BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

(ADJUDICATION ORDER NO: AO/SBM/EAD-3/154/2018)

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

In respect of:

Swallow Associates LLP (LLPIN: AAB- 1953)

463, Dr. Annie Besant Road,

Worli, Mumbai-400030

In the matter of

KEC International Limited

FACTS OF THE CASE

1. On the basis of the shareholding pattern filed by listed companies with the stock exchanges under the provisions of the listing agreement, it was observed by Securities and Exchange Board of India (hereinafter referred to as '**SEBI')** that certain persons/entities had acquired shares of various companies, which were beyond the threshold limit prescribed under the provisions of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as '**SAST Regulations, 1997**'). During the period December 2009 to March 2010 (hereinafter referred to as the '**examination period'/ 'relevant period'**), it was observed that the shareholding of one of the promoter group entities of KEC International Limited (hereinafter referred to as '**KEC'/ 'Target Company'**) had crossed the threshold limit prescribed under the relevant provisions of the

SAST Regulations, 1997. The shares of the target company are listed on National Stock Exchange (**'NSE'**) and Bombay Stock Exchange ('**BSE'**).

2. During the course of examination by SEBI, it was noted that Swallow Associates LLP (hereinafter referred to as '**Swallow'/ 'Noticee'**), a promoter group entity of the target company, had acquired the shares of the target company during the aforementioned examination period, which had crossed the threshold limit prescribed under the provisions of the SAST Regulations, 1997. As part of the re-arrangement of the holdings of the promoter group of the target company, it was observed that Jubilee Investments and Industries Limited ('**Jubilee**'), a promoter group entity of the target company, got merged with another promoter group entity of the target company viz. RPG Cellular Investments and Holdings Private Limited ('**RCIHPL'**) through a scheme of arrangement, which was sanctioned by the Hon'ble Calcutta High Court, vide its order dated June 11, 2009. As a result of the above mentioned scheme of arrangement, 63,56,692 equity shares of the target company constituting 12.88% of its total share capital, which was held by Jubilee was acquired by RCIHPL. Subsequently, RCIHPL also acquired an additional 0.58% stake in the target company by purchasing negligible quantities of shares of the target company from other promoter group entities of KEC during the relevant period. Pursuant to the above mentioned transactions, the individual shareholding of RCIHPL in the target company increased from 4.89% to 18.35% during the relevant period i.e. quarter ended December 2009 to quarter ended March 2010.

3. In this regard, it is pertinent to note that RCIHPL got merged with Swallow Associates Limited pursuant to an Order dated February 10, 2012 passed by the Hon'ble Bombay High Court. Further, Swallow Associates Limited has been converted into a Limited Liability Partnership entity vide a certificate of conversion dated October 31, 2012 and is presently known as Swallow Associates LLP i.e. the Noticee in the context of the current proceedings.

4. In view of the aforementioned transactions, it is alleged that the individual shareholding of the Noticee in the target company (which was 4.89% during the

quarter ended December 2009) increased to 18.35% (during the quarter ended March 2010) and thereby, the shareholding of the Noticee in the target company crossed the prescribed threshold limit of 5% under the provisions of SAST Regulations, 1997. Therefore, in terms of Regulations 7(1) r/w 7(2) of the SAST Regulations, 1997, Noticee was required to make the necessary disclosures to the target company and to the stock exchanges within two days of its acquisition of the shares. It is alleged that Noticee has failed to make the necessary disclosures required as per the aforementioned provisions of law. Therefore, adjudication proceedings were initiated against the Noticee under the provisions of section 15A(b) of the SEBI Act, 1992 (hereinafter referred to as '**SEBI Act'**).

APPOINTMENT OF ADJUDICATING OFFICER

5. Shri D Ravikumar was appointed as the Adjudicating Officer vide an Order dated June 16, 2014 under the provisions of section 15 I of the SEBI Act read with Rule 3 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as '**Adjudication Rules'**) read with Regulations 44 & 45 of the SAST Regulations, 1997 to inquire into and adjudge under the provisions of section 15A(b) of the SEBI Act for the alleged violation of the provisions of Regulation 7(1) r/w Regulation 7(2) of the SAST Regulations,1997 by the Noticee. Pursuant to the transfer of Shri D Ravikumar, I have been appointed as the Adjudicating Officer in the matter, vide an Order dated June 22, 2015.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING:

6. Show Cause Notice ref. A&E/EAD-3/DRK-DS/18958/2014 dated June 30, 2014 (hereinafter referred to as '**SCN'**) was issued to the Noticee under Rule 4(1) of the Adjudication Rules, to show cause as to why an inquiry should not be held against the Noticee and why penalty, if any, should not be imposed on it under the provisions of section 15A(b) of the SEBI Act for its alleged violation of the provisions of the SAST Regulations, 1997, as mentioned in the SCN. The SCN issued to the Noticee, inter alia, mentioned the following:-

