BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. PB/AO-86/2011]

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

In respect of

M/s SETHIA GEMS PRIVATE LIMITED
(PAN No. AAHCS4460J)

FACTS OF THE CASE IN BRIEF

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

2. The findings of the investigation led to the allegation that M/s Sethia Gems Private Limited (hereinafter referred to as **"Noticee"**) had violated regulation 13(1) of SEBI (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as **'PIT Regulations'**), regulation 7(1) read with regulation 7(2) and regulations 10 & 14 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as **'SAST Regulations'**) and therefore consequently, liable for monetary penalty under

sections 15A(b) and 15H (ii) of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as **"SEBI Act"**).

APPOINTMENT OF ADJUDICATING OFFICER

3. The undersigned has been appointed as Adjudicating Officer vide order dated March 23, 2011 under section 15 I of SEBI Act read with rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as '**Rules'**) to inquire into and adjudge the alleged violations of provisions of PIT Regulations and SAST Regulations.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

4. Show Cause Notice No. EAD-7/PB/AK/16984/2011 dated May 27, 2011 (hereinafter referred to as **"SCN"**) was issued to the Noticee under rule 4(1) of the Rules to show cause as to why an inquiry should not be initiated and penalty be not imposed under sections 15A(b) and 15H(ii) of SEBI Act for the alleged violations specified in the said SCN. The said SCN was sent through courier at the last known address of the Noticee at *"72/3 New Hanuman Building, Laminton Road, Dr. Sayajirao Vitthak Marg, Grant Road, Mumbai – 400 007"* but the same was returned undelivered with the remark *"shifted".* Therefore, the said SCN was sent to Mr. Shantilal Sethiya, director of the Noticee, who received the same on behalf of the Noticee.

5. It was alleged in the SCN that Shri Ashok Kumar Sethiya (deceased), director of the Noticee and brother-in-law of Ms. Sunita Sethia was funding Ms. Sunita Sethia. Ms Sunita Sethia trading through broker M/s Guru Share Brokers Pvt. Ltd. had a buying intent in the scrip of FDIL. The exposure of Ms. Sunita Sethia to other scrips was miniscule during the investigation period. Further, Mr. Padamchand L Jain, director of M/s Manmohan Gems Pvt. Ltd., is the

brother of one Mr. Pukharaj Pokharna. Mr. Pukharaj Pokharna had admitted in his written statement dated December 16, 2010 that he had carried out all the activities of M/s Guru Share Brokers Pvt. Ltd. on behalf of his wife Ms. Pramila Pokharna. Thus, it was alleged, that Late Ashok Kumar Sethiya, Noticee, M/s Manmohan Gems Pvt. Ltd. and Mr. Padamchand L Jain are persons acting in concert (hereinafter referred to as "PACs") with a common objective to acquire shares of FDIL.

6. The shareholding pattern of the PACs in FDIL for quarters ending December 2006, March 2007 and June 2007 are as follows:

Shareholders Name	December 2006	March 2007	June 2007
Late Shri Ashok Kumar Sethiya	-	-	5.87% (8,50,000)
M/s Sethia Gems Pvt. Ltd.	-	-	5.09% (7,37,500)
M/s Manmohan Gems Pvt. Ltd.	-	5.18% (3,00,000)	5.87% (8,50,000)
Padamchand L Jain	-	3.45% (2,00,000)	7.60% (11,00,000)
Total	-	8.63% (5,00,000)	24.43% (35,37,500)
Total no. shares of FDIL in relevant quarters	52,90,000	57,90,000*	1,44,78,000*

* Total number of shares of FDIL had increased because of conversion of warrants into shares.

7. It was alleged in the SCN that the aforesaid shares were acquired by the PACs on January 01, 2007 and April 24, 2007 on account of conversion of warrants into shares. The total shareholding of PACs for the quarter ending June 2007 was 35,37,500 shares i.e. 24.43% of total shareholding of FDIL. Noticee together with the other PACs while crossing the threshold limit of

15% specified under regulation 10 of SAST Regulations, on April 24, 2007, were required to make a public announcement of offer to acquire shares of FDIL in accordance with the relevant provisions of SAST Regulations within 4 working days from April 24, 2007 as per the provision of regulation 14 of SAST Regulations, which Noticee had failed to do. Thus, it was alleged that Noticee had violated provisions of regulation 10 read with regulation 14 of SAST Regulations.

