprove the allegations. In effect, this approach forces the Noticee to prove the defense rather than be faced with a reasonably proximate occurrence of facts. The contents of a letter of offer drafted by an acquirer and the merchant banker who is not an agent of the Noticee cannot constitute confirmed evidence of occurrence or non-occurrence of a violation and these proceedings have been adopted simply on the basis of contents of the letter of offer;

13.4 The Noticee confirmed that the filings relating to Regulation 8(3) of the Takeover Regulations, 1997 in respect of the financial years ending March 31, 1998-2003 had been once filed on February 25, 2004. However the Noticee stated that it is unable to confirm any facts or circumstances relating to these years in connection with compliance or non-compliance causes and reasons that led to the same and extenuating or mitigating factors that would be relevant for the proceedings;

13.5 That therefore it is wholly unreasonable to level an allegation two decades later and expect that innocence should be proven. Further that such an approach violates the constitutional provision available in India of the law not requiring the subject to prove innocence. On the contrary there needs to be a positive allegation of a violation on the basis of positive evidence of non-compliance. Moreover, acute delays and latches in initiating proceedings are wholly unsustainable and it would not be proper to expect a Noticee to prove innocence without access to old records, which it would not be reasonably expected to remain available. There is

a catena of judgments of courts holding that delays and latches in initiating proceedings are untenable and in the instant case, the delay is writ large on the record since the alleged period of violation was nearly two decades ago;

13.6 *That calling upon the Noticees to prove compliance of filings of nearly seventeen years ago in order to disprove an allegation is untenable. It is settled law that the onus of laying a charge is on authority levelling the charge, and without doing so, it is not legally permissible to ask a Noticee to disprove a charge or show cause why it should not be penalized. It is equally settled law that a weakness in the ability to defend can never become the strength of proving a charge;*

13.7 *That the allegations made by SEBI in the SCN are merely on suspicions and conjecture based on the details given in the Open Offer Letter of Offer. There has been no investigation or independent application of mind by SEBI. Thus, SEBI has violated well-settled principles of law enunciated by the Hon'ble Supreme Court in Bhagirath v. State of Madhya Pradesh (AIR 1976 SC 975) that:*

- *suspicion however strong cannot replace proof;*
- *conjecture and surmise can never constitute proof; and*
- *the prosecution's case cannot rest on the weakness of the defence;*

13.8 *that out of the 10 alleged instances of non-compliance / delayed compliance given in the Table in Paragraph 3 of the SCN, SEBI too acknowledges that there has been compliance in 9 out of the 10 instances, but only one out of such ten pertains to non-compliance of Regulation 8(3) of the Takeover Regulations, 1997. Apart from clearly being hit by the principles of delays and latches as the allegations date back to violations as far back as financial year 1997-98 and ought not to be acted upon, no useful purpose is served by initiating regulatory proceedings now;*

13.9 *That it is a settled law that no one should be put to proceedings after a delay so inordinate that it is impossible for him to disprove the charge. In this case there is complete absence of any evidence to prove the charge either. In State of Punjab vs Chaman Lai Goyal, the Supreme Court of India has ruled that a delay in instituting proceedings by so long a period that renders a reasonable defence of a charge impossible, would by itself constitute a breach of the principles of natural justice. It can never be argued that the onus of disproving a charge should first be discharged by the person accused of violation and that inability to do so would*

necessarily render the charge as being proven. Such an approach is contrary to all known principles of natural justice applicable in India;

13.10 That without prejudice to the foregoing, it is submitted that Clause 35 of the Listing Agreement also mandates submission of the certain details with the stock exchanges by all listed companies, separately for each class of equity shares/security in the specified formats. In substance, such public filings under the Listing Agreement are in pari materia with the disclosures required under Regulation 8(3)of the Takeover Regulations, 1997;

13.11 That there has been a complete compliance under Clause 35 of the Listing Agreement and this has been clearly mentioned in the Letter of Offer relating to the Open Offer, on which SEBI has squarely relied upon. Therefore, there could have been no gain to be accrued to the Noticees for not complying with Regulation 8(3) of the Takeover Regulations, 1997;