- *SEBI observed that you had acquired 66,38,862 equity shares of KEC International Ltd., constituting 13.46% of the total paid up share capital of the company. Pursuant to the said acquisition of shares, your shareholding in the company increased from 4.89% to 18.35%. However, you did not make the necessary disclosure with respect to the said acquisition of shares.*
- *As per the requirements of Regulation 7(1) read with Regulation 7(2) of the SAST Regulations, 1997, you were required to disclose the aggregate of your shareholding or voting rights in the company to the company and to the stock exchanges where the shares of the company are listed within two days.*
- *In view of the above facts, it is alleged that you have violated the provisions of Regulation 7(1) read with Regulation 7(2) of the SAST Regulations, 1997.*
- *The alleged violation of Regulation 7(1) read with Regulation 7(2) of the SAST Regulations, if proved, makes you liable for penalty under Section 15A(b) of the SEBI Act.*

7. The SCN dated June 30, 2014 was served on the Noticee. Vide letter dated October 12, 2015, Noticee submitted its reply, details of which are mentioned as under:-

    - *The events, which are the subject matter of the SCN, relate to the acquisition of shares in KEC by RPG pursuant to a scheme of arrangement that was completely exempted from not only making an open offer under Regulation 10, but also did not even attract disclosure obligations as alleged. RPG has subsequently merged with Swallow Associates Limited pursuant to an order dated February 10, 2012 passed by the Hon'ble Bombay High Court. Further, Swallow Associates Limited has been converted into a Limited Liability Partnership vide a certificate of conversion dated October 31, 2012 and is now known as Swallow Associates LLP.*

- *The SCN has been issued in connection with the acquisition of 66,38,862 equity shares constituting 13.46% of the equity share capital of KEC by Swallow. Pursuant to the Subject Transaction, the individual shareholding of Swallow increased from 4.89% to 18.35% between the quarter ended December 2009 and March 2010 quarter ("Relevant Period"). It is alleged that Swallow failed to make appropriate disclosures of the Subject Transaction under Regulations 7(1) and 7(2) of the SAST Regulations, 1997.*
- *We respectfully submit that the allegations in the SCN proceed upon an erroneous interpretation of the relevant provisions of the SAST Regulations, 1997 and since no disclosure obligations would arise at all under the SAST Regulations, 1997 in the present case. One of the fundamental concepts on which the SAST Regulations, 1997 is based on, is that of a "person acting in concert". Every obligation under the SAST Regulations, 1997 is premised on aggregating the holdings of all persons acting in concert and regardless of individual shareholding of any person, the holdings of all persons acting in concert has to be reckoned as a collective aggregated shareholding or voting power.*
- *Prior to the Subject Transaction, the collective shareholding of the promoter group in KEC for the quarter ending December, 2009 was 41.90%. Swallow, a promoter group entity, acquired 63,56,692 equity shares constituting 12.88% of the paid up capital of KEC pursuant to a scheme of arrangement where Jubilee Investments and Industries Ltd., a promoter group entity, merged into Swallow. The merger of Jubilee into RPG was approved by the Calcutta High Court vide its order dated June 11, 2009. The effective date of the scheme of amalgamation was October 23, 2009. RPG subsequently acquired an additional 0.58% of the paid up capital of KEC from various entities belonging to the promoter group. Even after the Subject Transaction, there was a negligible change in the collective shareholding of the promoter group in KEC i.e. it increased from 41.90% (as of December 31, 2009) to 41.99%. The collective shareholding*

of the promoter group who are persons acting in concert in KEC, prior to and after the Subject Transaction continued to remain the same.

- *Accordingly, after the subject transaction, whether the individual shareholding of Swallow in KEC crossed the prescribed thresholds is entirely irrelevant. The collective shareholding of the promoter group who are persons acting in concert in KEC, prior to and after the Subject Transaction continued to remain the same.*
- *Swallow and Jubilee have at all relevant times, been and always disclosed as promoter group entities in the shareholding pattern filed with the Exchanges by KEC. Therefore, they along with the other promoter group entities collectively exercised control over KEC and therefore, had a common objective or purpose of exercise of control, and consequently, were deemed to be persons acting in concert along with other entities comprising of the promoter group for the purposes of the SAST Regulations, 1997.*
- *The SCN ignores this fundamental premise and proceeds on the erroneous basis that the individual shareholding of Swallow in KEC ought to be reckoned for the purposes of the SAST Regulations, 1997 while ignoring the collective shareholding of the promoter group in KEC.*
- *The SCN ignores the fundamental concept under the SAST Regulations, 1997 that every acquisition and obligation should be reckoned only in the context of the collective entitlement to voting rights in the hands of all persons acting in concert. Such an approach would be incorrect, untenable and would constitute an explicit breach of a fundamental concept of how takeover regulations in India have always been legislated and interpreted by courts.*
- *It is now settled law that the disclosure obligations under Regulation 7 would at all times cover all persons acting in concert. There is positive case law to this effect and the legislative intent as discerned from the Bhagwati Committee Reports too underlines this fact.*