8. Further, it was also alleged in the SCN that, the shareholding of the Noticee in FDIL for the quarter ending March 2007 was nil. Upon acquisition/allotment of 7,37,500 shares i.e. 5.09% of total shareholding of FDIL in June 2007 quarter, on the account of conversion of warrants on April 24, 2007, the shareholding of the Noticee increased to 7,37,500 shares i.e. 5.09% of total shareholding of FDIL in June 2007 quarter. Noticee while crossing the threshold limit of 5% specified under regulation 13(1) of PIT Regulations, was required to make the disclosures to the company i.e. FDIL as per regulation 13(1) of PIT Regulations within four working days from the date of acquisition or from the receipt of intimation of allotment of shares, which the Noticee had failed to do. Thus, it was alleged that the Noticee had violated the provisions of regulation 13(1) of PIT Regulations.

9. Further, as of the aforesaid acquisition, the Noticee while crossing the threshold limit of 5% specified under regulation 7(1) of SAST Regulations, was required to make the disclosures to the company i.e. FDIL and to the stock exchange i.e. BSE as per regulation 7(1) read with regulation 7(2) of SAST Regulations within two days from the date of acquisition or from the receipt of intimation of allotment of shares, which the Noticee had failed to do. Thus, it was alleged that the Noticee had violated the provisions of regulation 7(1) read with regulation 7(2) of SAST Regulations.

10. The Noticee vide letter dated August 10, 2011 submitted its reply to the SCN, which *inter alia* stated as under:

"…….…

- *At the outset, we deny the allegations made against us in the said Notice, save and except those, which are specifically admitted herein. Nothing stated in the said Notice shall be deemed to be admitted by us merely on account of non-traverse, unless the same is specifically admitted in this reply……..*
- *……..With regard to Para 8 to Para 9 of the Notice, it is submitted that admittedly on account of conversion of warrants on 24th April 2007 we got the allotment of 7,35,000 Equity shares of the Target Company. After receiving this show cause notice we come to know about the said violations i.e. we have to file the disclosures under regulation 13(1) of PIT Regulations and regulation 7(1) read with regulation 7(2) of SAST regulations….*
- *….we got the allotment on account of conversion of warrants and all the formalities were complied with by the target company by issuing of notice, allotment of warrants and conversion of warrants to the stock exchange from time to time.*
- *All the information was available on the Bombay Stock Exchange website.*
- *The aforesaid violations are technical in nature……*
- *……..As per the definition of the PAC we along with Late Ashok Kumar Sethiya deemed to be a PAC and not all the persons/entities mentioned in your show cause notice. We further say that there is no reason in law to presume that Padamchand Jain and Manmohan Gems Private Limited are PAC along with us….*
- *……with regard to para 13 of the Notice, it is submitted that we had already denied the relationship between us and Padamchand Jain and Manmohan Gems Private Limited. Even though our holding along with Late Shri Ashok Kumar Sethiya was 10.96% it is not crossing the threshold limit of 15% specified under regulation 10 of SAST Regulations. Therefore there is no*

requirement of public announcement of offer to acquire shares of FDIL in accordance with the relevant provisions of Regulation 14 of SAST Regulations. We therefore once again submit that we had not violated regulations 10 read with regulation 14 of SAST Regulations.

- *With regard to para 14 of the Notice, it is submitted that the alleged violations i.e. delayed in making the disclosures, is at the highest a technical, procedural and venial breach and has not caused any adverse consequences to anybody. The same was inadvertent and unintentional. Further, as a result of the alleged technical violation, I have not made any disproportionate gain or unfair advantage, further by virtue of the alleged acquisitions no loss has been caused to any shareholders of the company and no penalty under section 15 A(b) of the SEBI Act 1992 may be imposed on us. Further as stated above we had not violated the provisions of Regulation 10 read with 14 of the Takeover Regulation therefore we are not liable for penalty under section 15H(ii) SEBI Act.*

……..……..…..."