13.12 That rather that the form, the essence of a provision must be taken into account and as such, in the instant case the underlying intent and purpose of the Regulation had been adequately served. The Noticee did not gain any unfair advantage, nor, was there any case of any investor grievance in connection with such filings;

13.13 That even assuming that the approach adopted i.e. to substitute proof of a charge with proof of the defence, or to treat the weakness in a defence as a strength of a charge, then too, there is no question of any gain or advantage that has accrued to them, let alone any disproportionate gain or unfair advantage.Also, no loss has been caused to any investor as a result of the delayed disclosures of the acquisition and the required information to the shareholders was always provided under Clause 35 of the Listing Agreement;

13.14 That the shareholding never ever changed for the disclosure to have any consequence, and no shareholder has been deprived of any benefits, nor, has there been any loss caused to them on account of the alleged violation. Further, the alleged delay or non-compliance was without any malafide intention and did not lead to any material benefits to the Noticee.

CONSIDERATION OF ISSUES

14. I have carefully perused the written submissions of the Noticee, the submissions made at the hearing and the documents available on record. It is observed that the allegation against the Noticee is that the Noticee has failed to make the relevant disclosure under the provisions of Regulations 8(3) of the Takeover Regulations, 1997for 7 consecutive financial years from financial

year (FY) 1997-98 to FY 2003-04, again once for the FY 2006 and again for 2 consecutive financial years (FY) 2008-09 to FY 2009-10.

15. The issues that, therefore, arises for consideration in the present case are:

a. Whether the Noticee has violated the provisions of Regulation 8(3) of the Takeover Regulations for 7 consecutive financial years from financial year (FY) 1997-98 to FY 2003-04, again once for the FY 2006 and again for 2 consecutive financial years (FY) 2008-09 to FY 2009-10?

b. Do the violations, if any, attract monetary penalty under Section 15 A(b)of SEBI Act?

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

FINDINGS

16. Before moving forward, it is pertinent to refer to the relevant provisions of Regulation 8(3) of the Takeover Regulations, 1997 which reads as under:

Regulation 8(3) of the Takeover Regulations, 1997

Continual disclosure.

8 (3) Every company whose shares are listed on a stock exchange, shall within 30 days from the financial year ending March 31, as well as the record date of the company for the purposes of declaration of dividend, make yearly disclosures to all the stock exchanges on which the shares of the company are listed, the changes, if any, in respect of the holdings of the persons referred to under sub regulation (1) and also holdings of promoters or person(s) having control over the company as on 31st March.

17. Now the first issue for consideration is whether the Noticee was required to make the relevant disclosure under the provisions of Regulations 8(3) of the Takeover Regulations, 1997for 7 consecutive financial years from financial year (FY) 1997-98 to FY 2003-04, again once for the FY 2006 and again for 2 consecutive financial years (FY) 2008-09 to FY 2009-10.The SCN alleged violation/non-compliance by the Noticee in respect of Regulation 8(3) of Takeover Regulations, 1997 as incorporated in the letter of Offer. The same is as shown in the tabular form below:

Regulation	Due Date of compliance	Date of compliance	Non-compliance/ Delay (no. of days)
8(3)	30.04.1998	25.02.2004	2,127
8(3)	30.04.1999	25.02.2004	1,762
8(3)	30.04.2000	25.02.2004	1,396
8(3)	30.04.2001	25.02.2004	1,031
8(3)	30.04.2002	25.02.2004	666
8(3)	30.04.2003	25.02.2004	301
8(3)	30.04.2004	-	Not complied
8(3)	30.04.2006	22.01.2007	267
8(3)	30.04.2009	07.05.2009	7
8(3)	30.04.2010	13.05.2010	13

18. As per Regulation 8(3) of the Takeover Regulations, 1997, Noticee was required to make yearly disclosure within 30 days from the financial year ending March 31, to the stock exchanges on which the shares of the company were listed, the changes, if any, in respect of the holdings of the persons referred to under sub regulation (1) of regulation 8 of the Takeover Regulations, 1997 and also holdings of promoters or person(s) having control over the company as on 31st March.

