BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. EAD-5/SVKM/AA/AO/22/2015-16]

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

Enakshi Impex Pvt. Ltd.

(**PAN: AACCE2529H**)

In the matter of Mahan Industries Limited

BACKGROUND IN BRIEF

1. Securities and Exchange Board of India (**SEBI**) conducted investigation relating to buying, selling or dealing in the shares of Mahan Industries Limited (hereinafter referred to as "**MIL/company**") to ascertain whether there was any violation of the provisions of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "**SEBI Act, 1992**") and Regulations made thereunder. Investigation revealed that as on December 31, 2009, MIL had issued capital of 71,50,000 shares of ₹ 10/- each and on January 4, 2010 MIL made a preferential allotment of convertible equity warrants for ₹ 30 crores. On January 15, 2010, MIL split its one share of ₹10/- each into 10 equity shares of ₹ 1/- each and hence as on this date company had issued capital of ₹ 7,15,00,000/- divided into 7,15,00,000 shares of ₹ 1/- each and outstanding convertible equity warrants of ₹ 30 crores. On February 20, 2010, the Board of Directors of the MIL decided that convertible warrants, where full amount of consideration has been received by the company, may be converted into equal number of shares of ₹ 1/- each. Accordingly, on February 20, 2010, MIL made allotment of 24,85,00,000 shares

of ₹ 1/- each to the preferential allottees of the convertible equity warrants. Therefore, on February 20, 2010 MIL had issued capital of 32,00,00,000 shares of ₹ 1/- each and outstanding convertible preferential warrants worth ₹5,15,00,000/-.

2. The details of the shares allotted to Enakshi Impex Pvt. Ltd. (hereinafter referred to as "**Noticee**") pursuant to conversion of equity warrants into equity share of ₹ 1/- each by MIL on February 20, 2010 and its percentage to the issued capital of MIL as on that date was as under:

Name	No. of shares allotted	% of shares to the issued capital of the company (32,00,00,000 shares of ₹ 1/- each)
Enakshi Impex Pvt. Ltd.	1,41,65,000	4.43

3. Pursuant to the aforesaid conversion of equity warrants into equity share of ₹ 1/- each by MIL on February 20, 2010, two other entities namely Gazala Constructions Pvt. Ltd and Narois Impex Pvt. Ltd. (hereinafter referred to as "**Gazala** and **Narois**" respectively) were allotted 1,72,50,000 shares and 1,66,75,000 shares of MIL respectively. The shareholding of Gazala and Narois constituted 5.39% and 5.21% respectively of the share capital of MIL at the relevant time. Investigation further revealed that Shri Mitesh Chandrakant Shah and Shri Sagar Dinesh Patel were the common directors of the Noticee, Gazala and Narois. Further, Narois and Noticee shared a common address and thus they were persons acting in concert ("**PAC**") in acquisition of shares of MIL on February 20, 2010. It was further observed that since the acquisition of shares by the Noticee, Gazala and Narois on February 20, 2010 entitled them individually as well as collectively to more than the threshold limits of shares or voting rights of MIL as stipulated under regulations 7(1) and 7(1A) read with regulation 7(2) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as **"SAST Regulations, 1997"**), they were under obligation to make disclosure about their aggregate shareholding or voting rights in the MIL to MIL as well as to BSE within 2 days of transaction as stipulated by

the afore-mentioned regulations. However, it was observed that no disclosures, as stipulated by the afore-mentioned regulations, for the said transaction dated February 20, 2010 was made by the Noticee. Therefore, it was alleged that the Noticee violated the provisions of regulations 7(1) and 7(1A) read with regulation 7(2) of SAST Regulations, 1997.