11. In the interest of natural justice and in order to conduct an inquiry in terms of rule 4(3) of the Rules, the Noticee was granted an opportunity of personal hearing on September 07, 2011, vide notice dated August 24, 2011 sent through SPAD to the Noticee. The said hearing notice was delivered. Mr. Balveer Singh Choudhary, Choudhary & Singhvi, Chartered Accountants, Authorized Representative, (hereinafter referred to as "**AR**") appeared on behalf of the Noticee. During the hearing, the AR made the following submissions, which *inter alia,* stated as under:

"……..……..

- *I reiterate the submissions made by the Noticee vide letter dated August 10, 2011.*
- *I reiterate that the violations of the provisions of regulation 7(1) read with regulation 7(2) of the SEBI (Substantial Acquisition of shares and Takeover)*

Regulations, 1997 and regulation 13(1) of SEBI (Prohibition of Insider Trading) Regulations, 1992, are technical in nature and therefore request the AO to take a lenient view in the matter.

- *With regard to the violations of regulation 10 read with regulation 14 of SEBI (Substantial Acquisition of shares and Takeover) Regulations, 1997, I state that the Noticee is not a person acting in concert with Shri Padamchand L Jain and M/s Manmohan Gems Pvt. Ltd. Further, as there is no common objective, meeting of minds and no funds transfer between Padamchand L Jain, M/s Manmohan Gems Pvt. Ltd. and Noticee for the purchase of shares of Target Company, therefore the Noticee cannot be termed as Person acting in concert with Shri Padamchand L Jain and M/s Manmohan Gems Pvt. Ltd.*
- *Further, the payment made by Sunita Sethiya to M/s Guru Share Brokers Pvt Ltd. was for the purchase of her own investments, which is an obligation for Sunita Sethiya to do so. I further mention that the Noticees acquired/allotted the shares in the preferential allotment (conversion of warrants).*
- *Further, in addition to the Noticee's reply dated August 10, 2011, I would like to submit the judgment of Hon'ble Securities Appellate Tribunal (SAT) dated August 29, 2011 in the matter of Northern Projects Limited v. Adjudicating Officer SEBI, in which it is held that "…..in other words, this relationship between them could come into being only by design and by the meeting of their minds leading to the shared common objective of acquiring shares of the target company. Whether they shared this common objective is a question of fact which has to be determined on the basis of the material on the record. We find that there is not even an iota of evidence on the record to show that they ever shared a common objective of acquiring shares of the target company. There is no material on the record to suggest that there was ever a meeting of their minds on this regard and the impugned order does not refer to any such material. In the absence of any such material we cannot but hold that NPL did not act in concert with the other purchasers and it was not a person acting in concert with them when it acquired the shares of the target company….."*

CONSIDERATION OF ISSUES AND FINDINGS

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

    a. Whether Noticee had violated the provisions of regulation 13(1) of PIT Regulations and the provisions of regulation 7(1) read with regulation 7(2) of SAST Regulations?
    b. Whether Noticee had violated the provisions of regulation 10 read with regulation 14 of SAST Regulations?
    c. Does the violations, if any, attract monetary penalty under sections 15A(b) and 15H(ii) of the SEBI Act?
    d. If so, what would be the monetary penalty that can be imposed taking into consideration the factors mentioned in section 15J of the SEBI Act?

Findings

The issues for examination in this case are as follows:

(a) Whether Noticee had violated the provisions of regulation 13(1) of PIT Regulations and the provisions of regulation 7(1) read with regulation 7(2) of SAST Regulations?

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

PIT Regulations

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

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

(a) the receipt of intimation of allotment of shares; or
(b) the acquisition of shares or voting rights, as the case may be.

(2). …….

Continual Disclosure

(3) ……..…..
(4) ……..….
(5) ……..…..
(6)…….…..…

SAST Regulations

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

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

(2) The disclosures mentioned in sub-regulations (1) and (1A)] shall be made within two days of,—

(a) the receipt of intimation of allotment of shares; or
(b) the acquisition of shares or voting rights, as the case may be.