19. In the matter, I find that the Noticee vide letter dated June 04, 2015 have *inter alia* contended that apart from relying on status of Compliance by the then promoters of the Noticee given in the Open Offer Letter of Offer dated June 29, 2011, SEBI does not have independent findings of any investigation or inquiry in the matter to level an allegation of delayed/ non-compliance of Regulation 8(3) of Takeover Regulations against the Noticee.

20. I note here that as rightly brought out by the Noticee, the SCN relies upon the disclosures made in the letter of Offer dated June 29, 2011.The information disclosed in the said letter of Offer has been vetted by the Manager to the Offer M/s. Corporate Professionals, a Merchant Banker registered with SEBI. The said letter Of Offer, vetted by a SEBI registered intermediary, disclosed as follows: *"As regards the Target Company is concerned, there has been a delay in filing the disclosures ….. under regulation 8(3) for the years 1998 to 2003, 2006, 2009 and 2010 by the TargetCompany. No record with respect to the disclosure made under regulation 8(3) by the Target Company for the year 2004 isavailable. The status of compliance with respect to chapter II of SEBI (SAST) Regulations, 1997 by the Target Company isgiven in Annexure B to this Letter of Offer."*

21. Thus, on a perusal of the letter of Offer, it becomes apparent that the Manager to the Offer who has vetted the disclosures made in the letter of Offer, had in 2011 made a clear distinction between

records of filing under Regulation 8(3) of the Takeover Regulations which were not available, from the delayed filing made by the company under Regulation 8(3). Such distinction would not have been possible unless the Manager to the Offer had carried out the due diligence exercise at the relevant point of time. Under the SEBI (Merchant Banking) Regulations, 1992, the Manager to the Offer is responsible for verification of the contents of the Letter of Offer in respect of the Offer and the reasonableness of the views expressed therein, and is required to submit to the Board at least two weeks prior to the opening of the issue for subscription, a due diligence certificate. I note that the Manager to the Offer M/s. Corporate Professionals vide due diligence certificate dated March 21, 2011 has *inter alia* confirmed that the disclosures made in the draft letter of Offer/final letter of Offer are true, fair and adequate to enable the investors to make a well informed decision.Any false or untrue certification by the Manager to the Offer would mean the risk of suspension/ cancellation of its registration to act as a Merchant Banker. I, thus, note here that the Noticee failed to appreciate the fact that a SEBI registered intermediary had carried out the necessary due diligence while concluding that the Noticee had made delayed filings.

22. Besides, I find that the Noticee too in its submissions has confirmed that the filings relating to Regulation 8(3) of the Takeover Regulations, 1997 in respect of financial years ending March 31, 1998-2003 had been once filed on February 25, 2004, though it could not provide the reasons that led to such delay.

23. I further agree with the Noticee that there need to be a positive allegation of a violation on the basis of positive evidence of non-compliance. I also agree with the Noticee that the onus of laying the charge is on the authority leveling the charge, and without doing so, it is not legally permissible to ask the Noticee to disprove a charge or show cause why it should not be penalized. In the extant matter, as stated earlier, the SCN has been issued based on the due diligence conducted by a SEBI registered Merchant Banker, whereby it was observed that there had been a delay by the company in complying with Regulation 8(3) for certain financial years, which has also been admitted by the company through the submissions made. The exact number of days of such delay was disclosed in the letter of offer and was available in public domain. Thus, it is not that the SCN was not supported by positive evidence. The disclosure in the letter of Offer based on due diligence exercise conducted by a merchant banker is evidence enough to prove the charge.

