

**BEFORE THE ADJUDICATING OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
[ADJUDICATION ORDER NO. EAD-12/ AO/SM/6-7/2018-19]**

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

In respect of:

Names of the Entities	PAN No.
Nirmal Kotecha	AEZPK2016H
Taib Securities Mauritius Ltd	AAACJ5003H

In the matter of M/s. M/s. Usher Agro Ltd ("UAL")

Facts of the case:

1. Securities and Exchange Board of India ("SEBI") had conducted investigation in the scrip of UAL during August 20, 2008 to December 31, 2008 (hereinafter referred to as 'period of investigation' or 'investigation period' to look into the possible violation of the provisions of the Securities and Exchange Board of India Act, 1992 ("the Act") and various Rules and Regulations made thereunder. Pursuant to it was observed that.
2. During investigation the following was observed:

Disclosure Violations under PIT Regulations and SAST Regulations

3. The shareholding of Nirmal Kotecha ("Nirmal"), on consolidation of shares held at different beneficiary accounts as on January 12, 2009 and especially pursuant to credit of 1,05,000 shares to his account on January 12, 2009, had exceeded 5% of share capital of UAL. Similarly, TAIB Securities Mauritius Ltd ("Taib Securities") whose shareholding in UAL before September 12, 2008 was 4.77% of total share capital of UAL. Pursuant to credit of 2, 84,675 shares on September 12, 2008, its shareholding exceeded 5%. It was ascertained from BSE and UAL that disclosure for the aforesaid increase in shareholding were not made by Nirmal and TAIB Securities to BSE and UAL. Hence, it was alleged that Nirmal and Taib Securities had violated Regulation 13(1) of SEBI (Prohibition of Insider Trading) Regulations, 1992 ("PIT Regulations, 1992") read with Regulation 12(2) of the SEBI (Prohibition of Insider Trading)

Regulations, 2015 (“PIT Regulations, 2015”) and Regulation 7(1) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (“SAST Regulations, 1997” read with Regulation 35 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (“SAST Regulations, 2011”).

4. In this order wherever PIT Regulations, 1992 is mentioned it should be referred to as PIT Regulations, 1992 read with Regulation 12 of SEBI (Prohibition of Insider Trading) Regulations, 2015.
5. In this order wherever SAST Regulations, 1997 is mentioned it should be referred to as SAST Regulations, 1997 read with Regulation 35 of SEBI (Acquisition of Shares and Takeovers) Regulations, 2011.

Appointment of Adjudicating Officer

6. SEBI had initiated adjudication proceedings against the entities mentioned above and appointed Shri D Sura Reddy as Adjudicating Officer vide order dated December 26, 2014 under Section 15 I of the Act read with Rule 3 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as ‘Rules’) to inquire into and adjudge Nirmal and TAIB Securities under Section 15A(b) of the Act for the alleged violation of the provisions of law by the entities. Pursuant to the transfer of the case, I have been appointed as Adjudicating Officer (AO), vide order dated May 18, 2017.

Show Cause Notice, Reply and Personal Hearing

7. Show Cause Notices (“SCN”) dated April 06, 2015 was issued to the Entities under the provisions of Rule 4 (1) of the Rules to show cause as to why an inquiry should not be initiated against the Entities and penalty should not be imposed under Section 15A (b) of the Act for the alleged violations as stated above.

Reply to SCN

TAIB Securities

8. Vide letter dated May 05, 2015 authorised M/s. Nishith Desai Associates to represent it which in turn vide its letter dated May 05, 2015 sought time to file the reply. However, no reply was filed till the date of hearing i.e., on July 13, 2017.

Nirmal

9. Vide letter dated April 20, 2015, Nirmal sought inspection / copy of materials / documents and time to file his reply. Erstwhile AO vide letter dated April 28, 2015 provided an opportunity of inspection. Accordingly, SEBI vide letter dated May 26, 2015 provided the copy of material/ documents relied upon.

Hearing

10. Pursuant to the transfer of the case, I granted an opportunity of personal hearing to the Entities, as detailed below in terms of Rule 4(3) of AO Rules :

10.1 The notice of hearing dated July 18, 2017 for the hearing scheduled on August 7, 2017 was served on TAIB Securities as per postal records. In response to the same the AR vide its letter dated July 24, 2017 submitted that TAIB was liquidated and submitted a copy of Mauritius Government Gazette dated August 19, 2016 notifying the dissolution of TAIB Securities Mauritius Ltd and requested for postponement of hearing. However, on the date of hearing, AR appeared before me and reiterated the submissions made vide letter dated July 24, 2017.