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

15. Regulation 7(1) read with regulation 7(2) of SAST Regulations deals with disclosure of number and percentage of shares/voting rights to the company and to the stock exchanges where shares of the target company are listed, by an acquirer who acquires shares or voting rights which (taken together with shares or voting rights, if any held by him) would entitle him to more than 5% or 10% or 14% or 54% or 74% shares or voting rights in a company, in any manner whatsoever, within two days of, viz., the receipt of intimation of allotment of shares or the acquisition of shares or voting rights, as the case may be.

16. Upon perusal of the documents available on record I find that the shareholding of the Noticee in FDIL for the quarter ending March 2007 was nil. On the account of conversion of warrants on April 24, 2007, the Noticee was allotted 7,37,500 shares and has thereby acquired 7,37,500 shares of FDIL i.e. 5.09% of total shareholding of FDIL. Thus, by means of said acquisition the shareholding of the Noticee had increased from nil to 5.09%.

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

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

19. I find from the submissions of the Noticee in its letter dated August 10, 2011 that the Noticee had claimed that they were not aware about the disclosures to be made under regulation 13(1) of PIT Regulations and under regulation 7(1) read with regulation 7(2) of SAST Regulations, and came to know that the disclosures were required to be made only after receiving the SCN dated May 27, 2011 issued by the undersigned. However, I am not inclined to accept the same, because ignorance of law is not an excuse.

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

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

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

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

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

22. Further, in the instant case, I find that Noticee has not disputed the fact that it was allotted 7,37,500 shares on account of conversion of warrants, thereby acquiring 7,37,500 shares of FDIL i.e. 5.09% of total shareholding of FDIL on April 24, 2007, thus by means of said acquisition its shareholding had increased from nil to 5.09%. Further, Noticee has submitted that it got the allotment of shares on account of conversion of warrants and all the formalities were complied by the company by issuing notice of allotment of warrants and conversion of warrants to the stock exchange from time to time. Therefore, all the information was available on the BSE website. Further, Noticee has admitted that the violation of regulation 13(1) of PIT Regulations and violation of regulation 7(1) read with regulation 7(2) of SAST Regulations were technical, procedural and venial breach and the same was inadvertent and unintentional.

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

Regulations which casts an obligation on the acquirer to disclose to the company and stock exchanges within 2 days of the acquisition of shares and also from the provisions of regulation 13(1) of PIT Regulations which casts an obligation on the person holding more than 5% of shares to disclose to the company within 4 working days of the allotment/acquisition of shares. Failure to disclose full details on the specific aspects provided in the regulations cannot be considered as trivial or of no consequence to be overlooked.

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

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

25. The Noticee, therefore, ought to have made relevant disclosures to the company as per the provisions of PIT Regulations and to the stock exchanges & company as per the provisions of SAST Regulations. However, the Noticee failed to do so. Therefore, in the light of above, I do not find any merit in the submissions of the Noticee regarding the alleged violation of

regulation 13(1) of PIT Regulations and violation of regulation 7(1) read with regulation 7(2) of SAST Regulations.

26. Thus, the allegations of violation of regulation 13(1) of PIT Regulations and violation of regulation 7(1) read with regulation 7(2) of SAST Regulations stands established.

27. By not making the disclosures on time, the Noticee failed to comply with its statutory obligation. The timely disclosure is mandated for the benefit of the investors at large. Hon'ble Securities Appellate Tribunal (SAT) in *Milan Mahendra Securities Pvt. Ltd. Vs SEBI*[1] held 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."*

(b) Whether Noticee had violated the provisions of regulation 10 read with regulation 14 of SAST Regulations?

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

Acquisition of fifteen per cent or more of the shares or voting rights of any company.

10. *No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise fifteen per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the regulations.*

Timing of the public announcement of offer.

14. (1) *The public announcement referred to in regulation 10 or regulation 11 shall be made by the merchant banker not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage specified therein :*

Provided……..