24. I note here that the Noticee has *inter alia*stated further that the contents of the letter of Offer drafted by an acquirer and the merchant banker, who is not an agent of the Noticee, cannot constitute confirmed evidence of occurrence or non-occurrence of a violation. I find it pertinent to mention here that the company, the acquirer and the merchant banker work together to ensure that the offer meets all legal, regulatory, accounting and tax related compliances and objectives. Further, it is not based on a mere guess or "hunch" that the Merchant Banker, who is a SEBI registered intermediary, had disclosed the delayed filing by the Noticee under Regulation 8(3) of the Takeover Regulations 1997. As brought out above, it is during the due diligence exercise carried out by the merchant banker (Manager to the Offer) that delayed compliance made by the Noticee was observed. I further note here that Noticee has neither questioned the validity of the due-diligence conducted by the Merchant Banker, nor, has the Noticee denied the alleged delayed/ non-compliance of the provisions of the Takeover Regulations, 1997. The onus was on the Noticee to point out failure/ lapse, if any, on the part of Manager to the Offer to act diligently in the matter. When a fact is proved in affirmative or evidence is led to prove the same, the onus shifts on the other side to negate the charge. In this context, I note that in the matter of ***A. Raghavamma and Another v. A. Chenchamma and Another (AIR 1964 SC 136),***while making a distinction between burden ofproof and onus of proof, the ***Hon'ble Supreme Court*** has opined as follows:

"There is an essential distinction between burden of proof and onus of proof: burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence."

On the contrary, I find here that the Noticee has confirmed the delayed filing made by them under Regulation 8(3) of the Takeover regulations, 1997. In view of the above, I find that there was positive evidence in support of the charge and the charge itself has been admitted to by the Noticee.

25. I note further that the Noticee has stated that the alleged violations dates back to 17 years ago at one extreme to 5 years ago at another rendering it impossible and unreasonable to prove or disprove the allegations. I find that the Noticee has confirmed that delayed filing was made by it under Regulation 8(3) in 2004 in respect of years 1998-2003. I find further that the ARs at the

hearing on behalf of the Noticee has also submitted that the Noticee had independently based on the records available with itself and with the Registrar of the Company (RoC) made disclosures under Regulation 8(3) of the Takeover Regulations, 1997 as per the compliance indicated in the letter of Offer. However, the Noticee through the written submissions has claimed that they are unable to confirm the circumstances or reasons that led to the delayed compliance and extenuating or mitigating factors that would be relevant for the proceedings.In the matter, I note that the letter of Offer in 2011 had also disclosed that SEBI may initiate action *inter alia* against the Company at a later stage in terms of the Takeover Regulations, 1997 and provisions of the SEBI Act for the said non-compliance of Chapter II of the Takeover Regulations, 1997 *inter alia* by the Company. Thus, I believe that the Noticee was made aware in 2011 itself that action could be initiated against it for delayed compliance under Regulation 8(3). Since records pertaining to year 2009 and 2010 were immediately preceding the year of open offer i.e. 2011, I consider it was obligatory on the part of the Noticee to have preserved those records atleast. But the Noticee, I find, has not brought out reasons or circumstances, if any, that resulted in delayed submissions made by it in 2009 and 2010 either. Further, neither has the Noticee pointed out any prejudices and disadvantages suffered by them due to the alleged delay in initiating proceedings. And mere delay in initiating proceedings cannot be a reason for absolving any person of the liability arising under law.

26. There are more than 5,000 listed companies who were required under Takeover Regulations, 1997 to make annual filing to the stock Exchanges where the company's shares were listed in respect of the holdings of the promoters or person(s) having control over the company as on 31st March. The extant delayed disclosure by the company under Regulation 8(3) came to notice of the Manger to the Offer while carrying out the due diligence with respect to the compliances made by the company under Takeover Regulations, 1997 at the time of open offer by Mr. Nav Rattan Munjal ('Acquirer'). The same was accordingly disclosed in the letter of offer and to SEBI. SEBI thereafter initiated the extant adjudication proceedings in the matter.

27. Besides under the SEBI Act, there is no limitation on initiation of adjudication proceedings for violation of various provisions of Act and Regulations made thereunder. In the matter of ***Radheyshyam Chiranjilal Goenka Vs. Adjudicating Officer, SEBI, the Hon'ble SAT*** on August 31, 2000 held that –

"… adjudication under section 15I for default under section 15F cannot be said to be hit by Article 14 of the Limitation act, as the default identified thereunder being a continuing one, till such time it is made good. In the instant case the default was made good only in September 1999, whereas the adjudication proceedings had commenced much earlier as way back in the year 1998."