4. It was further observed that since pursuant to conversion of equity warrants into equity share of ₹.1/- each by MIL on February 20, 2010, noticee along with Gazala and Narois held 5% or more shares of MIL, they were under obligation to make disclosure about their shareholding or voting rights in the MIL to MIL in Form A within 2 days of transaction as stipulated by Regulation 13(1) of SEBI (Prohibition of Insider Trading) Regulations, 1992 **(PIT Regulations, 1992**). However, it was observed that the Noticee did not make the requisite disclosure as stipulated by the afore-mentioned regulation. Therefore, it was alleged that the Noticee violated the provisions of regulation 13(1) of PIT Regulations, 1992.

5. During the course of investigation, Noticee was issued

i. summons dated February 22, 2013 under section 11C(3) of the SEBI Act to furnish certain information, as mentioned in the Annexure to the summons, before the Investigation Authority (**IA**) and

ii. summons dated March 08, 2013 under section 11C(5) of the SEBI Act to appear in person before the IA on March 20, 2013 to answer questions in relation to the investigation.

6. It was observed that noticee did not furnish full and complete information as required under the summons dated February 22, 2013 nor did it appear on the scheduled date and time before the IA as required under the summons dated March 08, 2013. Therefore, it was alleged that the noticee violated the provisions of section 11C(3) and 11C(5) of SEBI Act, 1992.

APPOINTMENT OF ADJUDICATING OFFICER

7. Shri A. Sunil Kumar was appointed as the Adjudicating Officer to inquire and adjudge under section 15A(a) and 15A(b) of the SEBI Act, 1992, the alleged violations of provisions of regulations 7(1) and 7(1A) read with regulation 7(2) of SAST Regulations, 1997; read with Regulation 35 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**SAST Regulations, 2011**), Regulation 13(1) of PIT Regulations, 1992 and section 11C(3) and 11C(5) of the SEBI Act, 1992, by the noticee. Subsequently, upon the transfer of Shri A. Sunil Kumar, I have been appointed as Adjudicating Officer, in the present matter, vide order dated June 22, 2015.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

8. Show Cause Notice no. EAD-5/ADJ/ASK/AA/OW/28881/2014 dated October 01, 2014 (hereinafter referred to as "**SCN**") was issued to the noticee in terms of Rule 4 of 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 SEBI Act, 1992 to show cause as to why an inquiry should not be initiated and penalty be not imposed under section 15A(a) and 15A(b) of SEBI Act, 1992 for the aforesaid violations specified in the SCN. The copies of the documents relied upon in the SCN were sent to the Noticee along with the SCN.

9. The said SCN was sent by the mode of hand delivery on October 01, 2014 and the same was returned undelivered with the comment "*No such Consignee*". Copy of the said SCN was again sent to the address of the noticee as available on the MCA website vide letter dated October 16, 2014. The said SCN was duly delivered to the noticee, however, no reply to the SCN was submitted by the noticee within the time prescribed in the SCN.

10. Thereafter, Noticee was given an opportunity of personal hearing on December 19, 2014 vide notice dated December 04, 2014. The said notice, sent by the mode of hand delivery, was returned undelivered with the comment "*Office locked*". In terms of Rule 7 of the Adjudication Rules, copy of the said notice was served upon the noticee vide letter dated December 16, 2014 by affixing it on the last known address of the noticee. However, Noticee neither replied to the SCN nor attended the personal hearing.

11. Another opportunity of personal hearing was given to the noticee on January 16, 2015 vide notice dated January 02, 2015. On the date of hearing, Mr. P.K.Ramesh appeared as Authorised Representative (**AR**) on behalf of the noticee and submitted that the noticee would be filing a detailed reply to the SCN within 10 days. AR also submitted that the noticee is contemplating the option of filing consent application in the matter for settlement of the adjudication proceedings and sought time of 10 days for filing the same.