[1] SAT Order dated April 15, 2005, Appeal No. 66/2003

29. As per regulation 10 read with regulation 14 of SAST Regulations an acquirer along with persons acting in concert, can acquire securities of any listed company which taken together with shares or voting rights, if any, held by them previously, would entitle them to exercise voting rights in excess of 15%, only if such acquirer makes a public announcement of offer to acquire shares of such company in accordance with the relevant provisions of the SAST Regulations. Such Public announcement would have to be made by the merchant banker appointed by the acquirer within four working days of entering into an agreement for acquisition of / deciding to acquire shares or voting rights exceeding the 15 percent threshold limit.

30. Further, it is also pertinent to refer to the definition of persons acting in concert as specified under regulation 2(1)(e) of the SAST Regulations, which read as under:

"person acting in concert" comprises,—

(1) persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company,

(2) without prejudice to the generality of this definition, the following persons will be deemed to be persons acting in concert with other persons in the same category, unless the contrary is established :

(i). a company, its holding company, or subsidiary or such company or company under the same management either individually or together with each other;

(ii). a company with any of its directors, or any person entrusted with the management of the funds of the company;

(iii). directors of companies referred to in sub-clause (i) of clause (2) and their associates;

(iv). mutual fund with sponsor or trustee or asset management company;

(v). foreign institutional investors with sub-account(s);

(vi). merchant bankers with their client(s) as acquirer;

(vii). portfolio managers with their client(s) as acquirer;

(viii). venture capital funds with sponsors;

(ix). banks with financial advisers, stock brokers of the acquirer, or any company which is a holding company, subsidiary or relative of the acquirer :

***Provided** that sub-clause (ix) shall not apply to a bank whose sole relationship with the acquirer or with any company, which is a holding company or a subsidiary of the acquirer or with a relative of the acquirer, is by way of providing normal commercial banking services or such activities in connection with the offer such as confirming availability of funds, handling acceptances and other registration work;*

(x). any investment company with any person who has an interest as director, fund manager, trustee, or as a shareholder having not less than 2 per cent of the paid-up capital of that company or with any other investment company in which such person or his associate holds not less than 2 per cent of the paid-up capital of the latter company.

31. 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. In the present case Noticee had admitted that, the Noticee and Late Ashok Kumar Sethiya are the PACs, as Late Ashok Kumar Sethiya was the director of the Noticee. Therefore, point of discussion which arises in the present case is whether the Noticee, Late Shri Ashok Kumar Sethiya, Mr. Padamchand L Jain and M/s Manmohan Gems Pvt. Ltd. together are PACs or not as per regulation 2(1)(e)(1) of SAST Regulations.

32. Two or more persons may act in concert with each other under regulation 2(1)(e)(1) of SAST Regulations even though they may be wholly unrelated. For this, the four elements as specified under regulation 2(1)(e)(1) of SAST Regulations has to be established i.e. (i) the persons must possess a common objective or purpose, (ii) that common objective or purpose must be for the substantial acquisition of shares or voting rights or gaining control over a listed company, (iii) the persons must directly or indirectly co-operate with each other by acquiring or agreeing to acquire shares or voting rights or control in the listed company and (iv) the co-operation must be pursuant to a formal or informal agreement or understanding.

33. The concept of PAC is acquisition specific i.e. all the four elements of regulation 2(1)(e)(1) have to exist in each acquisition separately. Therefore, two or more persons may act in concert in one acquisition at one point of time and may not act in concert in another acquisition at another point in time. Further, if any one of the element was missing from concert then persons cannot be considered as PACs.