- *The requirement to consider all holdings of persons acting in concert has always been a foundational and fundamental legislative intent of takeover regulations in India. The Bhagwati Committee Report dated January 18, 1997* ***("First Bhagwati Committee Report"),*** *based on which the Takeover Regulations of 1994 were first brought about, dealt with the concept of persons acting in concert as follows:*

  " ..."Persons acting in concert" have particular relevance to public offers, *for often an acquirer can acquire shares or voting rights in a company "in concert" with any other person in a manner that the acquisitions made by him remain below the threshold limit, though taken together with the voting rights of persons in concert, the threshold may well be exceeded.* ***It is therefore, important to define "persons acting in concert"...". (****Emphasis Supplied).*
- *The underlying concept was to ensure that persons who have common objectives or purpose of voting rights in a listed company ought to be grouped together for the purpose of determining thresholds for the purpose of takeover regulations. The First Bhagwati Committee Report goes on to recommend that certain persons, by their very relationship with the acquirer would be deemed to be acting in concert. It was recommended that such groups be defined and a rebuttable presumption that such persons are acting in concert be drawn in relation to such persons.*
- *Thus it is apparent that the requirement of considering the disclosure thresholds was on the basis of the collective holding of the acquirer and persons acting in concert with him. This was the manner in which SEBI itself has interpreted and applied the provisions of the SAST Regulations, 1997. It is also pertinent to note that some of the cases relied upon by us are based on the interpretation of the definition of the term 'acquirer' in the SAST Regulations, 1997. It is submitted that Regulation 7(1) and 7(2) use the term 'acquirer' and there is nothing in the SAST Regulations, 1997 that would warrant interpreting the definition in any other manner.*

- *This position is also reinforced by the provisions of (Substantial Acquisition of Shares and Takeovers) Takeover Regulations"). Regulation 28(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 states:*

  The disclosures under this Chapter ***shall be of the aggregated*** *shareholding* ***and voting rights of the acquirer or promoter of the target company or every person acting in concert with him*** *(Emphasis Supplied)*
- *As the collective holding of the promoter group in KEC did not change following the Subject Transaction, no disclosure obligations arose in the present case. Pursuant to the Subject Transaction, the shares of KEC have merely changed hands from between disclosed promoter group entities as a result of one entity merging into the other and there has be no change of control as envisaged under the SAST Regulations, 1997. Therefore, the breach if any, is technical and venial and the imposition of a penalty is not warranted.*
- *It is submitted that in the present instance, there was no gain, unfair advantage or benefit accrued to Swallow as a result of the alleged non-disclosure. No loss has been occasioned to investors as a result of this non-disclosure and it is not even SEBI's case that interests of investors have been adversely affected. Furthermore, the alleged default is not repetitive in nature.*

8. In the interest of natural justice and in terms of Rule 4(3) of the Adjudication Rules, Noticee was granted an opportunity of personal hearing on March 29, 2016. Shri Somasekhar Sundaresan, Shri Abhishek Venkataraman, Shri Dhaval Kothari, Advocates and Ms. Jiya Gangwani (hereinafter referred to as "**Authorised Representatives/ARs"**) appeared on behalf of the Noticee on the stipulated date of hearing. The ARs made the following submissions on behalf of the Noticee :-

- The ARs reiterated the submissions made by the Noticee in its reply dated October 12, 2015. The ARs mentioned that as the collective shareholding of the promoter group in KEC did not change following the subject transaction of the Noticee, no disclosure obligations were required to be made by the Noticee in the context of the present case.
- The ARs presented various case laws in support of its submissions, which were also submitted by the Noticee in its aforementioned reply dated October 12, 2015 i.e. reply of the Noticee to the SCN.
- The ARs sought additional time to make further submissions in the matter.

