BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. PB/AO- 69/2011]

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

In respect of

SANJAY R KIMTEE
(PAN No. AEOPK6715N)

FACTS OF THE CASE IN BRIEF

1. Securities and Exchange Board of India (hereinafter referred to as **"SEBI"**) conducted investigation in trading in the scrip of M/s Flawless Diamond India Limited (hereinafter referred to as **'FDIL'/'Company'**) which is listed on Bombay Stock Exchange (hereinafter referred to as **'BSE'**). The period of investigation in the scrip of FDIL was from June 2006 to February 2007 (hereinafter referred to as **'Investigation Period'**).

2. The findings of the investigation led to the allegation that Mr. Sanjay R Kimtee (hereinafter referred to as **"Noticee"**) had violated regulation 7(1) read with regulation 7(2) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as **'SAST Regulations'**) and regulation 13(1) of SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as **'PIT Regulations'**) and therefore consequently, liable for monetary penalty under section 15A(b) of the SEBI Act.

APPOINTMENT OF ADJUDICATING OFFICER

3. The undersigned has been appointed as Adjudicating Officer vide order dated March 23, 2011 under 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 '**Rules'**) to inquire into and adjudge the alleged violations of provisions of SAST Regulations and PIT Regulations.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

4. Show Cause Notice No. EAD-7/PB/AK/16926/2011 dated May 27, 2011 (hereinafter referred to as **"SCN"**) was issued to the Noticee under rule 4(1) of the Rules to show cause as to why an inquiry should not be initiated and penalty be not imposed under section 15A(b) of SEBI Act for the alleged violation specified in the said SCN. The said SCN was sent through courier and was delivered to the Noticee.

5. The Noticee vide letter dated June 16, 2011 submitted his reply to the SCN, which *inter alia* stated as under:

"……..…

1. *At the outset, I deny the allegations made against me in the said Notice, save and except those, which arte specifically admitted herein, Nothing stated in the said Notice shall be deemed to be admitted by me merely on account of non-traverse, unless the same is specifically admitted in this reply.*
2. *My para-wise reply to the Notice is as follows:*
3. *With regard to Para 1 to Para 2 of the Notice, it is submitted that the same is a matter of record therefore I have no comments to offer on the same.*

4. *with regard to Para 3 to Para 6 of the Notice, it is submitted that the same quotes various provisions of the Takeover Regulations and PIT Regulations.*
5. *With regard to Para 7 of the Notice, it is submitted that admittedly I received the allotment of 11,00,000 equity shares of the target company on account of conversion of warrants and due to this conversion our holding increased from Nil to 11,00,000 which represent 7.6% holding of the target company. After receiving this show cause notice we come to know about the said violations i.e. I have to file the disclosures under regulation 7(1) of SAST regulations and regulation 13(1) of PIT Regulations.*
6. *While appreciating our submissions following be noted:*
    i. *I am individual investor and making investment in various scrips.*
    ii. *I had agreed for the allotment of warrants in the Target Company and accordingly Target Company has disclosure all the particulars in the Notice issued to shareholders of the company and stock exchange therefore all the information regarding to conversion of warrants into equity shares are informed to stock exchange by the company.*
    iii. *I have not sold even a single share of the target company during the investigation period.*
    iv. *The aforesaid violations are technical in nature.*
7. *In the circumstances, it is submitted that the alleged violations i.e. delayed in making the disclosures, is at the highest a technical procedural and venial breach and has not caused any adverse consequences to anybody. The same was inadvertent and unintentional. Further, as a result of the alleged technical violation, I have not made any disproportionate gain or unfair advantage, further by virtue of the alleged acquisitions no loss has been caused to anybody.*
8. *In view of the foregoing submissions it is respectfully submitted that the allegations in the show cause Notice are technical in nature. It is therefore humbly prayed that kindly take a lenient view on the matter."*

6. In the interest of natural justice and in order to conduct an inquiry in terms of rule 4(3) of the Rules, the Noticee was granted an opportunity of personal hearing on July 19, 2011, vide notice dated July 05, 2011 sent through SPAD to the Noticee. The said hearing notice was delivered and acknowledged by the Noticee on July 07, 2011. Mr. Balveer Singh Choudhary, Choudhary & Singhvi, Chartered Accountants, Authorized Representative, (hereinafter referred to as "**AR**") appeared on behalf of the Noticee. During the hearing, the AR reiterated the submissions made vide letter dated June 16, 2011 and stated that the violations were technical in nature and requested the undersigned to take a lenient view in the matter.

CONSIDERATION OF ISSUES AND FINDINGS

7. I have carefully perused the submissions of the Noticee and the documents available on record. The issues that arise for consideration in the present case are :

    a. Whether Noticee had violated the provisions of regulation 7(1) read with regulation 7(2) of SAST Regulations and the provisions of regulation 13(1) of PIT Regulations?
    b. Does the violations, if any, attract monetary penalty under section 15A(b) of the 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 the SEBI Act?