12. Noticee filed reply to the SCN vide letter dated January 25, 2015. The summary of submissions of the noticee with respect to specific charges alleged in the SCN are as follows:

- *Noticee cannot be considered as a PAC under Regulation 2(e) of SAST Regulations, 1997 alongwith Gazala and Narois as i) it did not share any common objective to acquire shares; ii) there was no intention to gain control over the target company; iii) there was no agreement or understanding and iv) they did not directly or indirectly co-operate to acquire or agree to acquire shares or voting rights or control.*
- *As the noticee was not a PAC, it was not required to make any disclosure under SAST and PIT Regulations.*
- *If a company allots warrants to several persons directly, they cannot be deemed/treated as PAC. The allottees have privity with the company and no privity exists inter-se among themselves. Persons/individuals cannot become PAC by way of subscribing to preferential allotment alone.*
- *With regard to summons dated 22.02.13, the noticee with a view to comply with the directions of the IA furnished certain documents and provided certain information vide letter dated 04.03.2013. Inadvertently some*

remaining documents could not be sent owing to change in management and other operational issues. In view of the same, documents were submitted before the AO.

- *Noticee stated that the aforesaid documents are not relevant for the purpose of levying of charges relating to non-disclosures under SAST and PIT Regulations and nor it is shown that in the absence of these documents how the investigation proceedings have been hampered or adversely affected or delayed.*
- ***Mitigating factors***
  a) *The noticee has not violated any substantial provisions of law.*
  b) *There is a remarkable delay of about 4 years in issuance of SCN.*
  c) *The noticee is not guilty of conduct which is contumacious or dishonest or acted in conscious disregard of law.*
  d) *The noticee has not viewed the regulatory proceedings in a nonchalant manner.*
  e) *The noticee has not made any unfair gain or advantage in any manner.*
  f) *The lapse of non-disclosure on the part of the noticee is not repetitive in nature.*
- *In view of the above, noticee has submitted that it has not violated provisions of SAST and PIT Regulations.*
- *Noticee also referred to para 22 of Bharjatiya Steel Industries v Commissioner of Sales Tax, U.P. {(2008) 11 SCC 617}.*

13. As per the records, the consent application filed by the noticee was rejected by SEBI. The undersigned, after being appointed as Adjudicating Officer in the present matter, also gave an opportunity of hearing to the Noticee on July 20, 2015. Noticee did not appear on the scheduled date of hearing and vide email dated July 20, 2015, AR sought another opportunity of hearing. Another opportunity of hearing was given to the Noticee on August 11, 2015. On the scheduled date of hearing, AR and Shri Rohit Sharma, Advocate, appeared and submitted as follows:

"Upon conversion of warrants on February 20, 2010, Enakshi has acquired shares 4.43% of the paid up capital of the target company. It was alleged that Enakshi Impex Pvt Ltd with 4.43% was acting in concert with Narois Impex Pvt Ltd, with shareholding of 5.21% of the share capital and failed to comply with regulation 7(1) and(1A) of SAST Regulations, 1997 as well as regulation 13(1) of PIT Regulations, 1992. It is submitted that Mr. Mitesh Chandrakant Shah and Mr. Sagar Dinesh Patel who became common directors of Enakshi and Narois on

May 18, 2010. Hence, on the date of acquisition of shares on February 20, 2010, there were no common director between the acquirers. Hence they are not PAC's. Form 32 filed with MCA in this regard is filed. Common address of both the companies is not a ground for the concept of deemed PAC under SAST Regulations, 1997 and PIT Regulations, 1992."

CONSIDERATION OF ISSUES AND FINDINGS

14. 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 violated the provisions of Regulations 7(1) and 7(1A) read with Regulation 7(2) of SAST Regulations, 1997 and Regulation 13(1) of PIT Regulations, 1992?

b. Whether Noticee violated the provisions of section 11C(3) and 11C(5) of SEBI Act, 1992?

c. Does the violation, if any, attract monetary penalty under section 15A (a) and 15A (b) of SEBI Act, 1992?