9. Vide its letter dated April 06, 2016, Noticee made the following additional submissions-:

   - *The core issue to be borne in mind is that Regulation 7(1) was not at all attracted much less did it stand violated. This is a fundaments issue on which the SCN is blatantly erroneous since it simply goes contrary to well-settled law and interpretation of the very same provision by ignoring the collective and aggregate shareholding of the acquirer along with persons acting in concert.*
   - *Regulation 7(1) does not explicitly use the phrase "persons acting in concert". However, courts, as well as SEBI, have time and again held that since the definition of "acquirer" under Regulation 2(1)(b) itself includes persons acting in concert, the use of the word "acquirer" in Regulation 7(1) is enough to necessarily include acquisitions and holdings of persons acting in concert with the acquirer.*
   - *Right since the inception of the SAST Regulations, 1997, it has always been the understanding of SEBI, the courts and society at large, that Regulation 7(1) must be interpreted in light of its object and purpose viz. to inform the market in advance of the identity and interest of the acquirer and persons acting in concert with him in a target company. This would enable an investor to arrive at an informed decision vis-a- vis how to trade in the shares of the target company, and in turn, also inform the*

incumbents who control the target company to know about the potential increasing interest in the target company.

- *To determine whether the jurisdiction of Regulation 7(1) has been attracted by any facts, one would have to factor in the following facts:*

  i. *The aggregate percentage acquisition of voting rights by the acquirer and by persons acting in concert;*

  ii. *The aggregate percentage holding of voting rights held by the acquirer together with persons acting in concert prior to the acquisition;*

  iii. *The aggregate percentage voting rights of the acquirer and persons acting in concert, after the acquisition.*

- *Whenever the difference between the post-acquisition aggregate voting rights and the pre-acquisition aggregate voting rights crosses the threshold set out in Regulation 7(1), a disclosure must be made. The thresholds are 5%, 10%, 14% (because it would warn that there is a holding just short of the open-offer-triggering threshold for a substantial acquisition), 54% (because it would warn that there is a holding just short of the open- offer-triggering threshold for creeping acquisitions), and 74% (because it would warn that there is a holding just short of the maximum permissible non-public shareholding).*
- *In the instant case, the aggregate shareholding did not change at all pursuant to the Scheme. Coupled with other acquisitions, the difference between the aggregate holding as at the end of March 31, 2010 and December 31, 2009 was a marginal 0.09%. In other words, the aggregate holding was always over 41% and remained at just over 41% with the promoters always being in control over the Target Company.*
- *It has not even been examined by SEBI if there was any additional acquisition warranting disclosure under Regulation 7(1) much less has it been alleged by that SEBI Jubilee was not a promoter or a person acting in concert with Swallow. Jubilee's entire undertaking simply vested in and came to reside in the undertaking of Swallow.*

- *In the instant case, the transaction in question was between two promoter companies of the Target Company and who are in control of KEC. There was neither any change in the shareholding of the promoters nor any loss of control by the promoters. The thresholds stipulated under Regulation 7(1) had not been attracted at all, and therefore, no disclosure obligation was triggered at all.*
- *Even under the recently-notified regulations, SEBI has held steadfast to the principle that obligations of acquirers and persons acting in concert are joint and several under the takeover regulations. Under the SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014 ("Settlement Regulations"), the rule is that the "Indicative Amount" (IA) for computation of the size of the settlement amount would be calculated for each applicant person allegedly in breach. Only for cases of defaults under the Takeover Regulations, the Indicative Amount has to be computed as if for one single collective violation. Item 6 of Schedule II of Chapter I of the Settlement Regulations reads as follows:*

  "The IA is to be calculated for each applicant. In a case where multiple applicants make a combined application for a default arising from the same cause of action, ***the I A will be calculated for each applicant, as per the applicable formula except in cases related to defaults under the Takeover Regulations where the acquirer and persons acting in concert (PAC) may be considered to have joint liability.****"*
- *It is only because the obligation to disclose or the obligation to make an open offer is one single collective obligation to be discharged as one collective whole reckoning the threshold as one collective benchmark, that the Settlement Regulations make this special dispensation for the takeover regulations. In the instant case, two persons who were acting in concert as members of one collective group of promoters and held shares in the Target Company, merged into one entity. The holdings remained unchanged. No obligation to disclose was at all triggered. Regulation 7(1)*

was not even attracted. Therefore, the SCN is fundamentally untenable and bad in law.

I also observe from the material available on file that the consent application filed in the present matter by the Noticee under the SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014 was rejected by SEBI on technical grounds. Subsequently, vide its letter dated May 16, 2017, Noticee mentioned that it has nothing further to add in the matter other than to reiterate the submissions made by it vide its earlier letters in the said matter.

CONSIDERATION OF ISSUES AND FINDINGS:

10. I have taken into consideration the facts and circumstances of the case, the material available on record and the submissions made by the Noticee (both oral and written) in the said matter. It is alleged that Noticee has failed to make the necessary disclosures to the target company and to the stock exchanges as stipulated under the provisions of Regulations 7(1) & 7(2) of the SAST Regulations, 1997.

