**BEFORE THE ADJUDICATING OFFICER**
**SECURITIES AND EXCHANGE BOARD OF INDIA**
**[ADJUDICATION ORDER Ref No.: EAD-2/SS/VS/2018-19/1745-1757]**

**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:

| Sr. No. | Name of Noticee | Sr. No. | Name of Noticee |
|---|---|---|---|
| 1 | Mr. Kedar Nath Fatehpuria | 2 | Mr. Vijay Kumar Fatehpuria |
| 3 | Mr. Sunil Fatehpuria | 4 | Mr. Om Prakash Fatehpuria |
| 5 | Ms. Sushila Devi Fatehpuria | 6 | Mr. Bhagwati Fatehpuria |
| 7 | Ms. Anupama Jhunjhunwala | 8 | Mr. Anup Fatehpuria |
| 9 | Mr. Manish Fatehpuria | 10 | Ms. Rashmi Fatehpuria |
| 11 | Mr. Ramnath Fatehpuria | 12 | Ms. Snehlata Jhunjhunwala |
| 13 | Pushpanjali Estates Pvt. Ltd | | |

In the matter of
**Martin Burn Limited**

1. Securities and Exchange Board of India (hereinafter referred to as 'SEBI'), conducted an examination in the scrip of Martin Burn Limited (hereinafter referred to as 'MBL'), a company listed on the Bombay Stock Exchange (hereinafter referred to as 'BSE'), for the probable violation of provisions of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the 'SAST Regulations') and SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as the 'PIT Regulations') by its promoters; namely-

| Sr. No. | Noticee Name | Noticee No. | Sr. No. | Noticee Name | Noticee No. |
|---|---|---|---|---|---|
| 1 | Mr. Kedar Nath Fatehpuria | Noticee No. 1 | 2 | Mr. Vijay Kumar Fatehpuria | Noticee No. 2 |
| 3 | Mr. Sunil Fatehpuria | Noticee No. 3 | 4 | Mr. Om Prakash Fatehpuria | Noticee No. 4 |
| 5 | Ms. Sushila Devi Fatehpuria | Noticee No. 5 | 6 | Mr. Bhagwati Fatehpuria | Noticee No. 6 |
| 7 | Ms. Anupama Jhunjhunwala | Noticee No. 7 | 8 | Mr. Anup Fatehpuria | Noticee No. 8 |
| 9 | Mr. Manish Fatehpuria | Noticee No. 9 | 10 | Ms. Rashmi Fatehpuria | Noticee No. 10 |
| 11 | Mr. Ramnath Fatehpuria | Noticee No. 11 | 12 | Ms. Snehlata Jhunjhunwala | Noticee No. 12 |
| 13 | Pushpanjali Estates Pvt. Ltd. | Noticee No. 13 | | | |

(Hereinafter the Noticee No. 1 to 13 are collectively referred to as 'the Noticees').

2. It was observed, from the shareholding pattern of MBL as disseminated on the BSE website, that during the quarter ending December-2009 and March-2010 there were *inter-se* transfers of shares amongst the promoters of MBL, wherein, Mr. Kedar Nath Fatehpuria had acquired 1.85% shares of MBL on January 05, 2010, 5.28% shares on January 07, 2010 and 3.28% shares on January 18, 2010 from Ms. Manju Fatehpuria, Mr. Vijay Kumar Fatehpuria and Mr. Vishal Fathepuria, respectively. Thus, he had acquired total of 10.41% shares in MBL during the period December-2009 to January-2010. Consequent to these acquisitions by way of *inter-se* transfers, the shareholding of Mr. Kedar Nath Fatehpuria increased from 43.83% to 54.24% and combined shareholding of the promoters (other than sellers) increased from 61.44% to 71.85% during the period December-2009 to January-2010. The change in shareholding of the promoters/promoter group pursuant to above share transfers / acquisitions during the said period was noted as following: -

| Sr. No. | Name of Shareholder | Pre-Transactions Holding | | Post-Transactions Holding | |
|---|---|---|---|---|---|
| | | No. of shares held | % to total shares | No. of shares held | % to total shares |
| 1 | Mr. Kedar Nath Fatehpuria (Noticee No. 1) | 1929988 | 43.83 | 2451635 | 54.24 |
| 2 | Ms. Manju Fatehpuria | 81455 | 1.85 | 0 | 0 |
| 3 | Mr. Vijay Kumar Fatehpuria (Noticee No. 2) | 232649 | 5.28 | 0 | 0 |
| 4 | Mr. Vishal Fatehpuria | 144533 | 3.28 | 0 | 0 |
| 5 | Other Promoters (Mr. Sunil Fatehpuria, Mr. Om Prakash Fatehpuria, Ms. Sushila Devi Fatehpuria, Mr. Bhagwati Fatehpuria, Ms. Anupama Jhunjhunwala, Mr. Anup Fatehpuria, Mr. Manish Fatehpuria, Ms. Rashmi Fatehpuria, Mr. Ramnath Fatehpuria, Ms. Snehlata Jhunjhunwala and Pushpanjali Estates Pvt. Ltd.)(Noticee No. 3-13) | 712655 | 17.61 | 712655 | 17.61 |
| | Total | 3164290 | 71.85 | 3164290 | 71.85 |