15. Noticee has submitted that there is a remarkable delay of about 4 years in issuing the SCN. I find from the available records that investigation was carried out by SEBI into buying, selling or dealing in the shares of MIL and action against various entities, including the noticee, was approved by the competent authority on February 28, 2014. Thereafter, Shri A. Sunil Kumar, erstwhile Adjudicating Officer in the matter, issued the SCN to the noticee. Hence I find that there is no delay and no prejudice caused to the noticee by way of any interim restraint order. In any case, under the facts and circumstances of the case, delay in initiating the proceedings itself cannot be said to have vitiated the proceedings.

Issue I - Violation of provisions of regulations 7(1) and 7(1A) read with regulation 7(2) of SAST Regulations, 1997 and regulation 13(1) of PIT Regulations, 1992

16. Before moving forward, it is pertinent to refer to the relevant provisions of SAST Regulations, 1997 and PIT Regulations, 1992 which reads as under:

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."

PIT Regulations, 1992

"Disclosure of interest or holding by directors and officers and substantial shareholders in a listed companies - Initial Disclosure
13. *(1) Any person who holds more than 5% shares or voting rights in any listed company shall disclose to the company in Form A, the number of shares or voting rights held by such person, on becoming such holder, within 2 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."

17. Upon perusal of the submissions and documents available on record, it is an admitted fact that the noticee was allotted 1,41,65,000 equity shares of MIL upon conversion of its 14,16,500 convertible warrants by MIL on February 20, 2010. It is also not in dispute that the aforesaid allotted shares constituted 4.43% of the issued share capital of MIL at the relevant time and no disclosure either under SAST Regulations, 1997 or PIT Regulations, 1992 was made by the noticee. It is

also a matter of record that pursuant to the aforesaid conversion of equity warrants into equity share of by MIL on February 20, 2010, Gazala and Narois were also allotted 1,72,50,000 shares and 1,66,75,000 shares of MIL respectively and the same constituted 5.39% and 5.21% respectively of the share capital of MIL at the relevant time.

18. It has been alleged that since i) Shri Mitesh Chandrakant Shah and Shri Sagar Dinesh Patel were the common directors of the noticee, Gazala and Narois and ii) Narois and Noticee shared a common address, they were PAC in acquisition of shares of MIL on February 20, 2010 and as such acquisition of shares by the noticee, Gazala and Narois on February 20, 2010 entitled them individually as well as collectively to more than the threshold limits of shares or voting rights of MIL as stipulated under regulations 7(1) and 7(1A) read with regulation 7(2) of SAST Regulations, 1997 they were under obligation to make disclosure about their aggregate shareholding or voting rights in the MIL to MIL as well as to BSE within 2 days of transaction as stipulated by the afore-mentioned regulations. However, it was observed that no disclosures as stipulated by the afore-mentioned regulations, for the said transaction dated February 20, 2010 was made by the Noticee.

19. As regards the charge of violation of Regulation 7(1) of SAST Regulations, 1997, I find that the acquisition by the noticee on February 20, 2010 of 1,41,65,000 equity shares of MIL entitled them to 4.43% of the equity share capital of MIL at the relevant time which individually was less than the threshold limits of shares or voting rights of MIL as stipulated under regulations 7(1) read with regulation 7(2) of SAST Regulations, 1997. Hence, unless the noticee acted as PAC with Gazala or Narois, there was no obligation upon the noticee to make disclosure about its aggregate shareholding or voting rights in the MIL to MIL as

well as to BSE within 2 days of transaction as stipulated by the afore-mentioned regulations.

20. As regards the noticee's collective obligation in its capacity as PAC alongwith Gazala and Narois to make disclosure under regulation 7(1) of SAST Regulations, 1997, noticee has contended that it was not PAC either with Gazala or Narois in acquisition of shares of MIL on February 20, 2010. It has further contended that persons cannot become PAC by way of subscribing to preferential allotment alone and that the allottees have privity with the company and no privity exists inter-se among themselves.