11. Before moving forward, the relevant provisions of the SAST Regulations, 1997 allegedly violated by the Noticee and as mentioned in the SCN are reproduced as under:-

SAST Regulations, 1997

"Acquisition of 5% and more shares 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.

(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.

12. I observe that the disclosure obligations stipulated under Regulation 7(1) of the SAST Regulations, 1997 are triggered when the shareholding of an entity in a company crosses the threshold limit of 5% or 10% or 14% or 54% or 74% of the total share capital of the company. Upon crossing the threshold limit, in terms of Regulation 7(1) read with Regulation 7(2) of the SAST Regulations, 1997, the entity is under an obligation to make the necessary disclosures to the target company and to the stock exchange, within two days of the acquisition of shares or voting rights, as per the prescribed reporting format. Upon perusal of the shareholding details submitted by the target company to BSE during the relevant period, I observe that the Noticee's shareholding in the target company increased from 4.89% (during the quarter ended December 2009) to 18.35 % (during the quarter ended March 2010). As already discussed at paras 2 to 4 above, Noticee acquired 63,56,692 shares of the target company constituting 12.88% of its total share capital and further purchased negligible quantities of shares of the target company (about 0.58%) from other promoter group entities of the target company during the examination period. In view of the fact that Noticee's shareholding in the target company crossed the prescribed threshold limit of 5% during the relevant period, Noticee was required to make the necessary disclosures to the stock exchanges and to the target company within two days of the acquisition of shares. The Noticee has admitted to the fact that its shareholding in the target company increased from 4.89 % to 18.35% during the relevant period. The Noticee also admitted that it had failed to make the necessary disclosures mandated under Regulations 7(1) r/w 7(2) of the SAST Regulations, 1997 during the relevant period. I observe that Noticee made the relevant disclosures only after it had received the SCN in the context of the present proceedings i.e Noticee filed the disclosures on September 24, 2014.

13. The contentions of the Noticee that disclosure obligations under Regulations 7(1) r/w 7(2) of the SAST Regulations, 1997 did not arise as the shares of the

target company were acquired by it as a result of the scheme of arrangement, the shares were acquired from other promoter group entities of the target company, the aggregate shareholding of the promoter group did not undergo any major change during the relevant period, there was no change in control/management of the target company as a result of the acquisition of shares by the Noticee, the violation by the Noticee, if any, is technical and venial and the interests of the investors have not been adversely affected etc. are not valid grounds for not making the mandatory disclosure requirements. The above contentions of the Noticee are without any basis and devoid of any merit. In this regard, I note that Hon'ble Securities Appellate Tribunal (**SAT)** through its various judgments have consistently observed that these factors are not valid grounds for not complying with the mandatory disclosure obligations prescribed under the Takeover Regulations. In this context, I would like to place reliance on the observations made by Hon'ble SAT in the matter of *Akriti Global Traders Ltd vs SEBI* (decided on September 30, 2014) wherein Hon'ble SAT had observed that "…… *Obligation to make disclosures under the provisions contained in SAST Regulations, 2011 as also under PIT Regulations, 1992 would arise as soon as there is acquisition of shares by a person in excess of the limits prescribed under the respective regulations and it is immaterial as to how the shares are acquired. Therefore, irrespective of the fact as to whether the shares were purchased from open market or shares were received on account of amalgamation or by way of bonus shares, if, as a result of such acquisition/receipt, percentage of shares held by that person exceeds the limits prescribed under the respective regulations, then, it is mandatory to make the disclosures under those regulations*…..".

14. Similarly, in the matter of Ms. Komal Nahata vs SEBI (Appeal no. 05/2014), the Hon'ble SAT had observed that " …….*Argument that no investor has suffered on account of non-disclosure and that the Adjudicating Officer has not considered the mitigating factors set out under the provisions of section 15J of the SEBI Act, 1992 is without any merit because firstly penalty for non-compliance of the SAST Regulations, 1997 and PIT Regulations, 1992 is not*

dependent upon investors actually suffering on account of such non-disclosures".