3. Admittedly, the *inter-se* transfer of shares amongst promoters as above was exempted under regulation 3(1)(e)(iii) of the SAST Regulations from the open offer obligations in accordance with regulation 11 of the SAST Regulations. However, the Noticees (except Noticee No. 2) were under obligation to make requisite disclosures under regulation 3(3)

and file post-acquisition report in terms of regulation 3(4) read with regulation 3(5) of the SAST Regulations. The provisions of the said regulations 3(3), 3(4) and 3(5) as applicable at the relevant time provided as hereinafter:

> ***SAST Regulations, 1997***
>
> ***Applicability of the regulation***
>
> ***3. (3)*** *In respect of acquisitions under clauses 3 (e), (h) and (i) of sub-regulation (1), the stock exchanges where the shares of the company are listed shall, for information of the public, be notified of the details of the proposed transactions at least 4 working days in advance of the date of the proposed acquisition, in case of acquisition exceeding 5 per cent of the voting share capital of the company.*
>
> ***(4)*** *In respect of acquisitions under clauses (a), (b), (e) and (i) of sub regulation (1), the acquirer shall, within 21 days of the date of acquisition, submit a report along with supporting documents to the Board giving all details in respect of acquisitions which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him) would entitle such person to exercise 15 per cent or more of the voting rights in a company.*
> *Explanation -For the purposes of sub-regulations (3) and (4), the relevant date in case of securities which are convertible into shares shall be the date of conversion of such securities.*
>
> ***(5)*** *The acquirer shall, along with the report referred to under sub-regulation (4), pay a fee of twenty five thousand rupees to the Board, either by a banker's cheque or demand draft in favour of the Securities and Exchange Board of India, payable at Mumbai.*

4. Mr. Kedar Nath Fatehpuria was also under obligation to make requisite disclosure to MBL and BSE as follows:-

    a. under regulation 7(1A) read with regulation 7(2) of the SAST Regulations with regard to his acquisition dated January 07, 2010 (acquisition of 5.28% shares); and
    b. under regulation 7(1) read with regulation 7(2) of the SAST Regulations with regard to his acquisition dated January 18, 2010 (acquisition of 3.28% shares).

5. The relevant provisions of regulation 7 of the SAST Regulations as applicable at the relevant time are reproduced hereinafter:

***SAST Regulations, 1997***

***Acquisition of 5 per cent and more shares or voting rights of a company***

***7. (1)*** *Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent or ten per cent or fourteen per cent or fifty four per cent or seventy four per cent shares or voting rights in a company, in any manner whatsoever, shall disclose at every stage the aggregate of his shareholding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed.*

***(1A)*** *Any acquirer who has acquired shares or voting rights of a company under sub-regulation (1) of regulation 11, or under second proviso to sub-regulation (2) of regulation 11 shall disclose purchase or sale aggregating two per cent or more of the share capital of the target company to the target company, and the stock exchanges where shares of the target company are listed within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale.*

*Explanation— For the purposes of sub-regulations (1) and (1A), the term 'acquirer' shall include a pledgee, other than a bank or a financial institution and such pledgee shall make disclosure to the target company and the stock exchange within two days of creation of pledge.*

***(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.*

6. It was also observed that with regard to the aforementioned *inter-se* transfer dated January 07, 2010 wherein Noticee No. 1 acquired 2,32,649 shares of MBL ( 5.28%) from Noticee No. 2 , both of them (i.e. purchaser- Noticee No.1 and the seller ( Noticee No. 2) were required to make disclosures in terms of regulation 13(3) and regulation 13(4) of the PIT Regulations. The relevant provisions of regulation 13 of the PIT Regulations as applicable at the relevant time are reproduced hereinafter:

***PIT Regulations, 1992***

***Continual disclosure.***

***13. (3)*** *Any person who holds more than 5% shares for voting rights in any listed company shall disclose to the company in Form C the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below 5%, if there has been change in such holdings from the last disclosure made under sub-regulation (1)*

*or under this sub-regulation; and such change exceeds 2% of total shareholding or voting rights in the company.*

***(4)** Any person who is a director or officer of a listed company, shall disclose to the company and the stock exchange where the securities are listed in Form D, the total number of shares or voting rights held and change in shareholding or voting rights, if there has been a change in such holdings of such person and his dependents (as defined by the company) from the last disclosure made under sub-regulation (2) or under this sub-regulation, and the change exceeds Rs. 5 lakh in value or 25,000 shares or 1% of total shareholding or voting rights, whichever is lower.*

7. When SEBI vide its letter dated January 16, 2014 sought details regarding the compliance of regulation 3(4) read with regulations 3(5) of SAST Regulations, the Noticee No. 1 vide letter dated February 05, 2014 submitted that as he was already holding more than 15% shares in the MBL and further he acquired only 10.41%, it does not attract any compliance in terms of regulation 3(4) of SAST Regulations. This response of the Noticee No. 1 was not found acceptable by SEBI, in view of the judgment of Hon'ble SAT in the matter of *Naagraj Ganeshmal Jain vs SEBI*, wherein vide order dated August 17, 2001 following was held:

*"On a perusal of regulation 3(4) it is seen that in respect of certain acquisitions, which include acquisitions in preferential allotment, the acquirer is required within 21 days of the date of acquisition to file a report with SEBI with details in respect of acquisitions which would entitle such person to exercise 10% or more of the voting rights. The Appellants had advanced more or less the same argument as put forth with reference to the applicability of regulation 11(2) to them that their holding exceeded the prescribed limit even before the present acquisition, also in support of their contention that regulation 3(4) is not attracted. It has already been discussed at length in this order that the said argument is devoid of any merit. What is envisaged in regulation 3(4) is not a onetime reporting, as is evident from the reason stated by the committee necessitating such reporting. Thus the contention that regulation 3(4) is not required to be complied with by the Appellants who had crossed the benchmark before 15.9.1997 is of no sound footing and I reject the same."*

8. SEBI vide letter dated March 20, 2014 and reminder letters dated June 04 and July 02, 2014 advised Noticee No. 1 to confirm the status of compliance under regulation 3(3) of the SAST Regulations. The Noticee No. 1, vide his letters dated June 17 and July 9, 2014,

submitted that he was not able to find out or locate any documents or compliance done in the matter. SEBI noted that no report was submitted by the Noticee No.1 under regulation 3(4) read with regulation 3(5) of the SAST Regulations with regards to his aforesaid acquisition dated January 07, 2010.