21. Whether or not two or more persons are acting in concert is a question of fact and is to be answered on the facts and circumstances of each case. As it is difficult to prove concert by direct evidence, therefore circumstantial evidence have to be taken into consideration while proving the concert. Further, the circumstantial evidence should be sufficient to raise a presumption in its favour with regard to the existence of a fact sought to be proved. Since it is exceedingly difficult to prove facts which are especially within the knowledge of parties concerned, the legal proof in such circumstances partakes the character of a prudent man's estimate as to the probabilities of the case.

22. From the submissions of the Noticee and documents available on record I find that, the connection between the Noticee, Gazala and Narois has been alleged on the basis of common directors and the common address of Narois and Noticee. As far as the common directors are concerned, I note from the Form 32 submitted by the noticee that Mr. Mitesh Chandrakant Shah and Mr. Sagar Dinesh Patel who were Directors in Gazala and Narois became Directors of Noticee only on May 18, 2010 much after the date of acquisition of shares on February 20, 2010. Thus the shareholding of the noticee cannot be clubbed with that of Gazala and Narois on the ground of common Directors.

23. I note that it is not in dispute that the noticee shared common address with that of Narois i.e. *25/D, Office No.4, 1st Floor, KN Road, Mumbai - 400009*. However, the noticee has contended that the common address of both the companies is not a ground for the deemed PAC and that the allottees have privity with the company and no privity exists inter-se among themselves.

24. I have seen the Memorandum of Association (MOA), as available on MCA website, filed by Narois and Noticee and find that both these companies' MOA is dated September 07, 2009 with their Authorised Share Capital of ₹ 1,00,000/- each divided into 10,000 shares of ₹ 10/- each. I further find from their respective MOAs that both these companies have been formed by same persons i.e. Shri Karan Kapoor and Shri Ravindra Belekar, who are having the same address and have taken 5,000 shares each in both these companies. I further find from the Form No. 5, as available on the website of MCA, that the share capital of Noticee and Narois was changed for the first time on February 26, 2010 and March 12, 2010 respectively pursuant to ordinary resolution passed at the meeting of the members. It is pertinent to mention here that MIL made preferential allotment of convertible equity warrants for ₹ 30 crores on January 4, 2010 and these warrants were converted into equity shares on February 20, 2010. I find that on these days both the noticee and Narois were under the same management as per sub-section (1B) of section 370 of the Companies Act, 1956 and Shri Karan Kapoor and Shri Ravindra Belekar, by virtue of their common shareholding of 50% each in both these companies, were controlling both these companies on the date of acquisition i.e. February 20, 2010.

25. The contention that the noticee and Narois cannot be deemed to be PAC under Regulation 2(e) of SAST Regulations, 1997 is also examined. I note that the aforementioned regulation enumerates certain class of persons to be deemed to be acting in concert. It is a rebuttable presumption. Merely because persons

with common address are not stated to be deemed PAC does not mean that they can never be considered as PAC if the facts point out otherwise. Without prejudice to the generality of the definition of PAC, the Regulation deems certain class of person to be acting in concert and one among them is the companies under the same management. As per the finding arrived hereinbefore, on the date of acquisition i.e. February 20, 2010, both the noticee and Narois were under the same management and were being controlled by Shri Karan Kapoor and Shri Ravindra Belekar by virtue of their common shareholding of 50% each in both these companies. Hence the contention of the noticee there was no privity between it and Narois and it was not PAC with Narois cannot be accepted.

26. As the noticee and Narois were both under the same management for the aforesaid reason on the date of acquisition of shares, I find Noticee to be a PAC with Narois under Regulation 2(e)(2)(i) SAST Regulations, 1997 and that being the case the shareholding of the noticee has to be taken alongwith that of Narois.