34. The essential elements of PAC as per regulation 2(1)(e)(1) of SAST Regulations are discussed here under:

- The commonality of objective is the cornerstone to decide whether two persons have acted in concert and is essential for a finding of concert. For example, if only one of the promoters were interested in increasing his stake in the target company by acting in concert with acquirers, there could be no basis to impute his objective to his co-promoters. Hon'ble SAT in *Modi Spinning & Weaving Mills Co. Ltd V. SEBI & Others*[2], held that co-promoters are not, by the mere fact of being co-promoters, deemed to act in concert with each other. Further, Hon'ble SAT in *Kishore Rajaram Chhabria v. SEBI*[3] held that mere knowledge of the acquisition of shares is not, by itself, sufficient to constitute commonality of objective. Therefore, for a person to be a PAC, he must possess common objective.
- Second essential element of regulation 2(1)(e)(1) of SAST Regulations is that common objective must be to acquire substantial shares or voting rights or gaining control over the target company. Hon'ble SAT in *Alliance Capital Mutual Fund v. SEBI*[4] held that *"in our view, even though the fund and the sub-accounts had a common objective, they are not covered by clause (1) of regulation 2(1)(e) because their object was not to acquire a substantial stake or control in the target company in the target company. They were making investments to earn profits for the unit holders."*

[2] SAT Order dated August 1, 2001, Appeal No. 43/2001
[3] SAT Order dated August 1, 2003, Appeal No. 13/2002
[4] SAT Order dated November 1, 2007, Appeal No.132/2004

- Third essential element of regulation 2(1)(e)(1) of SAST Regulations is that the persons must directly or indirectly *co-operate* with each other by acquiring or agreeing to acquire shares or voting rights or control in the listed company. Justice PN Bhagwati Committee report on Takeover 1997 indicated that the cooperation which is implicit in the idea of concert *'could be extended in several ways, directly or indirectly, or through an agreement – formal or informal'.* But the obvious form of cooperation, which can render a person to be a concert party of another, is the act of acquiring shares i.e. concert has been inferred from the fact that funds for an acquisition by one person were provided by another. Hon'ble Bombay High Court in *Shirish Finance & investment Pvt. Ltd. V. M Sreenivasulu Reddy*[5] held that *'…In our view, concerted action must relate to their action to acquire shares. if one provides the fund and other acquires the shares in his name, it must held that they have acted in concert to acquire the shares and in view of the definition of acquirer in the 1994 Regulations, both are considered to be acquirers. It does not matter who is shown as the purchaser of the shares …..'*
- Fourth essential element of regulation 2(1)(e)(1) of SAST Regulations is that the co-operation must be pursuant to a formal or informal agreement or understanding. Further, as it is very difficult to prove concert by direct evidence, therefore circumstantial evidence have to be taken into consideration while proving the concert. Circumstance from which concert can be inferred include common addresses, preferential allotment of securities on favorable terms, a common chairman, common shareholding, identical responses to show cause notices signed by the same person, joint demat account, similar trading patterns etc.

[5] 2001 (1) Bom CR 419

35. Hon'ble Supreme Court in *Daiichi Sankyo Company Ltd. vs. Jayaram Chigurupati*[6] *and Others* observed that:

> *"……..…To begin with, the concept of 'person acting in concert' under regulation 2(e)(1) is based on a target company on the one side, and on the other side two or more persons coming together with the shared common objective or purpose of substantial acquisition of shares etc. of the target company. Unless there is a target company, substantial acquisition of whose shares etc. is the common objective or purpose of two or more persons coming together there can be no 'persons acting in concert'. For, de hors the target company the idea of 'persons acting in concert' is as irrelevant as a cheat with no one as victim of his deception. Two or more persons may join hands together with the shared common objective or purpose of any kind but so long as the common object and purpose is not of substantial acquisition of shares of a target company they would not comprise 'persons acting in concert'.*
>
> *The other limb of the concept requires two or more persons joining together with the shared common objective and purpose of substantial acquisition of shares etc. of a certain target company. There can be no 'persons acting in concert' unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares etc. of the target company. For, de hors the element of the shared common objective or purpose the idea of 'person acting in concert' is as meaningless as criminal conspiracy without any agreement to commit a criminal offence. The idea of 'persons acting in concert' is not about a fortuitous relationship coming into existence by accident or chance. The relationship can come into being only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose of acquisition of substantial acquisition of shares etc. of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement or an understanding, formal or informal; the acquisition of shares etc. may be direct or indirect or the persons acting in concert may cooperate in actual acquisition of shares etc. or they may agree to cooperate in such acquisition. Nonetheless, the element of the shared*

[6] (2010) 157 Comp Cas 580 (SC)

common objective or purpose is the sin qua non for the relationship of 'persons acting in concert' to come into being.……..