15. In the matter of Virendrakumar Jayantilal Patel vs SEBI (Appeal No. 299 of 2014), Hon'ble SAT observed that "……. *obligation to make disclosures within the stipulated time is a mandatory obligation and penalty is imposed for not complying with the mandatory obligation. Similarly argument that the failure to make disclosures within the stipulated time, was unintentional, technical or inadvertent and that no gain or unfair advantage has accrued to the appellant, is also without any merit, because, all these factors are mitigating factors and these factors do not obliterate the obligation to make disclosures"* (Emphasis supplied). Further, in the matter of Bindal Synthetics Private Limited vs. SEBI, Hon'ble SAT in its order dated June 09, 2014, observed that:

"*Counsel for the appellant submitted that the appellant had sold shares to Shri Anand Arya, who was also a promoter of Blue Blends (India) Limited and, therefore, transfer within the promoter group being inter-se transfer, disclosure obligation contained under regulation 7(1A) read with regulation 7(2) of SAST Regulations, 1997 were not applicable.....*

……As rightly contended by counsel for the respondent and also held by the AO, obligation to make disclosure under regulation 7(1A) read with regulation 7(2) of SAST Regulations, 1997 is applicable to both purchase and sale whether effected within the promoter group or not and, therefore, disclosure made by Shri Anand Arya as purchaser does not obliterate the obligation cast upon the appellant to make disclosure as a seller of the shares in question." (Emphasis Supplied)

16. In view of the series of orders of Hon'ble SAT, as discussed above, the contentions of the Noticee mentioned above are misplaced as these are not valid reasons to avoid liability. In its various submissions, the Noticee has vehemently contended that the requirement of considering the disclosure thresholds under the SAST Regulations, 1997 was on the basis of the collective shareholding of the acquirer in the target company along with the shareholding

of persons acting in concert with him. It was contended by the Noticee that one of the fundamental concepts on which the SAST Regulations, 1997 is based on is that of “persons acting in concert” and the obligation to make the disclosure u/r 7(1) r/w 7(2) of SAST Regulations, 1997 has to be reckoned only after aggregating the shareholding of all the persons acting in concert and not on the basis of the individual shareholding of any person/entity crossing the threshold limit at any given point of time. The Noticee mentioned that every obligation under the Takeover Regulations is premised on aggregating the shareholding of all the persons acting in concert and regardless of the individual shareholding of any person crossing the prescribed threshold limit, the shareholding of all the persons acting in concert has to be reckoned as a collective aggregated shareholding or voting power. The Noticee contended that the term acquirer that has been defined in the SAST Regulations also includes ‘persons acting in concert’ (PACs). The Noticee mentioned that even though Regulation 7(1) of SAST Regulations, 1997 does not explicitly use the phrase ‘persons acting in concert’, however, the Courts, as well as SEBI, have time and again held that since the definition of the term ‘acquirer’ under Regulation 2(1)(b) of SAST Regulations itself includes ‘persons acting in concert’, the use of the word ‘acquirer’ in Regulation 7(1) of SAST Regulations, 1997 necessarily include acquisition and holdings of the persons acting in concert with the acquirer. Since the collective shareholding of the Noticee along with its PACs (i.e. the other entities belonging to the promoter group of the target company) during the relevant period witnessed only a marginal increase i.e. from 41.90 % to 41.99% and did not cross the threshold limit under the SAST Regulations, Noticee was of the view that there was no requirement on its part to make the disclosures under Regulations 7(1) r/w 7(2) of SAST Regulations, 1997. The Noticee time and again reiterated that the term ‘acquirer’ defined in the SAST Regulations, 1997 also includes the PACs and in support of its submissions, Noticee drew reference to various judgments of Hon’ble SAT viz. Radheshyam Tulsian & Ors vs SEBI (decided on April 26, 2006), Mega Resources Ltd vs SEBI (Appeal No. 49/2001), M/s Gopalakrishnan Raman & Ors vs SEBI (Appeal no 281 of 2014)

and Ravi Mohan vs SEBI (Appeal no 97 of 2014). I have perused the said judgments referred by the Noticee and have observed that the same are not relevant in the facts and circumstances of the present proceedings against the Noticee in as much as the said judgments (except in the matter of Ravi Mohan Vs SEBI) do not throw much light on the core issue raised by the Noticee in its submissions i.e. the disclosure thresholds mandated under the SAST Regulations, 1997 was on the basis of the collective shareholding of the acquirer along with the PACs and not on the basis of the individual shareholding crossing the threshold limit.