10.2 In response to hearing notice dated July 13, 2017 for the hearing scheduled on August 7, 2017, counsel of Nirmal vide their letter dated July 21, 2017 stated that they are making an application under SEBI (Administrative and Civil Proceedings) Regulations, 2014 and requested for keeping the proceedings in abeyance till the outcome of the application. Pursuant to the rejection of settlement application, one more opportunity of hearing was granted on February 2, 2018 and the same was adjourned to April 6, 2018 at the request of Nirmal. On the date of hearing, ARs of Nirmal appeared before me and reiterated the submissions made vide their letter dated April 05, 2018 which inter-alia states that:

10.2.1 While accepting that the single incidence of disclosure was not made inadvertently, it is stated that Nirmal did not accrue any illegal or undue profits nor was a single case of loss to any investor reported due to the alleged non-disclosure.

10.2.2 The relevant information of acquisition of shares by Nirmal was already available in public domain by means of the disclosure made by UAL in compliance with Clause 35 of listing agreement.

10.2.3 *Nirmal upon being notified about the non-disclosure through SCN rectified the same by filing the disclosure with UAL, NSE and BSE on July 21, 2017 under PIT and SAST Regulations.*

10.2.4 *Reference has been made to Hon'ble SAT's observation in the matter of Reliance Industries Ltd Vs SEBI in appeal no. 39/2002 wherein it is observed that "... Para 11. We also do not think that the appellant had deliberately suppressed the information with ulterior motive. The appellant can, at best, be held to have made a technical lapse. In such circumstances, the role of a regulator is to rehabilitate and bring to an end litigation, which may not cast a stigma on the appellant, who otherwise, admittedly, has maintained a good track record. The High Court in Cabot's case has pronounced that if a breach was merely technical and unintentional, it does not merit penal consequence. It ultimately depends on the facts of each case. In this case, the breach was bona fide and the appellant was under the impression since it had already made a disclosure earlier it was not necessary to make a fresh disclosure once again. This, in our view, is an error of judgment and, at best, an error of understanding the law. Ignorance of law is no excuse but an erroneous interpretation is a mitigating factor especially if such interpretation is honest and bona fide to the knowledge of the appellant. Following the judgment in Cabot International and for the reasons stated herein, we hold that the breach cannot be called as deliberate and the non-disclosure was due to lack of understanding of the law. In that view of the matter, the impugned order is set aside..."*

Consideration issues, Evidences and Findings

11. I have carefully perused the charges levelled against the entities in the SCN and written submissions made in response to SCN and all the documents available on record. In the instant matter, the following issues arise for consideration and determination:

- I. **Whether Nirmal and TAIB Securities have violated Regulation 13(1) of PIT Regulations, 1992 and Regulation 7(1) of SAST Regulations, 1997?**
- II. **Does the violation, if any, on the part of the entities attract monetary penalty under Section 15A(b) of the Act?**

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

12. Before proceeding further, I would like to refer to the relevant provisions of PIT Regulations 1992, PIT Regulations 2015, SAST Regulations 1997 and SAST Regulations 2011 which read as under:

Relevant provisions of SAST Regulations, 1997:

Acquisition of 5% and more shares of a company

7. (1) Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent or ten per cent. or fourteen percent. 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.

Relevant provisions of SAST Regulations, 2011:

Repeal and Savings.

35.(1) The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, stand repealed from the date on which these regulations come into force.

(2) Notwithstanding such repeal,—

- (a) anything done or any action taken or purported to have been done or taken including comments on any letter of offer, exemption granted by the Board, fees collected, any adjudication, enquiry or investigation commenced or show-cause notice issued under the repealed regulations, prior to such repeal, shall be deemed to have been done or taken under the corresponding provisions of these regulations;
- (b) the previous operation of the repealed regulations or anything duly done or suffered thereunder, any right, privilege, obligation or liability acquired, accrued or incurred under the repealed regulations, any penalty, forfeiture or punishment incurred in respect of any offence committed against the repealed regulations, or any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, shall remain unaffected as if the repealed regulations has never been repealed;
- (c) any open offer for which a public announcement has been made under the repealed regulations shall be required to be continued and completed under the repealed regulations. After the repeal of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, any reference thereto in any other regulations made, guidelines or circulars issued thereunder by the Board shall be deemed to be a reference to the corresponding provisions of these regulations.

Relevant provisions of PIT Regulations:

Initial Disclosure.

13. (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 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.

PIT Regulations, 2015

Repeal and Savings.

12. (1) The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 are hereby repealed.

(2) Notwithstanding such repeal,—

- (a) the previous operation of the repealed regulations or anything duly done or suffered thereunder, any right, privilege, obligation or liability acquired, accrued or incurred under the repealed regulations, any penalty, forfeiture or punishment incurred in respect of any offence committed against the repealed regulations, or any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, shall remain unaffected as if the repealed regulations had never been repealed; and
- (b) anything done or any action taken or purported to have been done or taken including any adjudication, enquiry or investigation commenced or show-cause notice issued under the repealed regulations prior to such repeal, shall be deemed to have been done or taken under the corresponding provisions of these regulations

FINDINGS

Whether TAIB Securities and Nirmal have violated Regulation 13(1) of PIT Regulations, 1992 and Regulation 7(1) of SAST Regulations, 1997?