27. Now going back to the issue of violation of regulation 7(1) of SAST Regulations, 1997, I find that acquisition by the noticee on February 20, 2010 of 1,41,65,000 equity shares of MIL as PAC alongwith Narois entitled them to more than the threshold limits of shares or voting rights of MIL as stipulated under regulations 7(1) read with regulation 7(2) of SAST Regulations, 1997. That being the case, they were under obligation to make disclosure about their aggregate shareholding or voting rights in the MIL to MIL as well as to BSE within 2 days of transaction as stipulated by the afore-mentioned regulations. However, it is an undisputed fact that the Noticee did not make the requisite disclosure as stipulated by the afore-mentioned regulations. In view of the same, I hold that the noticee has violated Regulation 7(1) read with Regulation 7(2) of SAST Regulations, 1997.

28. In so far as the obligation to make disclosure Regulation 7(1A) of SAST Regulations, 1997 is concerned, I note that the said provision is applicable only in respect of those acquirers whose shareholding together with shareholding of persons acting in concert, if any, is between 15% and 55% as stipulated under regulation 11(1) of SAST Regulations, 1997. In the instant matter, I find that it is a matter of record that the noticee's shareholding alongwith the shareholding of Narois was below the limits prescribed under regulation 11(1) of SAST Regulations, 1997. Therefore, the allegation of violation of regulation 7(1A) of SAST Regulations, 1997 by the noticee is not established. In fact, Regulation 7(1A) of SAST Regulations, 1997 has no application in the facts of the case.

29. As regards the violation of regulation 13(1) of PIT Regulations, 1992, I note that under the said regulation, any person who holds more than 5% shares or voting rights in any listed company, is under an obligation to disclose to the company in the prescribed Form the number of shares or voting rights held by such person on becoming the holder within two working days of the receipt of allotment of shares or acquisition of shares or voting rights. I note that the concept of PAC is not applicable under the PIT Regulations, 1992 and in the instant case, it is a matter of record that the noticee was allotted 4.43% of the equity share capital of MIL on February 20, 2010 which is below the limits prescribed under regulation 13(1) of PIT Regulations, 1992. Therefore, the allegation of violation of regulation 13(1) of PIT Regulations, 1992 by the noticee is not established.

Issue -II -Violation of the provisions of section 11C(3) and 11C(5) of SEBI Act, 1992

30. It would be appropriate here to refer to the aforesaid provisions of the SEBI Act, 1992 which reads as under:

Section 11C(3) and Section 11C(5) of the SEBI Act, 1992

Section 11C(3): *The Investigating Authority may require any intermediary or any person associated with securities market in any manner to furnish such information to, or produce such books, or registers, or other documents, or*

record before him or any person authorised by it in this behalf as it may consider necessary if the furnishing of such information or the production of such books, or registers, or other documents, or record is relevant or necessary for the purposes of its investigation.

Section 11C(5): *Any person, directed to make an investigation under sub-section (1), may examine on oath, any manager, managing director, officer and other employee of any intermediary or any person associated with securities market in any manner, in relation to the affairs of his business and may administer an oath accordingly and for that purpose may require any of those persons to appear before it personally.*

31. I find that it is not in dispute that the Noticee was issued summons dated February 22, 2013 under section 11C(3) of the SEBI Act to furnish certain information, as mentioned in the Annexure to the summons, before the IA on March 04, 2013. I note that Noticee vide letter dated March 04, 2013 submitted only part of the information as required by summons dated February 22, 2013 and further stated that other details sought vide the said summons would be submitted in due course of time. It is also an admitted fact that the same was not provided to SEBI during the course of investigation. It is also a matter of record that the Noticee was issued summons dated March 08, 2013 under section 11C(5) of the SEBI Act, 1992 to appear in person before the IA on March 20, 2013 to answer questions in relation to the investigation which the noticee failed to do.