8. Before moving forward, it is pertinent to refer to the provisions of SAST Regulations and PIT Regulations, which reads as under:-

SAST Regulations

7. Acquisition of 5 per cent or more shares or voting rights of a company

(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.

PIT Regulations

13. Disclosure of interest or holding by directors and officers and substantial shareholders in a listed company – Initial Disclosure

(1). Any person who holds more than 5% shares or voting rights in any listed company shall disclose to the company, the number of shares or voting rights held by such person, on becoming such holder, within 4 working 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.

(2). ……..

Continual Disclosure

(3) ……..
(4) ……....
(5) ……...
(6)…….…

9. Regulation 7(1) read with regulation 7(2) of SAST Regulations deals with disclosure of number and percentage of shares/voting rights to the company and to the stock exchanges where shares of the target company are listed, by an 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 5% or 10% or 14% or 54% or 74% shares or voting rights in a company, in any

manner whatsoever, within two days of, viz., the receipt of intimation of allotment of shares or the acquisition of shares or voting rights, as the case may be.

10. As per regulation 13(1) of PIT Regulations, any person whose shareholding is in excess of 5% in any listed company has to make the required disclosure to the company in a prescribed format within 4 working days from (a) the receipt of intimation of allotment of shares, or (b) the acquisition of shares or voting rights.

11. Upon perusal of the documents available on record I find that the shareholding of the Noticee in FDIL for the quarter ending March 2007 was nil. On the account of conversion of warrants on April 24, 2007, the Noticee was allotted 11,00,000 shares and has thereby acquired 11,00,000 shares of FDIL i.e. 7.60% of total shareholding of FDIL. Thus, by means of said acquisition the shareholding of the Noticee had increased from nil to 7.60%.

12. Noticee, while crossing the threshold limit of 5% specified under regulation 7(1) of SAST Regulations, was required to make the disclosures to the company i.e. FDIL and to the stock exchange i.e. BSE as per regulation 7(1) read with regulation 7(2) of SAST Regulations i.e. within two days from the date of allotment/acquisition, which the Noticee had failed to do.

13. Further, as of the abovementioned allotment/acquisition, the Noticee while crossing the threshold limit of 5% specified under regulation 13(1) of PIT Regulations, was required to make the disclosures to the company i.e. FDIL as per regulation 13(1) of PIT Regulations i.e. within four working days from the receipt of intimation of allotment of shares or from the date of acquisitionof shares, which the Noticee had failed to do.

14. I find from the submissions of the Noticee in his letter dated June 16, 2011 that he has claimed that he was not aware about the disclosures to be made under regulation 7(1) read with regulation 7(2) of SAST Regulations and under regulation 13(1) of PIT Regulations, and came to know that the disclosures were required to be made only after receiving the SCN dated May 27, 2011 issued by the undersigned. However, I am not inclined to accept the same, because ignorance of law is not an excuse.

15. '*Ignorantia juris non excusat*', that is to say, ignorance of law is not an excuse. Ignorance of law of the state does not exclude any person from the penalty for the breach of it, because every person is bound to know the law, and is presumed so to do. If any individual should infringe the law of the country through ignorance or carelessness, he must abide by the consequences of his error; it is not competent of him to aver in a Court of Justice that he was ignorant of the law of the land, and Court of Justice is not at liberty to receive such a plea.

16. A mistake of law is never accepted as a defence in actions, whether civil or criminal. The basis of this rule is said to be another maxim in the law of evidence, namely, "every man is presumed to know the law". Austin, the famous jurist explained two reasons of the rule, i.e., 'Ignorance of law is no excuse', thus,

    (i) If ignorance of law were admitted as a ground of exemption, the Courts will be involved in questions, which it were scarcely possible to solve, and which would render the administration of justice next to impracticable.

    (ii) If ignorance of law were admitted as a ground of exemption, ignorance of law would always be alleged by the party by way of defence, and the Court, in every case, would be bound to decide the point, whether the party was really ignorant of the law. And for

the purpose of determining the cause of his ignorance, it would be incumbent upon the Court to unravel it's precious history and to search his whole life for the elements of just and correct solution.

17. Further, in the instant case, I find that Noticee has not disputed the fact that he was allotted 11,00,000 shares on account of conversion of warrants, thereby acquiring 11,00,000 shares of FDIL i.e. 7.60% of total shareholding of FDIL on April, 24 2007, thus by means of said acquisition his shareholding had increased from nil to 7.60%. Further, Noticee has admitted that the violations of regulation 7(1) read with regulation 7(2) of SAST Regulations and violation of regulation 13(1) of PIT Regulations are technical in nature and the same were inadvertent and unintentional and requested the undersigned to take a lenient view in the matter.