28. In the case at hand, I note as per the disclosures made in the letter of Offer and specifically admitted to by the Noticee that the default for the years 1998 to 2003 was made good only in 2004, and thereafter for the years and the dates provided in para 17 above. Further as has been brought out above, the Noticee has not provided any reasons or circumstances that led to delayed filing under Regulation 8(3) even in respect of two immediate preceding years i.e. 2009 and 2010, just prior to the letter of Offer dated June 29, 2011. Thus, I note that even though the Noticee was within knowledge in the year 2011 of the fact that SEBI may initiate action against the Noticee at a later stage for non-compliances/ delayed compliances listed out in the letter of Offer against it, the Noticee, I find,adopted a casual approach to the whole matter. It did not take due care to preserve the available records of even the immediate preceding period. Alternatively,it can be presumed that there could have been no reasonable basis for such delayed filing. Be that as it may, the contention of the Noticee that delay is writ large on the record since the alleged period of violation was nearly two decades ago, thus, does not hold any merit. Thus under the circumstances, if the Noticee is to be given benefit on the ground that there has been delay in initiating the proceedings, and, therefore, the proceedings should be quashed, I am of the view that it would result in travesty of justice than upholding of justice.

29. I note further that the Noticee has also contended that the allegation made in the SCN are merely on suspicions and conjecture based on details given in the letter of Offer and that there has been no investigation or independent application of mind by SEBI. If this argument of the Noticee was to be accepted, then the basis of regulatory requirement of appointing a SEBI registered merchant banker for conducting due diligence in an open offer would become redundant and would also naturally raise the basic question on the *raison d'être* of the merchant banker. I, thus, find that the said argument too does not hold any merit.

30. As per the letter of Offer, I find that no record with respect to the disclosures made under regulation 8(3) by the company for the year 2004 is available. In absence of evidence as to whether the

company made delayed filing under Regulation 8(3) for the year 2004, or,did not comply with Regulation 8(3) of the Takeover Regulations, 1997 for the year 2004, I am inclined to give the benefit of doubt to the company for that particular year and conclude that violation of Regulation 8(3) of the Takeover Regulations, 1997 for the year 2003-04 against the company does not stand established.

31. I find that the Noticee in its submission has admitted that the filings relating to regulation 8(3) of Takeover Regulations, 1997 during the period of the financial years ending March 1998-2003 had once been filed on February 25, 2004. Further, the status of compliance by the Noticee under Regulation 8(3) of the Takeover Regulations, 1997 for 7 consecutive financial years from FY 1997-98 to FY 2003-04, again once for FY 2006, and again for 2 consecutive financial years from FY 2008-09 to FY 2009-2010is as given in para 17, duly vetted by the Manager to the Offer. However as stated earlier, due to absence of records, I am inclined to give the benefit of doubt to the company in respect of filings required to be made for the year 2003-04.

32. I find that Regulation 8(3) is in the form of mandatory annual disclosures to be filed by a company to the stock exchanges on which the shares of the company are listed, in respect of the shareholding *inter alia* of the promoters or persons(s) having control over the company, so that investors are made aware of the changes, if any, in the holdings of these persons so as to enable them to take an informed investment decision. In view of all of the above, it stands established that the Noticee has violated Regulation 8(3) of the Takeover Regulations, 1997for 6 consecutive financial years from financial year (FY) 1997-98 to FY 2002-03, again once for the FY 2006 and again for 2 consecutive financial years (FY) 2008-09 to FY 2009-10 (9 times). The respective number of days of delay in compliance under Regulation 8(3) for each applicable financial year has been enumerated in the table at Para 17 above.

33. The Hon'ble Supreme Court of India in the matter of *SEBI Vs. Shri Ram Mutual Fund* [2006] 68 SCL 216(SC) held that *"In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant…".* Further in the matter of Ranjan Varghese v. SEBI (Appeal No. 177 of 2009 and Order dated April 08, 2010), the

Hon'ble SAT had observed *"Once it is established that the mandatory provisions of takeover code was violated the penalty must follow*.

34. In view of the foregoing, I am convinced that it is a fit case to impose monetary penalty under Section 15A(b) of the SEBI Act for the violation of Regulation 8(3) of the Takeover Regulation, as applicable against the Noticee, which reads as under:

15 A(b) of the SEBI Act, 1992 prior to SEBI (Amendment) Act, 2002 (w.e.f. 29-10-2002)

If any person, who is required under this Act or any rules or regulations made thereunder,--
To file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty not exceeding five thousand rupees for every day during which such failure continues.