9. Vide email dated February 05, 2015, SEBI sought details from BSE about disclosures if made to MBL under regulation 3(3), regulation 7(1) and regulation 7(1A) of the SAST Regulations. BSE, vide emails dated February 09 and 13, 2015 had submitted that as per its records, no disclosures were received under aforementioned regulations of the SAST Regulations in the matter of MBL.

10. With regard to acquisition dated January 07, 2010, SEBI vide emails dated February 06 and September 04, 2015 sought from BSE, the details of disclosures made by Noticee No. 1 and Noticee No. 2 under regulation 13(3) and regulation13(4) of the PIT Regulations. BSE, vide emails dated February 09 and September 04, 2015 submitted that no disclosures were received by it from the Noticees or MBL under PIT Regulations for any of the aforesaid change in shareholding of promoters.

11. In view of the above, SEBI alleged that the Noticee No. 1 to 13 have violated the provisions of the SAST Regulations and PIT Regulations as detailed in the following table:

| Noticee No. | Name of Noticee | SAST Regulations violated | PIT Regulations violated |
|---|---|---|---|
| 1 | Mr. Kedar Nath Fatehpuria | 3(3) and 3(4) read with 3(5), 7(1) and 7(1A) read with 7(2) | 13(3) and 13(4) |
| 2 | Mr. Vijay Kumar Fatehpuria | - | 13(3) and 13(4) |
| 3 | Mr. Sunil Fatehpuria | 3(3) and 3(4) read with 3(5) | - |
| 4 | Mr. Om Prakash Fatehpuria | 3(3) and 3(4) read with 3(5) | - |
| 5 | Ms. Sushila Devi Fatehpuria | 3(3) and 3(4) read with 3(5) | - |
| 6 | Mr. Bhagwati Fatehpuria | 3(3) and 3(4) read with 3(5) | - |
| 7 | Ms. Anupama Jhunjhunwala | 3(3) and 3(4) read with 3(5) | - |
| 8 | Mr. Anup Fatehpuria | 3(3) and 3(4) read with 3(5) | - |
| 9 | Mr. Manish Fatehpuria | 3(3) and 3(4) read with 3(5) | - |
| 10 | Ms. Rashmi Fatehpuria | 3(3) and 3(4) read with 3(5) | - |
| 11 | Mr. Ramnath Fatehpuria | 3(3) and 3(4) read with 3(5) | - |
| 12 | Ms. Snehlata Jhunjhunwala | 3(3) and 3(4) read with 3(5) | - |
| 13 | Pushpanjali Estates Pvt. Ltd. | 3(3) and 3(4) read with 3(5) | - |

12. SEBI felt that the promoters (other than sellers who were part of the promoter group) are deemed to be persons acting in concert (PACs) with regard to the acquisition of the Noticee No. 1 dated January 07, 2010 that was exempted under regulation 3(1) (e) (iii) and

they all were liable to make the disclosures under regulation 3(3) and regulation 3(4) read with regulation 3(5) of the SAST Regulations. Hence, all the Noticees (except Noticee No. 2 who was one of the sellers) herein have been alleged to have violated the provisions of regulations 3(3) and 3(4) read with regulation 3(5) of the SAST Regulations. Further, Noticee No. 1 has also been alleged to have violated the provisions of regulations 7(1A) and 7(1) read with regulation 7(2) of the SAST Regulations with regard to his acquisition dated January 07, 2010 and January 18, 2010, respectively. Noticee No. 1 and 2 have also been alleged to have violated provisions of regulations 13(3) and 13(4) of the PIT Regulations with regard to the *inter-se* transfer among them on January 07, 2010.

13. In view of the above, SEBI appointed Shri Suresh Gupta, Chief General Manager, as Adjudicating Officer (AO) vide order dated August 01, 2016 to inquire and adjudge under section 15A (b) of the SEBI Act the aforesaid alleged violations by the respective Noticees. Subsequently, pursuant to a communication-order dated April 02, 2018, this case has been transferred to me on May 31, 2018. It has been advised that except for the change of the Adjudicating Officer the other terms and condition of the original orders (whereby the aforesaid Adjudicating Officers was appointed) '*shall remain unchanged and shall be in full force and effect'*. It has also been advised that *I should proceed in accordance with the terms of reference made in the original orders.*

14. After receipt of the record as aforesaid, the notice to show cause no. EAD-2/SS/VS/21279/1-13/2018 dated July 30, 2018 (hereinafter referred to as 'SCN') was issued to the Noticees in terms of rule 4(1) of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as the 'Adjudication Rules') read with section 15I of the SEBI Act and the terms of reference advised vide communication dated April 02, 2018. By the SCN the Noticees were called upon to show cause as to why an inquiry should not be held against them in terms of rule 4 of the Adjudication Rules and penalty be not imposed under Section 15A(b) of the SEBI Act. The provisions of section 15A(b) of the SEBI Act are as hereinafter:

> ***Penalties and Adjudication***
>
> ***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,—*
>
> *(a)* …

***(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 which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees*

15. The SCN was sent at the last known address of the Noticees through Speed Post / hand Delivery/Affixture Acknowledgement Due, which was duly served upon them. The Noticee No. 1 and 2, vide letter dated September 5, 2018, submitted on behalf of all the Noticees that the settlement proceedings in respect of application in terms of regulation 3(1) of the SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014 are in progress in the instant matter. The respective applicants had already attended the proceedings before the Internal Committee dealing with their settlement proposal in the matter on August 09, 2018, through Video Conferencing from Eastern Region Office, SEBI, Kolkata. Therefore, the Noticees requested to keep the instant inquiry and adjudication proceeding in abeyance.

16. Subsequently, on September 21, 2018 it was informed by concerned department in SEBI that the settlement proposals of the Noticees were rejected on the ground of *"failure to submit the revised settlement terms within stipulated days' time"*. Thus, in terms of rule 4(3) of the Adjudication Rules, vide notice dated September 26, 2018 the Noticees were granted another opportunity to file their reply and avail the opportunity of hearing on October 05, 2018. After seeking further time, the Noticees availed the opportunity on October 29, 2018 when Mr. Atul Kumar Labh and Mr. Varun Fatehpuria the authorised representatives (ARs) made oral submissions through Video Conferencing from Eastern Region Office, SEBI, Kolkata and contended that the Noticees were not aware of rejection of their settlement proposal until they received the notice of hearing in these proceedings. They also requested for fifteen days' time to file written reply/submission and production of evidence in support of their submission, which was granted. Thereafter, the Noticees No. 1 vide letter dated November 13, 2018 filed written reply/submission in the matter.

17. Subsequently, on further inquiry on the submissions of the Noticees with regard to the disposal of their settlement application filed by them with SEBI, vide internal noting received on December 07, 2018 concerned department in SEBI informed that, inadvertently, the Noticees had not been informed of the rejection of their settlement applications and vide

letters dated November 22, 2018 and November 26, 2018 SEBI has informed the concerned Noticees about the rejection of their settlement applications.

18. It is noted that the Noticees have availed the opportunity of filing replies and hearing. They have now been intimated about rejection of their settlement proposals by SEBI. Thus, the instant proceedings must now conclude in terms of the Adjudication Rules. I proceed accordingly. I have considered the allegations levelled in the terms of reference, the aforesaid submissions of the Noticees and the relevant material available on record. The Noticees have admitted the transactions that allegedly triggered the obligations of respective Noticees under respective regulations to make requisite disclosures/ file report. It is also relevant to mention here that under the provisions of relevant regulations the alleged disclosure obligations are transaction specific and relate to the date of transaction and not to combined transactions in a selected period.

19. With respect to allegation of violation of regulations 3(3) and 3(4) of the SAST Regulations it is noted that the basis of this allegation is the acquisition dated January 07, 2010 (acquisition of 5.28% shares of MBL) by Noticee No.1 from Noticee No.2 which triggered the threshold in regulation 11 of the SAST Regulations but was exempted from open offer obligations in terms of regulation 3(1)(e)(iii). Though such acquisition is exempted from open offer obligations, the details of the proposed acquisition are required to be notified to the concerned stock exchange under regulation 3(3) for information to the public '*at least 4 working days'* in advance. It has been alleged that the Noticees (except Noticee No.2) failed to make disclosures to the stock exchange as required under regulation 3(3) of the SAST Regulations. In this regard, the Noticee No. 1, vide his letter dated November 13, 2018 *inter-alia* submitted for himself and other alleged PACs that-

> "…*the transaction were off market transactions through some family arrangement and the date of acquisition was not fixed or executed in the market. In a family arrangement, timing of decision is not certain as it depends upon lot of host factors…….and hence pre-ascertaining the compliance requirement at least four working days in advance is not sometime practically possible in case of transfer of shares amongst the relatives. Due to reasons mentioned above, it was totally escaped and beyond the control of the parties to do the compliance pertaining to regulation 3(3) of SAST Regulations."*

20. In this regard, I am of the view that mode of acquisition is relevant only for the purpose of exemption under regulation 3(1)(e)(iii) from making open offer, if the acquisition is beyond the prescribed threshold. In this case, admittedly, the acquisition being by way of *inter-se* transfers amongst promoters (claimed to be family members) was exempted from the open offer obligations under regulation 11 of the SAST Regulations. However, there is no exemption provided in the SAST Regulations from compliance obligations of making requisite disclosure under regulation 3 (3) to the stock exchange for the purpose of public dissemination. The object of notifying stock exchanges under regulation 3(3) is to ensure that material information is provided to the stock exchange, to benefit the investors as they get advance information about the proposed consolidation/divestment amongst the promoters so that they can take an informed decision with regard to their investment in the shares of the company. The non-reporting to the stock exchanges defeats the very object of the said requirement. The regulations do not permit any dispensation of the obligation under regulation 3(3) on the grounds as contended by the Noticee No. 1. Regulation 3(3) prescribes the minimum with regard to the time limit. I, therefore, hold that the Noticees must have made requisite disclosures at least 4 days in advance about the proposed acquisition. However, they have failed to do so. I, therefore, do not agree with such contentions and hold that the failure to make such crucial disclosures to the stock exchange within at least 4 days, in advance, is established in this case.