17. At this juncture, I find it necessary to mention the observations made by Hon'ble SAT in one of the judgments referred by the Noticee in support of its contention that disclosure thresholds mandated under the SAST Regulations, 1997 was on the basis of the collective shareholding of the acquirer along with the PACs and not on the basis of the individual shareholding crossing the threshold limit. In the case law cited by the Noticee i.e. Ravi Mohan vs SEBI (Appeal no 97 of 2014 and decided on 16.12.2015), Hon'ble SAT has observed that the expression 'acquirer' defined under regulation 2(1)(b) stipulates that wherever the term 'acquirer' is used in the SAST Regulations, 1997, it shall be referable to a person who acquires shares or voting rights in the target company either by himself or with any person acting in concert with the acquirer. I note that the above judgment of Hon'ble SAT was made in the context of the failure on the part of the appellants to make the relevant disclosures prescribed under the provisions of Regulation 7(1A) of the SAST Regulations, 1997. In this regard, the argument ascribed by the appellants was that for the purpose of making the discloures mandated under Regulation 7(1A) of SAST Regulations, 1997, the shareholding of the individual acquirer in the target company alone should be reckoned and not the aggregated shareholding of the acquirer along with the PACs.

18. In this regard, Hon'ble SAT in its Order dated December 16, 2015 had observed the following "……. *We see no merit in the above contention. Once the*

*regulation defines the expression 'acquirer' under regulation 2(1) (b) of the Takeover Regulations to mean a person who has acquired shares or voting rights of the target company either by himself or with any person acting in concert with the acquirer then, that meaning has to be assigned to the expression 'acquirer' wherever used in the Takeover Regulations, 1997. Therefore, it would be just and proper to hold that the expression 'acquirer' in regulation 7(1A) is referable to a person who has acquired shares of the target company either by himself or with persons acting in concert with him. Even after defining the expression 'acquirer', fact that in some regulations the expression 'acquirer' is used and in some regulations the expression 'acquirer' together with 'persons acting in concert' is used, it cannot be presumed that in regulation 7(1A) the expression 'acquirer' is referable to a person holding the shares of the target company individually. In other words, whether the expression 'acquirer' is followed by the words 'together with persons acting in concert' or not, the said expression used in regulation 7(1A), would be referable to purchase or sale of shares by the acquirer either by himself or with persons acting in concert with the acquirer. In the present case, aggregate sale of shares of the target company by the appellants (acquirers) as persons acting in concert when exceeded 2% of the share capital of the target company, appellants were obliged to make disclosures to the target company and to the stock exchanges and since appellants failed to make disclosures to the stock exchanges, the appellants have violated regulation 7(1A)". (*Emphasis supplied)

19. In this context, I would also like to place reliance on another judgment of Hon'ble SAT in the matter of G. Suresh vs SEBI (Appeal no 39 of 2014) wherein the factual interpretation of Regulation 7 of SAST Regulations, 1997 was further clarified by Hon'ble SAT in its Order dated April 29, 2014. In this regard, Hon'ble SAT had observed the following-

"*It may be mentioned that the disclosure requirements under Regulation 7 of SAST Regulations require every acquirer alone to make a declaration of his holding, if any, together with the shares acquired by him. Regulation 7(1) does*

*not require the acquirer to aggregate the shares acquired and/or held by him together with shares of any other person including person acting in concert with him. The question of the Appellant holding shares along with person acting in concert with him aggregating to more than 15% is irrelevant for the purpose of making declarations under Regulations 7(1) read with Regulation 7(2). If an acquirer acquires shares when acting in concert with others which acquisition exceeds the limit prescribed, declarations have to be made by the acquirer and person acting in concert as well. True and timely disclosures by an acquirer of shares in a company or an important regulatory tool intended to serve a public purpose of disseminating this information to the company as well as to Stock Exchange expeditiously. Such disclosures are very important as they help investors to take an informed decision in investing in the scrip of said company". (*Emphasis supplied)

20. In view of the series of orders of Hon'ble SAT, as discussed above, the contention of the Noticee that the disclosure thresholds mandated under the SAST Regulations, 1997 was on the basis of the collective shareholding of the acquirer along with the PACs and not on the basis of the individual shareholding crossing the threshold limit is without any merit. It is amply clear from the above judgments of Hon'ble SAT that Noticee was duty bound to make the relevant disclosures u/r 7(1) r/w 7(2) to the company and the stock exchanges upon its individual shareholding in the target company crossing the prescribed threshold limit of 5 % of the total share capital of the target company. In view of the above observations, I find that Noticee has failed to make the relevant disclosures u/r 7(1) r/w 7(2) of the SAST Regulations, 1997 within the stipulated time period and therefore, I hold that the Noticee has violated the provisions of Regulation 7(1) read with Regulation 7(2) of the SAST Regulations, 1997.