…….We may now proceed to the deeming provision as contained in sub clause (2) of regulation 2(e). Here, it would be better to restate the obvious that the deeming provision can not do away either with the target company or the common objective or purpose of substantial acquisition of shares etc. of the target company shared by two or more persons because to do so would be destructive of the very idea of 'persons acting in concert' as defined in sub-clause (1) of regulation 2(e). We, therefore, see no merit in the submission, as urged at one stage, on behalf of the respondents that sub- regulation (2) of regulation 2(e) containing the deeming clause should be seen as a `stand alone' provision, independent of sub-regulation (1) of regulation 2(e). The deeming provision under sub-regulation (2) operates only within the larger framework of sub-regulation (1) of regulation 2(e).……..

……..Regulation 2(1)(e)(2) defines 'person acting in concert'. It is a deeming provision. It has to be read in conjunction with regulation 2(1)(e)(1) which states that person acting in concert comprises of persons who in furtherance of a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly cooperate by acquiring or agreeing to acquire shares or voting rights in the target company or to acquire control over the target company. The word 'comprises' in regulation 2(1)(e) is significant. It applies to regulation 2(1)(e)(2) as much as to regulation 2(1)(e)(1). A fortiori, a person deemed to be acting in concert with others is also a person acting in concert. In other words, persons who are deemed to be acting in concert must have the intention or the aim of acquisition of shares of a target company. It is the conduct of the parties that determines their identity. Whether a person is or is not acting in concert with the acquirer would depend upon the facts of each case. In order to hold that a person is acting in concert with the acquirer or with another person it must be established that the two share the common intention of acquisition of shares of some target company.……."

36. Further, Hon'ble SAT in *Triumph International Finance India Limited vs. SEBI*[7], held that, *"……Association between persons is one thing but their acting in concert with a common objective to acquire substantial number of share in a company in pursuance to an understanding or an agreement between them is altogether different. Merely because the appellant acted as a broker of some of the companies owned/controlled by Ketan Parekh does not make it a 'person acting in concert' with those companies. This could, if at all, mean association with those companies. Close business association between two or more persons does not by itself make them persons acting in concert……"*

37. Further, Hon'ble SAT in *Northern Projects Limited vs. SEBI*[8], held that *"……..it is clear from the observations of the Supreme Court that persons acting in concert must also have the common objective or objective of acquisition of shares of the target company. As already observed, the fact that they shared a common objective of acquiring is missing in the present case. In this view of the matter, we are of the considered opinion that NPL was not a 'person acting in concert' with the other purchasers and that the deeming provisions in Regulations 2(1)(e)(2)(i) of the takeover code cannot be made applicable to the facts of the present case……"*

38. From the submissions of the Noticee and documents available on record I find that, the only connection between Noticee, Late Shri Ashok Kumar Sethiya, Mr. Padamchand L Jain and M/s Manmohan Gems Pvt. Ltd. is that Mr. Padamchand L Jain's (director of M/s Manmohan Gems Pvt. Ltd.) brother's wife's company was the broker to Ms. Sunita Sethia, and Ms. Sunita Sethia is sister-in-law of Late Shri Ashok Kumar Sethiya, director of the Noticee. Further, there is nothing on record which establishes that the funds had been transferred between Noticee, Late Shri Ashok Kumar Sethiya, Mr. Padamchand L Jain and M/s Manmohan Gems Pvt. Ltd. for the purchase of

[7] SAT Order dated February 09, 2010, Appeal No. 183/2009
[8] SAT Order dated August 29, 2011, Appeal No. 55/2011

share warrants in the year 2006, whose conversion on January 01, 2007 and on April 24, 2007 had resulted into the acquisition.

39. Thus, from the facts and circumstances of the present case, there is nothing on record which establishes that Noticee, Late Shri Ashok Kumar Sethiya, Mr. Padamchand L Jain and M/s Manmohan Gems Pvt. Ltd. had shared a common objective to acquire substantial shares or voting rights or gain control over the target company. Therefore, in the absence of common objective between Noticee, Late Shri Ashok Kumar Sethiya, Mr. Padamchand L Jain and M/s Manmohan Gems Pvt. Ltd., I am of the view that Noticee, Late Shri Ashok Kumar Sethiya, Mr. Padamchand L Jain and M/s Manmohan Gems Pvt. Ltd. are not PACs.