32. However, the noticee has contended that it is not shown that as to how the investigation process or proceedings have been hampered or adversely affected or delayed in the absence of these documents. It is pertinent to mention here that it is the prerogative of IA to decide from whom to seek information and any non-compliance of the summons of the IA hampers the process of investigation. If the appellant had appeared before the investigating officer and answered his queries or if he had furnished the requisite information that was sought from him, many things relevant to the investigation might have come to light. When IA summons a person to appear before him, it is the statutory duty of such person to appear before the IA and to answer the queries. It is well established that timely

submission of information is very important for the purpose of effective investigation proceedings and non-cooperation by an entity can be detrimental to the interest of investors and securities market on account of delay or hindrance in the investigation.

33. I note that in its reply to the SCN made vide letter dated January 27, 2015, the Noticee has submitted for the first time some of the documents/information, including details relating to demat account statement and bank book and cash book, sought by the summons dated February 22, 2013. However, I am of the considered opinion that the Noticee ought to have submitted these information/documents before the IA during the stage of the investigation in compliance with the Summons and not to Adjudicating Officer on receipt of the SCN. Moreover, the fact that the noticee could make available the documents in the instant proceedings, also shows that the Noticee was in a position of providing those information/documents to IA but did not submit the same at the relevant time reflecting the non-cooperative attitude of the Noticee to the whole investigation process of SEBI. The documents sought especially details relating to demat account statement and bank book and cash book are very important to keep audit trail and the noticee by not submitting the same stonewalled the investigation.

34. The Hon'ble SAT has also recognized the importance of compliance of summons and personal appearance and in the matter of *DKG Buildcon Pvt. Ltd. v. SEBI* (Appeal No. 106 of 2006, Date of Decision: 07.01.2009), it has held: *"…By not responding to the summons, the representative(s) of the appellant did not appear before the investigating officer as a result whereof their statements could not be recorded. This, obviously, hampered the investigations. In the result, the inescapable conclusion is that the appellants were adamant in not furnishing the information sought from them though vital to the investigations and that they*

stonewalled the investigations as commented by the adjudicating officer. It is of utmost importance that every person from whom information is sought should fully co-operate with the investigating officer and promptly produce all documents, records, information as may be necessary for the investigations. If persons are allowed to flout the summons issued to them during the course of the investigations, the Board as the watchdog of the securities market will not be able to perform its duties in protecting the interests of the investors and safeguarding the integrity of the securities market."

35. In this context, I would like to also refer to the order of the Hon'ble SAT in the matter of *Mr. Jalal Batra vs. SEBI* (Appeal no. 184 of 2010, date of decision: December 06, 2010) wherein it observed "*.....We have observed time and again that it is of utmost importance that market players like the appellant should fully cooperate with the investigations that are carried out by the Board, the watchdog of the securities market. If market players and intermediaries avoid appearing before the investigating officer or furnish the necessary information sought from them, the Board as a market regulator will not be able to carry out its statutory functions and duties of protecting the integrity of the securities market and the investigations would be grossly hampered. Non co-operation with the market regulator has to be viewed seriously. We do not know what else would have come to light if the appellant had appeared before the investigating officer or if he had furnished the requisite information that was sought from him."*

36. In view of the aforesaid, I find that the noticee did not comply with the summons dated February 22, 2013 and March 08, 2013 when it failed to submit full and complete information to IA as well as when it failed to make personal appearance before IA as sought vide the said summons respectively. Therefore, I hold that the noticee has violated provisions of sections 11C(3) and 11C(5) of SEBI Act, 1992.

Issue III - Does the violation, if any, attract monetary penalty under section 15A(a) and 15A (b) of SEBI Act, 1992?