21. In terms of regulation 3(4) of the SAST Regulations, the acquirer is obligated to submit report alongwith supporting documents to SEBI giving all details in respect of acquisition, within 21 days of the acquisition which taken together with the shares held by PACs would entitle the acquirer to exercise 15% or more of the voting rights in the company. In terms of regulation 3(5), the acquirer must pay a fee of ₹25,000 alongwith the report submitted to SEBI under regulation 3(4). In this case no report has been submitted to SEBI with regard to the aforesaid acquisition dated January 07, 2010. Further, the requisite fee under regulation 3(5) has also not been paid to SEBI. With regards to this, the Noticee No.1, vide his letter dated November 13, 2018 has *inter alia* submitted for himself and other alleged PACs that –

> *…There are two facets to the provisions of regulation 3(4) of SAST, 1997: (a) with the acquisition whether the acquirer is getting 15 percent or more of the voting rights for the first time; and /or (b) with the acquisition whether the acquirer is getting further incremental right of 15percent or more of the voting rights over and above his existing voting right. ….the acquirer Mr. Kedar Nath Fatehpuria was already holding 43.83% of total share of MBL and with the*

*acquisitions of shares his holding became 54.24% of total shares. On the examination of the fact with regulation 3(4) of SAST, 1997, it can be seen that the acquirer is not getting the voting right of 15% for the first time over here. He was already holding more than 15% voting right in the Company. The pre holding of the acquirer is 43.73% and post holding is 54.24%. Here, the acquirer is getting an incremental voting right of 10.41% which is less than 15% and accordingly it does not fall under second aspect of regulation 3(4) of SAST too…..we can conclude that the acquirer in the instant case is neither getting the voting right of 15% for the first time nor is getting an additional voting right of 15% with the acquisition and hence from no angle regulation 3(4) of SAST is applicable to us….In light of the above, we can say that the decision cited by yourself in the matter of Nagraaj Ganeshmal Jain vs. SEBI does not hold good in this case as the acquirer in the matter exceeded the limit stipulated vide regulation 3(4) of SAST."*

22. In this case, admittedly, the basis of allegation is the acquisition when Noticee No.1 acquired 5.28% shares from Noticee No. 2, on January 07, 2010. It is noted that pursuant this acquisition the individual shareholding of Noticee No. 1 in the company increased from 45.68% to 50.96% and collective shareholding of the acquirer (Noticee No.1) and other promoters (Noticees No. 3 to 13), who were acting in concert with the acquirer, increased from 66.57% to 71.85% on the date of this acquisition. From the language of regulation 3(4) it is noted that the required report is to be submitted to SEBI with regard to the acquisition of the acquirer which taken together with the shares held by the PACs would '*entitle'* the acquirer to exercise 15% or more of the voting rights in the company. In my view, the report under regulation 3(4) is to be filed each time when there is an exempted acquisition that entitles acquirers along with PACs to exercise 15% or more voting rights in the company. It is not a one-time reporting requirement. In other words, under regulation 3(4) report should be submitted, every time an acquirer, already holding 15% or more shares, acquires additional shares through exempted acquisition which further consolidates the shareholding of the acquirer alongwith that of the PACs with him so as to entitle him to exercise more than 15% voting rights in the company. In this regard, I note that in matter of *Naagraj Ganeshmal Jain vs SEBI*, wherein Hon'ble SAT vide order dated August 17, 2001 similar arguments raised were rejected by Hon'ble SAT in following words:-

*"……..The Appellants had advanced more or less the same argument as put forth with reference to the applicability of regulation 11(2) to them that their holding exceeded the prescribed limit even before the present acquisition, also in support of their contention that regulation 3(4) is not attracted. It has already been discussed at length in this order that the said argument is devoid*

*of any merit. What is envisaged in regulation 3(4) is not a onetime reporting, as is evident from the reason stated by the committee necessitating such reporting. Thus the contention that regulation 3(4) is not required to be complied with by the Appellants who had crossed the benchmark before 15.9.1997 is of no sound footing and I reject the same. "*

23. The above position has been upheld by Hon'ble SAT and other Courts in several other matters including the case of *Satyadeva Prakash Sinha vs. SEBI (SAT order dated April 30, 2003), Cabot International Capital Corporation Case* (*SAT order dated January 25, 2001and Hon'ble High Court by Judgement dated March 03, 2004),* etc. In all these cases, the promoters/acquirers who were already holding more than 15% shares in the respective companies were held to be under obligation to submit the report under regulation 3(4) when they acquired additional shares through exempted acquisitions. The position settled in all these judgement are squarely applicable to the facts of the case in hand.

24. Thus, it is clear that the reporting requirement under regulation 3(4) are not intended to be complied with only when the acquirer acquires 15% shares/ voting rights in the company as sought to be contended by these Noticees. If such arguments are accepted the requirements will be rendered otiose as further consolidations by way of exempted acquisitions would be made, by acquirers holding 15% shares, in clandestine manner and the purpose of the regulation will be defeated to the detriment of interest of investors. The purpose of such reporting is meant to provide crucial information which enables SEBI to ascertain whether the acquisition is an exempted acquisition under the regulation and if not, to take appropriate action in the interest of investors. Thus, the requisite report under sub regulation 3(4) is not only important for ensuring transparency in acquisitions but it is also crucial from the point of view of the enforcement of the SAST Regulations. I, therefore, reject such contentions of the Noticee No. 1 and find that he has violated the provisions of regulation 3(4) read with 3(5) of SAST Regulations.