13. From the material available on record and non-submission of any reply by TAIB Securities, it is established that TAIB Securities had violated the above regulations by not filing the required disclosures. However, TAIB Securities an entity registered at Mauritius and is dissolved vide order dated August 19, 2016 as per the documents submitted by ARs of TAIB Securities. Since TAIB Securities cease to exist, I am inclined to drop the proceedings and dispose of the SCN issued against TAIB Securities.
14. From the material available on record and from the submissions made by Nirmal, I note that there is a clear failure on the part of Nirmal in making the required disclosure within the stipulated time. I note that counsel of Nirmal had cited the SAT order in the matter of Reliance Industries (Appeal 39/2002), mentioned *supra*, as a mitigating factor. I also note in the said

matter SAT has held that since there was an error of judgement/error of understanding the law about the shareholding at best Reliance can be held to have made a technical lapse.

15. The facts of the case in the instant matter is different with that of SAT Appeal 39/2002 mentioned *supra*, and hence I am not inclined to accept the same.

16. In view of the above and relying on SAT's ruling in **Appeal No. 66 of 2003 - Milan Mahendra Securities Pvt. Ltd. Vs SEBI**, wherein the Hon'ble SAT 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.*" Having established that Nirmal had not made the disclosure, I find Nirmal has contravened the provisions of Law and liable for penalty.

Does the violation, if any, on the part of Nirmal attracts monetary penalty under Section 15 A (b) of the Act?

17. Having concluded that Nirmal has violated the provision of SEBI Act and hence liable for monetary penalty under Section 15A(b) of the Act in terms of the penal provisions as stated below:

SEBI Act

Section 15A(b) of the Act (as existed during the period of violation) reads as under:

Penalty for fraudulent and unfair trade practices.

Penalty for failure to furnish information, return, etc.

15A. *If any person, who is required under this Act or any rules or regulations made thereunder,—
(b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified there for 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.*

Issue III: If so, what would be the quantum of monetary penalty that can be imposed on Nirmal after taking into consideration the factors mentioned in Section 15J of the Act?

18. While determining the quantum of penalty under Section 15A(b) it is important to consider the factors stipulated in Section 15J of SEBI Act, which read 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.

19. It is observed from the records that any gain or unfair advantage accrued to Nirmal as a result of non-disclosure has not been quantified. Further, there is no material is made available on record to assess the disproportionate gain or unfair advantage, amount of loss caused to an investor or group of investors as a result of non-disclosure. However, Hon'ble Securities Appellate Tribunal ("SAT") in the matter of Vitro Commodities vs SEBI has 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.* Hence, even though, Nirmal has violated provisions of PIT Regulations and SAST Regulations, I am considering the same as one violation and levying the following penalty.

ORDER

20. In view of the above, after considering all the facts and circumstances of the case and exercising the powers conferred upon me under Section 15-I of the Act and Rule 5 of Rules, I hereby impose a monetary penalty as detailed below on Nirmal under Section 15A(b) of the Act. In my view, the penalty imposed is commensurate with the default committed by the entities.

Entity	Provisions of law violated	Penalty levied under Section	Quantum of penalty in Rs.
Nirmal Kotecha	Regulation 13(1) of PIT Regulations, 1992 and Regulation 7(1) of SAST Regulations, 1997	Section 15 A(b) of SEBI Act, 1992	2,00,000 (Two lakhs only)

21. The amount of penalty shall be paid within 45 days of receipt of this order either by way of

- (i) demand draft in favor of "SEBI - Penalties Remittable to Government of India", payable at Mumbai
(or)

(ii) by e-payment in the account of

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

22. The entities shall forward said Demand Draft or the details / confirmation of penalty so paid through e-payment to the Chief General Manager of Enforcement Department of SEBI. The Format for forwarding details / confirmations of e-payments shall be made in the following tabulated form as provided in SEBI Circular No. SEBI/HO/GSD/T&A/CIR/P/2017/42 dated May 16, 2017 and details of such payment shall be intimated should be forwarded to "The General Manager (Enforcement Department - DRA- II), Securities and Exchange Board of India, SEBI Bhavan, Plot no C- 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400052 and also to e-mail ID - tad@sebi.gov.in

Date	
Department of SEBI	
Name of Intermediary/ Other Entities	
Type of Intermediary	
SEBI Registration Number (if any)	
PAN	
Amount in Rs.	
Purpose of Payment (including the period for which payment was made e.g. quarterly, annually	
Bank name and Account number from which payment is remitted	
UTR No	

23. In terms of Rule 6 of the Rules, copies of this order are sent to the entities and also to Securities and Exchange Board of India.

Date: April 11, 2018
Place: Mumbai

SAHIL MALIK
ADJUDICATING OFFICER