37. In this context, reliance is placed upon the order of the Hon'ble Supreme Court of India in the matter of *Chairman, SEBI v.. Shriram Mutual Fund* {[2006] 5 SCC 361} wherein it was held that "*In our view, the penalty is attracted as soon as contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. ……. Hence, we are of the view that once the contravention is established, then the penalty has to follow and only the quantum of penalty is discretionary."*

38. The noticee has referred to observation made by Hon'ble Supreme Court of India in para 22 of *Bharjatiya Steel Industries v Commissioner of Sales Tax, U.P.* {(2008) 11 SCC 617} regarding absence of mens rea as a ground for non-levy of penalty. However, the reliance placed by the Noticee on the afore-mentioned case does not support its case as in the referred case the Hon'ble Supreme Court of India has also observed that *"Furthermore, the question as to whether mens rea is an essential ingredient or not will depend upon the nature of the right of the parties and the purpose for which penalty is sought to be imposed."* I am of the view that in the Shriram Mutual Fund case referred supra, the Hon'ble Supreme Court while interpreting the provisions of the SEBI Act, 1992 has made it abundantly clear that as soon as contravention of the statutory obligation as contemplated by the Act and the Regulation is established then the penalty has to follow and only the quantum of penalty is discretionary. It further held that "… *imputing mens rea into the provisions of Chapter VIA is against the plain language of the statute and frustrates entire purpose and object of introducing Chapter VIA to give teeth to the SEBI to secure strict compliance of the Act and the Regulations."* In view of the same, in my opinion the aforesaid judgment is of no assistance to the Noticee.

39. As the violation of provisions of Regulation 7(1) read with regulation 7(2) of SAST Regulations, 1997 and section 11C(3) and 11C(5) of SEBI Act, 1992 by the noticee has been established I hold that Noticee is liable for monetary penalty under section 15A (a) and 15A(b) of SEBI Act, 1992 which reads as under:

*"**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) to furnish any document, return or report to the Board, fails to furnish the same, 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;

(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;"

40. I have considered the factors mentioned in section 15J of SEBI Act, 1992 and I note that the material made available on record has not quantified the amount of disproportionate gain or unfair advantage made by the Noticee and the loss suffered by the investors as a result of the Noticee's default. However, it is important to note that securities market operates on disclosure based regime and hence true and timely disclosure of information, as prescribed under the statute, is an important regulatory tool intended to serve a public purpose. The Noticee, by its failure to make requisite disclosure within the time prescribed under SAST Regulations, 1997 prevented dissemination of valuable information to investors at the relevant point of time. Moreover, by not submitting complete details in response to summons, including those relating to Bank and demat statements which could have shown the fund flow and securities flow, and by not appearing before the IA for answering queries / giving explanations/clarifications despite having received the summons compromises the regulatory framework and hampers the investigation. Further, any delay or hurdle in investigation due to

non-cooperation by any entity is detrimental to the interest of investors in securities market and the same deserves to be viewed seriously.

ORDER

41. After taking into consideration all the facts and circumstances of the case, I, in exercise of the powers conferred upon me under Section 15I (2) of the SEBI Act read with Rule 5 of the Adjudication Rules, hereby impose following penalty on the noticee i.e. Enakshi Impex Pvt. Ltd.:

Penalty Amount	**Violation**
₹ 2,50,000/- (Rupees Two Lakh Fifty Thousand Only)	Under section 15A(b) of SEBI Act for violation of Regulation 7(1) of SAST Regulations, 1997 read with Regulation 35 of SAST Regulations, 2011.
₹ 2,00,000/- (Rupees Two Lakh Only)	Under section 15A(a) of SEBI Act for violation of section 11C(3) of SEBI Act, 1992.
₹ 2,00,000/- (Rupees Two Lakh Only)	Under section 15A(a) of SEBI Act for violation of section 11C(5) of SEBI Act, 1992.
Total	₹ 6,50,000/- (Rupees Six Lakh Fifty Thousand Only)

42. I am of the view that the penalty imposed is commensurate with the violations committed by the Noticee. The penalty shall be paid by way of demand draft drawn 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 shall be forwarded to the "The Division Chief (Enforcement Department - DRA-IV), Securities and Exchange Board of India, SEBI Bhavan, Plot No. C – 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051."

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

Date: September 29, 2015
Place: Mumbai

S. V. Krishnamohan
Chief General Manager &
Adjudicating Officer