25. Admittedly, the non-compliance of reporting requirements under regulation 3(3) and 3(4) was not in account of any ignorance rather it was on account of their stand that such reporting were not warranted. It is thus clear that the non-compliance of regulation 3(3) and 3(4) was because the Noticee No. 1 didn't feel it necessary. The non-compliance was deliberate and conscious decision of the Noticee No.1 based on the interpretation of the regulations by him. The provision of regulation 3(3) and 3(4) are couched in plain language and there is no scope for further interpretation particularly in view of the settled positions as mentioned

hereinabove. Mistaken interpretation of regulations is not an excuse to absolve the defaulters, as in this case, from the consequence of non-compliance.

26. The other charge connected with this *inter-se* transfer dated January 07, 2010 is that the Noticee No. 1 had failed to make requisite disclosures as required under regulation 7(1A) read with regulation 7(2) of the SAST Regulations and the Noticee No. 1 and No. 2 had failed to make requisite disclosures as required under regulations 13(3) and 13(4) of the PIT Regulations. Further, with regard to acquisition dated January 18, 2010, Noticee No. 1 had failed to make requisite disclosure as required under 7(1) read with 7(2) of the SAST Regulation. In this regard, the Noticee No.1 vide its letter dated November 13, 2018, has claimed that the requisite disclosures under regulations 7(1) and 7(1A) read with regulation 7(2) of the SAST Regulations by Noticee No. 1 and under regulation 13(3) and regulation 13(4) of the PIT Regulations by Noticee No.1 and No. 2 were duly made by Noticee No.1 and No. 2 within stipulated time. In this regard, they have relied upon copies of letters dated January 09, 2010 and January 20, 2010 claimed to have been written by the Noticee No. 1 to BSE and letters dated April 27, 2018 to Calcutta Stock Exchange intimating the details of their impugned transactions. I note that the Noticees have not provided any proof of dispatch and delivery of aforesaid letters to the concerned stock exchange as claimed within mandatory timeline specified in regulation 7(2) of SAST Regulations and regulation 13(5) of the PIT Regulations. In this regard, it is relevant to refer to and rely upon the following observations of Hon'ble SAT in the matter of *Mega Resources Ltd. v. SEBI (Appeal No. 49/2001*) wherein it was observed that:

> *"…regulation is not simply on sending the information, it requires disclosure. Mere dispatch of the information is short of the said requirement. If the requirement was only "to send", on sufficient proof of posting the letter would have in the normal course to some extent met with such a requirement. But Regulation 7(1) requires the acquirer to disclose the aggregate of his holding in the Target Company to the company. Sub regulation (2) prescribes the time limit within which the disclosure is required to be made…….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 the information should reach the person to whom it is meant. The obligation does not end by simply posting the information in a letter box."*

27. The agency through which the document is sent, acts as the agent of the sender and if a dispute were, to arise whether the said document has been received by the addressee or not, the onus would be on the sender to establish the fact by clear and cogent evidence in this regard. In this case, the Noticee No. 1 and 2 have not submitted any proof of receipt of any disclosures to the BSE in this regard. On the other hand, the BSE, vide its aforesaid emails available on record, has denied having received any of the alleged disclosures. I, therefore, find that the Noticees No.1 and 2 have failed to establish any disclosure made by them to MBL and BSE in regulations 7(1), 7(1A) of SAST Regulations and regulation 13(3) and 13(4) of the PIT Regulations as alleged with regard to their respective transactions dated January 07, 2010 and January 18, 2010. The statutory timelines stipulated in regulation 7(2) of the SAST Regulations and regulation 13(5) of the PIT Regulations are mandatory. In this regard, it is noted that the Hon'ble SAT in its Order dated September 30, 2014, in the matter of *Akriti Global Traders Ltd. Vs SEBI* 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……."*

28. The complete default in making material disclosures to MBL and the BSE, as found in this case, cannot be mitigated by making disclosures at another stock exchange after 8 years that too when there is no trading or conduct of business at that stock exchange. The claimed disclosures to the Calcutta Stock Exchange belatedly is also not proved by any evidence. Be whatever it may, any such disclosures at this stage is of not any help to the Noticees. Such disclosures as claimed to have been made now in this case, were not made voluntarily. The Noticee No. 1 had written those letters to Calcutta Stock Exchange only after SEBI has started inquiry. Such disclosures are, in effect, more dis-informative than informative and only historical. Considering the facts and circumstance of this case the non-compliance was nothing but a wilful defiance of the provisions of the regulations.

29. In this case, it is thus, established that the Noticee No. 1 had failed to make requisite disclosure to MBL and BSE under regulation 7(1A) read with regulation 7(2) of the SAST Regulations with regard to his acquisition dated January 07, 2010 (acquisition of 5.28% shares) and under regulation 7(1) read with regulation 7(2) of the SAST Regulations with regard to his acquisition dated January 18, 2010 (acquisition of 3.28% shares). Further, the Noticee No.