15 A(b) of the SEBI Act, 1992 after SEBI (Amendment) Act, 2002 (w.e.f. 29-10-2002)

Penalty for failure to furnish information, return, etc.-

15.A(b)*If any person, who is required under this Act or any rules or regulations made thereunder,--*
To file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

35. While determining the quantum of monetary penalty under Section 15 A(b) of SEBI Act, I have considered the factors stipulated in Section 15-J of SEBI Act, which reads as under:-

Factors to be taken into account by the adjudicating officer

15J. *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.

36. In view of the charges as established, the facts and circumstances of the case and the judgments referred to and mentioned hereinabove, the quantum of penalty would depend on the factors referred in Section 15-J of SEBI Act and stated as above. It is noted that no quantifiable figures are available to assess the disproportionate gain or unfair advantage made as a result of such default by the Noticee. Further from the material available on record, it may not be possible to ascertain the exact monetary loss to the investors on account of default by the Noticee. However, the main objective of the Takeover Regulations is to afford fair treatment for shareholders who are affected by the change in control. The Regulation seeks to achieve fair treatment by *inter alia* mandating disclosure of timely and adequate information to enable shareholders to make an informed decision and ensuring that there is a fair and informed market in the shares of companies affected by such change in control. Correct and timely disclosures are also an essential part of the proper functioning of the securities market and failure to do so results in preventing investors from taking well-informed decision. Thus, the cornerstone of the Takeover regulations is investor protection.

37. As per Section 15A(b) of the SEBI Act, prior to amendment dated October 29, 2002, the Noticee was liable to a penalty not exceeding Rs. 5,000/- for every day of default during which such default continues for failure to file any return or furnish information, books or documents within the time specified. With effect from October 29, 2002, the Noticee is liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less. I note that the ARs have confirmed that there was no past non-compliance of SEBI Act and Regulations by the Noticee and no action was taken by SEBI in the past against the Noticee.

38. I, however, note that the ***Hon'ble Securities Appellate Tribumal (SAT) in the matter of Komal Nahata Vs. SEBI (Date of judgment- January 27, 2014)*** has observed that:

"Argument that no investor has suffered on account of non disclosure and that the AO has not considered the mitigating factors set out under Section 15J of SEBI Act, 1992 is without any merit because firstly penalty for non compliance of SAST Regulations, 1997 and PIT Regulations, 1992 is not dependent upon the investors actually suffering on account of such non disclosure."

In view of the same, the argument put forth by the Noticee that no loss was caused to any investor as a result of the delayed disclosures of the acquisition and that there was no case of any investor grievance in connection with such filings is not relevant for the given case.

39. In the matter, I also note that in ***Appeal No. 78 of 2014 of Akriti Global Traders Ltd. Vs. SEBI,the Hon'ble Securities Appellate Tribunal (SAT) vide Order dated September 30, 2014*** *had observed that:*

"… Argument of appellant that the delay was unintentional and that the appellant has not gained from such delay and therefore penalty ought not to have been imposed is without any merit, because, firstly, penal liability arises as soon as provisions under the regulations are violated and that penal liability is neither dependent upon intention of parties nor gains accrued from such delay." In view of the same, the argument put forth by the Noticee that there is no question of any gain or advantage that has accrued, let alone any disproportionate gain or unfair advantage and that the alleged delay was without any malafide intention is also not relevant for the given case.

40. In addition to the aforesaid, I am also inclined to consider the following mitigating factors while adjudging the quantum of penalty: a) the paid-up capital/ market capitalization of the company at the relevant point of time; b) the trading volumes of the company's shares on BSE, where the shares were listed, during the relevant period; and c) the number of occasions in the instant proceeding that the Noticee has violated the relevant provisions of the Takeover Regulations, 1997.