21. By not making the disclosure on time, the Noticee has failed to comply with the mandatory statutory obligation. True and timely disclosures are mandated under the SAST Regulations for the benefit of the investors at large. There can be no dispute that compliance of regulations is mandatory and it is the duty of SEBI to enforce the compliance of these regulations. In this context, it may be noted that

the Hon'ble SAT in Appeal no. 66 of 2003, in the case of Milan Mahendra Securities Pvt. Ltd. vs. SEBI, by its order dated November 15, 2006, has observed that "*the Regulations were framed on the basis of the input provided by a committee headed by Justice P. N. Bhagwati which had recommended that substantial acquisition of shares and takeovers should operate principally to ensure fair and equal treatment to all shareholders in relation to substantial acquisition of shares and takeovers. The object of the Regulations is to give equal treatment and opportunity to all the shareholders and protect their interests. To translate these principles into reality measures have to be taken by the Board to bring about transparency in the transactions and it is for this purpose that dissemination of full information is required…….*"

22. As the violation of Regulation 7(1) r/w 7(2) of the SAST Regulations, 1997 by the Noticee is established, I am convinced that it is a fit case to impose monetary penalty on the Noticee under the provisions of Section 15A(b) of the SEBI Act, which reads as under :

Penalty for failure to furnish information, return, etc.

15A. *If any person, who is required under this Act or any rules or regulations made thereunder-*

(b)to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.

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

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

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

(c) the repetitive nature of the default.

24. With regard to the above factors, I note from the material made available that there was nothing on record to show that the violation by the Noticee was repetitive in nature. Further, the material available on record has not quantified the profit/loss for the violations committed by the Noticee. However, I am of the view that by not making the disclosure on time, the Noticee has failed to comply with the mandatory statutory obligation. In this context, reliance is placed upon the order of the Hon'ble Supreme Court of India in the matter of *Chairman, SEBI Vs Shriram Mutual Fund { [2006]5 SCC 361 }* – wherein the Hon'ble Supreme Court of India 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……..."*

25. The details of the shareholding of the promoters and timely disclosures thereof to the company and stock exchanges etc. are of significant importance from the standpoint of the investors. True and timely disclosures would facilitate the investors to take a more informed decision to invest or not to invest in a particular scrip. Such information, received by the investors in a time bound manner, would facilitate them immensely in taking a balanced investment decision as regards to their holding in the Company. In the instant case, the Noticee, having acquired more than 5% stake in the Target Company, the timely disclosure of the same by the Noticee under the relevant provisions of SAST Regulations, 1997, was of significant importance from the point of view of the general investors. Further, the purpose of these disclosures is to bring about transparency in the transactions and to assist the Regulator to effectively monitor the transactions in the securities market. Hon'ble SAT in the case of M/s Coimbatore Flavors & Fragrances Ltd & Ors vs SEBI (Appeal No 209 of 2014 and Order dated August 11, 2014), observed " *Undoubtedly, the purpose*

of these disclosures is to bring about more transparency in the affairs of the companies. True and timely disclosures by a company or its promoters are very essential from two angles. Firstly, investors can take a more informed decision to invest or not to invest in a particular scrip and secondly, the Regulator can properly monitor the transactions in the capital market to effectively regulate the same".

ORDER

26. After taking into consideration the facts and circumstances of the case, the submissions made by the Noticee, the nature of violation committed by the Noticee and also the factors mentioned in the preceding paragraphs, I, in exercise of the powers conferred upon me under Section 15-I of the SEBI Act read with Rule 5 of the Adjudication Rules, hereby impose a penalty of Rs 3,00,000/- (Rupees Three lakh only) on the Noticee i.e. Swallow Associates LLP (LLPIN : AAB 1953) under the provisions of section 15A(b) of the SEBI Act, 1992 for its failure to comply with the requirements of Regulation 7(1) read with Regulation 7(2) of the SAST Regulations, 1997 read with Regulation 35 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

27. The amount of penalty shall be paid either by way of demand draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, or by e-payment in the account of "SEBI- Penalties Remittable to Government of India", A/C No 31465271959, State Bank of India, Bandra Kurla Complex Branch, RTGS Code SBIN0004380 within 45 days of receipt of this order. The said demand draft or forwarding details and confirmation of e-payments made (in the format as given in the table below) should be forwarded to The Division Chief, Enforcement Department (EFD), Securities and Exchange Board of India, SEBI Bhavan, C-4A, 'G' Block, Bandra Kurla Complex, Bandra (East), Mumbai 400 051

1. Case Name:	
2. Name of Payee:	

3. Date of payment:	
4. Amount Paid:	
5.Transaction No:	
6. Bank Details in which payment is made:	
7. Payment is made for: (like penalties /disgorgement/recovery/Settlement amount and legal charges along with order details)	

28. In terms of Rule 6 of the Adjudication Rules, copy of this order is sent to the Noticee viz. Swallow Associates LLP and also to Securities and Exchange Board of India.

Place: Mumbai
Date: 31.05.2018

SURESH B MENON
ADJUDICATING OFFICER