1 and 2 have also failed to make requisite disclosure to MBL and BSE under regulation 13(3) and 13(4) of the PIT Regulations with regard to aforementioned transaction dated January 07, 2010 (transaction of 5.28% shares). Thus, in my view there was complete failure on the part of Noticee No. 1 and 2 to make the requisite disclosures. The reporting under the respective regulations serves two purposes - the company is informed of acquisition of sizeable holding so that if necessary it can take steps to guard against an attempted raid , the stock exchange is informed so that the investing public will come to know of the position enabling them to stick on with or exit from the company. Such defaults as found in this case has brazenly defeated the purpose of the Regulations. Hon'ble SAT in the matter of *Coimbatore Flavors & Fragrances Ltd. vs SEBI (Appeal No. 209 of 2014 order dated August 11, 2014),* has also held that "*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 secondly; the Regulator can properly monitor the transactions in the capital market to effectively regulate the same."*

30. I, therefore, find that this case deserves adjudication of penalty under section 15A (b) read with sections 15I and 15J of the SEBI Act. Considering the overlapping requirements with regard to disclosures under the SAST Regulations and PIT Regulations, I deem it necessary to refer to the guiding factors laid down by Hon'ble SAT for imposing penalty in similar cases on persons charged for such overlapping obligations.

31. It is noted that regulation 3(3) is not very specific as who should notify stock exchange as required therein. Regulation 3(4) put the obligation of reporting therein on the acquirer. It is settled position that the person who avails the exemption must fulfill the conditions of exemptions. Thus, the obligations under both the regulation are primarily cast upon the acquirer. However, by virtue of definition of *'acquirer'* and the definition of term *'person acting in concert'* in the SAST Regulations, the PACs are automatically within the definition of '*acquirer'* even if they have not acquired a single share. The question would, thus, be whether the acquirer as well as all the PACs should notify the stock exchange and filed the report with SEBI under regulation 3(3) and 3(4), respectively. The answer would be technically in affirmative in strict sense. However, since the failure is linked to penal consequences, one has to look to the consequences arising out of the failure in a realistic manner rather than adopting narrow and pedantic approach. It is noted that in similar circumstances, while dealing with obligation of the acquirers and PACs to make disclosures under regulation 7 of the SAST Regulations Hon'ble SAT in the matter of *O.P. Gulati v. SEBI (Appeal No. 185 of 2011 decided*

*on January 11, 2012)* laid down a test to determine which of the acquirers need to make disclosures under SAST Regulations. In that case, the Hon'ble SAT observed that:

> *"…Does the said regulation require each and every acquirer within the meaning of the takeover code to make a declaration to the stock exchanges is the moot question? We are of the view that it is not so.*
>
> *... A person who may fall within the definition of acquirer under the takeover code but has not acquired the shares and is not a person acting in concert with the person acquiring the shares is not obliged to make disclosure ….*
>
> *In a given case, suppose there are 20 persons in a target company who may fall within the definition of 'acquirer' under the takeover code and say only two of them have purchased or sold shares aggregating two per cent or more of the share capital of the target company and these two persons are not acting in concert with any of the other eighteen persons. If the argument of learned counsel for the respondent Board is accepted then all the twenty persons who fall within the definition of 'acquirer' are required to make disclosure to the company as well as to the concerned stock exchanges. Such additional disclosure by eighteen persons who have neither purchased nor sold shares, nor are persons acting in concert with the two acquirers, serves no purpose.*
>
> *It is settled legal principle that a court should adopt that interpretation which is just, reasonable and sensible rather than that which is none of those things. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results. (Principles of Statutory Interpretation by G. P. Singh, 12th Edition 2010, pg.131-132). A reasonable construction agreeable to justice and reasons is to be preferred to an irrational construction. The statutory provision is to be read in a manner so as to do justice to all the parties. Any construction leading to confusion and absurdity must be avoided. The construction that results in hardship, serious inconvenience or anomaly or gives unworkable and impracticable results, should be avoided [vide In the matter of M/s Omkar Overseas LtdPage 7of 7Corporation Bank v/s Saraswati Abharansala (2009) 1 SCC 540 and Sonic Surgical vs. National Insurance Co. Ltd. (2010) 1 SCC 135]…."*

32. In my view the guiding principles, rationale and objects laid down in the aforesaid judgement of Hon'ble SAT are relevant with regard to the matter of imposition of penalty on other promoters who are PACs with Noticee No.1 in this case also. Admittedly none of the alleged PACs had acquired any share in the MBL during the relevant time and they have been levelled as PACs with Noticee No. 1 merely on account of their status and not on the basis of their any manifest or covert conduct. I, therefore, find that the consequences attendant on the non-compliance of regulation 3(3) and 3(4) of the SAST Regulations by the acquirer should not be inflicted upon Noticee No. 3 to 13.

33. I further note that the transaction dated January 07, 2010 triggered similar obligations under regulation 13(3) and regulation 13(4) of the PIT Regulations and 7(1A) read with regulation 7(2) of the SAST Regulations. For the purpose of inquiry and adjudication of these similar violations arising out of same transactions it is relevant to rely upon the order dated September 04, 2013 passed by the Hon'ble SAT in the matter of *Vitro Commodities Private Limited Vs. SEBI* wherein the it had observed that:

> *"It may be noticed that provisions of Regulations 7(1) of Takeover Regulations, 1997 and Regulation 13(1) of PIT Regulations, 1992 are not substantially different, since violation of first automatically triggers violation of second and hence there is no justification for imposition of penalty for second violation when penalty for first violation has been imposed. It may be seen that Regulation 7(1) of Takeover Regulations, 1997 and Regulation 13(1) of PIT Regulations, 1992 are not stand alone Regulations and one is corollary of other".*

34. In view of the aforesaid *ratio decidendi*, I am of the view that the violation of the provisions of regulation 13(3) and regulation 13(4) of the PIT Regulations and regulation 7(1A) read with regulation 7(2) of the SAST Regulations are not substantially different and can be considered as a single violation by Noticee No.1 for the purpose of adjudication in the matter. The Noticee No.2 is separately liable for penalty under section 15A (b) for his defaults in making requisite disclosures under regulation 13(3) and 13(4) of the PIT Regulations.