41. From the shareholding pattern for the quarter ended March 31, 2001 to March 31, 2010 as available on BSE website, I note that the paid up capital of the company was Rs. 24,90,000 comprising of 2,49,000 equity shares of Rs. 10/- each, of which the promoters held 2,48,875 shares representing 99.95% of the paid-up capital in March 2001 which gradually reduced to 1,85,375 shares representing 74.45% in the quarter ending June 2008 and continued as such till 2010. Further, during the relevant period there were 127 public shareholders. From a perusal of the letter of Offer, I find that the shares of the company were deemed to be infrequently traded under the Takeover Regulations, 1997. I note from Para 32 above that it has been established that the Noticee has violated Regulation 8(3) of the Takeover Regulations, 1997 for 6 consecutive financial years from financial year (FY) 1997-98 to FY 2002-03, again once for the FY 2006 and again for 2 consecutive financial years (FY) 2008-09 to FY 2009-10 (9 times).

42. I further note that the Noticee has submitted that the shareholding of the Noticee with respect to the period in question was available on record in view of the disclosure made by the company with BSE under clause 35 of the Listing Agreement.

43. In the matter, I note that the ***Hon'ble Securities Appellate Tribunal (SAT) in Premchand Shah and Others V. SEBI (Appeal no. 108 of 2010 decided on February 21, 2011)***, has held as follows:

"..... *When law prescribes a manner in which a thing is to be done, it must be done only in that manner or not at all. Both sets of regulations prescribe formats in which the disclosures are to be made and those are then put out for the information of the general public through special window(s) of the stock exchange which did not happen in this case. The fact that non disclosure has been made penal makes it clear that the provisions of regulation 7(1A) of the takeover code and regulations 13(3) and 13(4) of the insider regulations are mandatory in nature. Non disclosure of the information in the prescribed manner deprived the investing public of the information which is required to be available with them when they take an informed decision while making investments."*

44. I would also like to rely on the judgment of ***Hon'ble SAT in Bindal Synthetics Private Limited Vs. SEBI (Appeal no. 75 of 2014 decided on June 09, 2014),*** wherein it was observed that "..... *fact that the appellant had made disclosures under PIT Regulations, 1992 does not absolve appellants obligation to make disclosure under regulation 7(1A) of SAST Regulations, 1997.*" The disclosure made under PIT Regulations is not substitute for the disclosure to be made under SAST Regulations.

45. Thus, I note that the Noticee cannot absolve itself by making disclosures under Listing Agreement *in lieu* of making necessary disclosures under the Takeover Regulations, 1997, as the purpose and intent of both the laws are different. Further, every company whose shares were listed on a stock Exchange was subject to disclosure requirements under Regulation 8(3) of the Takeover Regulations, 1997 irrespective of reporting made under clause 35 of the listing agreements with the stock Exchanges.

46. As a listed company, the Noticee had a responsibility to comply with the disclosure requirements in accordance with their spirit, intention and purposeso that the investors could take a decision whether to buy, sell, or hold the Noticee's securities. Delayed compliance with disclosure requirements by the Noticee undermines the regulatory objectives and jeopardizes the achievement of the underlying policy goals.

ORDER

47. After taking into consideration all the facts and circumstances of the case, I impose a penalty of **Rs. 4,50,000/-(Rupees Four lakh fifty thousand only)** on the **Noticee viz. M/s. Khatau Exim Limited (now known as M/s. Velox Industries Limited)** under the provisions of Section 15A(b) of the SEBI Act for violation of Regulation 8(3) of the Takeover Regulations, 1997. In the facts and circumstances of the case, I am of the view that the said penalty is commensurate with the default committed by the Noticee.

48. With respect to the allegation of violation under Regulation 8(3) of the Takeover Regulation, 1997 for the year 2003-04, the Noticee is given benefit of doubt in the matter.

49. The Noticee shall pay the said amount of penalty by way of demand draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, within 45 days of receipt of this order. The said demand draft should be forwarded to Chief General Manager, Corporation Finance Department, SEBI Bhavan, Plot No. C – 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

50. In terms of rule 6 of the Rules, copies of this order are sent to the Noticee and also to the Securities and Exchange Board of India.

Date:September 22, 2015 **Anita Kenkare**

Place: Mumbai **Adjudicating Officer**