18. In terms of regulation 7(1) of SAST Regulations disclosure is required to be made to the company and to the stock exchange and in terms of regulation 13(1) of PIT Regulations disclosure is required to be made to the company. "Disclose to the company and to the stock exchange" is the clue. "Disclose" according to Webster's Encyclopedic Dictionary means - to make known, reveal or uncover – to cause to appear, allow to be seen, lay open to view. According to Black's Law Dictionary "Disclosure" means – act of disclosing, revelation, the impartation of that which is secret or not fully understood. Disclose is to expose to review or knowledge anything, which before was secret, hidden or concealed. Thus, the requirement is that complete information should reach the person for whom it is meant. The fact that complete information should be disclosed to the company and to the stock exchange is also evident from the provisions of regulation 7(2) of SAST Regulations which casts an obligation on the acquirer to disclose to the company and stock exchanges within 2 days of the acquisition of shares and also from the provisions of regulation 13(1) of PIT Regulations which casts an obligation on the person holding more than 5% of shares to disclose to the

company within 4 working days of the allotment/acquisition of shares. Failure to disclose full details on the specific aspects provided in the regulations cannot be considered as trivial or of no consequence to be overlooked.

19. In this regard, it will be appropriate to refer to the observations of The Hon'ble High Court at Calcutta in Writ Petition 331/2001 in the matter of Arun Kumar Bajoria v/s SEBI – Order dated March 27, 2001. The Hon'ble Court while examining the issue of compliance with regard to regulation 7 of SAST Regulations, made the following observations:-

"……the object of Regulation 7 is to inform the investors that an individual has acquired 5 percent shares in the company concerned. If the acquisition has been made by more than one individual in association with each other, it is also obligatory on the part of such individuals to disclose their identity. This can only be done when the information is given to the company. If after the company has received the information, its officer do not read the information and in consequence thereof no information is given to the investors through the concerned stock exchanges, the company is to be blamed but unless the company receives the information, the question of the officers of the company reading the information and then transmitting such information to the investors through the stock exchanges concerned does not, nor can at all arise. Therefore, it is obligatory on the pat of the person so acquiring to inform the company….."

20. Thus, in the light of above, the allegations of violations of regulation 7(1) read with regulation 7(2) of SAST Regulations and violation of regulation 13(1) of PIT Regulations stands established.

21. By not making the disclosures on time, the Noticee failed to comply with his statutory obligation. The timely disclosure is mandated for the benefit of the investors at large. In Appeal No. 66 of 2003 - *Milan Mahendra Securities Pvt. Ltd. Vs SEBI* – Order dated April 15, 2005 the Hon'ble Securities Appellate Tribunal has observed that, *"the purpose of these disclosures is to bring about*

transparency in the transactions and assist the Regulator to effectively monitor the transactions in the market."

22. The Noticee, therefore, ought to have made relevant disclosures to the company as per the provisions of SAST Regulations and PIT Regulations. However, the Noticee failed to do so.

23. The provisions of section 15A (b) of SEBI Act is reproduced hereunder:

> ***15A***. ***Penalty for failure to furnish, information, return etc.***
>
> *If any person, who is required under this Act or any rules or regulations made thereunder, -*
> *(a)……*
> *(b) to file any return or furnish any information, books or other documents within the time specified therefore in the regulations, fails to file return or furnish the same within the time specified therefore 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.*
> *(c)……*

24. The Hon'ble Supreme Court of India in the matter of *SEBI Vs. Shri Ram Mutual Fund [2006] 68 SCL 216 (SC)* held that *"once the violation of statutory regulations is established, imposition of penalty becomes sine qua non of violation and the intention of parties committing such violation becomes totally irrelevant. Once the contravention is established then the penalty is to follow"*.

25. In view of the foregoing, I am convinced that it is a fit case to impose monetary penalty under section15A (b) of the SEBI Act.

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

"15J - Factors to be taken into account by the adjudicating officer

While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-

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

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

(c) the repetitive nature of the default."

27. The object of the SAST Regulations and PIT Regulations mandating disclosure of acquisition/sale beyond certain quantity is to give equal treatment and opportunity to all shareholders and protect their interests. To translate this objective into reality, measures have been taken by SEBI to bring about transparency in the transactions and it is for this purpose that dissemination of full information is required. The purpose of these disclosures is to bring about transparency in the transactions and assist the Regulator to effectively monitor the transactions in the market. The Noticee could not pre-judge the reaction of the investors. However, by virtue of the failure on the part of the Noticee to make the necessary disclosures on time, the fact remains that the investors were deprived of the important information at the relevant point of time. In other words, by not complying with the regulatory obligation of making the disclosure, it had concealed the vital information from the investors. It may not be possible to ascertain the exact monetary loss to the investors on account of default by the Noticee.

ORDER

28. After taking into consideration all the facts and circumstances of the case, I hereby impose a monetary penalty of ₹ 1,00,000/- (Rupees one lakh only) under section 15A (b) of the SEBI Act on the Noticee which will be commensurate with the violation committed by him.

29. The Noticee shall pay the said amount of penalty by way of demand 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 Ms. Anita Kenkare Investigation Department, SEBI, SEBI Bhavan, Plot No. C – 4 A, “G” Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

30. 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: July 29, 2011 **PARAG BASU**

Place: MUMBAI **ADJUDICATING OFFICER**