35. Under section 15I imposition of penalty is linked to the subjective satisfaction of the Adjudicating Officer. The words in the section that "*he may impose such penalty*" are of considerable significance, especially in view of the guidelines provided by the legislature in section 15J. Further, vide Part VIII of Chapter VI of the Finance Act, 2017 which was brought after Judgement of Hon'ble Supreme Court in the case of Roofit Industries, while

the adjudging the quantum of penalty the adjudicating officer has discretion and such discretion should be exercised having regard to the factors specified in section 15J. The factors stipulated in Section 15J of the 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.*
>
> *Explanation-*
>
> *For the removal of doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under sections 15A to 15E,clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section.*

36. It is also settled position that the words *"shall be liable to"* used in the context of "penalty in any statute, do not convey an absolute imperative; they are merely directory and leave it to the discretion of the Authority to impose any penalty or not. Having regard to the factors listed in section 15J, it is noted from the material available on record that any quantifiable gain or unfair advantage accrued to the respective Noticees 1 and 2 or the extent of loss suffered by the investors as a result of the default cannot be computed. In this case, these Noticees being promoters / persons in control of MBL and holding substantial stake therein should have been diligent to ensure compliance of the reporting/disclosure requirements which are crucial for investor protection, transparency and regulatory monitoring of such transactions. However, in this case the transactions have been undertaken for further consolidation of shareholding of one of the promoters in a clandestine and completely opaque manner. The Noticee No. 1 has repeatedly acquired shares and had deliberately failed to make requisite disclosures. There is no material on the record to show even subsequent disclosures within reasonable time about the impugned transactions of the Noticee No. 1 and 2. This apart, the Noticee No.1 had also avoided paying the prescribed fee to SEBI as stipulated in regulation 3(5) of the SAST Regulations; repeatedly failed to make disclosures

with regard to his acquisition dated January 07, 2010 and January 18, 2010; and had completely disregarded the requirements of several regulations as found in this case. The facts found in the case clearly show indifference of these Noticees with regard to the regulatory compliances. The complete failure and defiance, as found in this case, had defeated the purposes of the regulations and is blameworthy so as to inflict the consequences of non-compliances by Noticees No. 1 and 2.

37. Considering the facts and circumstances of the case and exercising the powers conferred upon me under section 15I of the SEBI Act read with rule 5 of the Adjudication Rules, I am of the view that the findings as aforesaid support imposition of penalty upon Noticee No.1 and 2 with regard to the valuations committed by them. I, therefore, hereby impose the monetary penalty on Noticee No. 1 and 2 as per following table under Section 15A(b) of the SEBI Act. In my view, the said penalty is commensurate with the violation committed by these Noticees in this case.

| **Name of Noticee** | **Failures** | **Amount of Penalty - Provisions of regulations violated** |
|---|---|---|
| Mr. Kedar Nath Fatehpuria (Noticee No. 1) | Failed to make requisite disclosures with regards to transaction dated January 07, 2010 | **₹ 5,00,000**/-(Rupees five lac only) for violation of regulation 3(3) and 3(4) read with 3(5) of the SAST Regulations.<br><br>**₹ 2,00,000** /-(Rupees two lac only) for violation of regulation 7(1A) read with 7(2) of the SAST Regulations and regulation 13(3) and 13(4) read with 13(5) of the PIT Regulations. |
| | Failed to make requisite disclosures with regards to transaction dated January 18, 2010 | **₹ 1,00,000**/-(Rupees one lac only) for violation of regulation 7(1) read with 7(2) of the SAST Regulations. |
| Mr. Vijay Kumar Fatehpuria (Noticee No. 2) | Failed to make requisite disclosures with regards to transaction dated January 07, 2010 | **₹ 1,00,000**/-(Rupees one lac only) for violation of regulation 13(3) and 13(4) read with 13(5) of the PIT Regulations. |

38. The Noticees No. 1 and 2, respectively shall remit aforesaid amount of penalty within 45 days of receipt of this order either by way of Demand Draft in favour of *"SEBI - Penalties Remittable to Government of India",* payable at Mumbai, OR through e-payment facility into Bank Account the details of which are as follows:

| | |
|---|---|
| Bank Name | State Bank of India |
| Branch | Bandra-Kurla Complex |
| RTGS Code | SBIN0004380 |
| Beneficiary Name | SEBI – Penalties Remittable To Government of India |
| Beneficiary A/c No | 31465271959 |

39. The said demand draft or forwarding details and confirmation of e-payment made in the format as given in following table should be sent to "The Division Chief, EFD-DRA-III, Securities and Exchange Board of India, SEBI Bhavan, Plot no. C- 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051" and also to e-mail id :- tad@sebi.gov.in

| | | |
|---|---|---|
| 1 | Case Name | |
| 2 | Name of the Payee | |
| 3 | Date of Payment | |
| 4 | Amount Paid | |
| 5 | Transaction No. | |
| 6 | Bank Details in which payment is made | |
| 7 | Payment is made for<br>(like penalties/disgorgement / recovery/ settlement amount and legal charges along with order details) | |

40. In terms of Rule 6 of the Adjudication Rules, copies of this order is sent to the Noticees and also to SEBI.

**Date: December 21, 2018**
**Place: Mumbai**

**Santosh Shukla**
**Chief General Manager &**
**Adjudicating Officer**