40. Further, as Noticee, Late Shri Ashok Kumar Sethiya, Mr. Padamchand L Jain and M/s Manmohan Gems Pvt. Ltd. are not PACs, therefore, their acquisition cannot be taken together for the purpose of triggering the threshold limit as specified under regulation 10 read with regulation 14 of SAST Regulations. Further, considering the fact that the combined shareholding of the Noticee and Late Shri Ashok Kumar Sethiya (with whom the Noticee had admitted to be PACs) as on June 2007 was 10.96%, hence, the combined shareholding of the Noticee with Late Ashok Kumar Sethiya was not crossing the threshold limit of 15% as specified under regulation 10 read with regulation 14 of SAST Regulations, therefore, I am of the view, the Noticee was not required to make a public announcement of open offer as per regulation 10 read with regulation 14 of SAST Regulations. Thus, I find merit in the submissions of the Noticee regarding the alleged violation of regulation 10 read with regulation 14 of SAST Regulations. Therefore, the violation of the provisions of regulation 10 read with regulation 14 of SAST Regulations does not stand established.

(c) Does the violations, if any, attract monetary penalty under sections 15A(b) and 15H(ii) of the SEBI Act?

41. The provisions of sections 15A(b) and 15H(ii) of SEBI Act are reproduced hereunder:

> ***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 therefore in the regulations, fails to file return or furnish the same within the time specified therefore in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.*
> *(c)……*
>
> ***Penalty for non-disclosure of acquisition of shares and take-overs***
>
> ***15H.*** *If any person, who is required under this Act or any rules or regulations made thereunder, fails to-*
> *(i) ……*
> *(ii) make a public announcement to acquire shares at a minimum price; or*
> *(iii)……*
> *(iv)……*
>
> *he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher."*

42. The Hon'ble Supreme Court of India in the matter of *SEBI Vs. Shri Ram Mutual Fund*[9] held that *"once the violation of statutory regulations is established, imposition of penalty becomes sine qua non of violation and the intention of parties*

[9] *[2006] 68 SCL 216 (SC)*

committing such violation becomes totally irrelevant. Once the contravention is established then the penalty is to follow".

43. In view of the foregoing, I am convinced that it is a fit case to impose monetary penalty under section 15A(b) of the SEBI Act for the violation of the provisions of regulation 13(1) of PIT Regulations and violation of the provisions of regulation 7(1) read with regulation 7(2) of SAST Regulations as mentioned above.

(d) What would be the monetary penalty that can be imposed taking into consideration the factors mentioned in section 15J of the SEBI Act?

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

> ***"15J - Factors to be taken into account by the adjudicating officer***
>
> *While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-*
> *(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;*
> *(b) the amount of loss caused to an investor or group of investors as a result of the default;*
> *(c) the repetitive nature of the default."*

45. The object of the SAST Regulations and PIT Regulations mandating disclosure of acquisition/sale beyond certain quantity is to give equal treatment and opportunity to all shareholders and protect their interests. To translate this objective into reality, measures have been taken by SEBI to bring about transparency in the transactions and it is for this purpose that dissemination of full information is required. The purpose of these disclosures is to bring about transparency in the transactions and assist the Regulator to

effectively monitor the transactions in the market. The Noticee could not pre-judge the reaction of the investors. However, by virtue of the failure on the part of the Noticee to make the necessary disclosures on time, the fact remains that the investors were deprived of the important information at the relevant point of time. In other words, by not complying with the regulatory obligation of making the disclosure, the Noticee had concealed the vital information from the investors. It may not be possible to ascertain the exact monetary loss to the investors on account of default by the Noticee.

ORDER

46. After taking into consideration all the facts and circumstances of the case, I hereby impose a monetary penalty of ₹1,00,000 (Rupees one lakh only) under section 15A (b) of the SEBI Act for the violation of the provisions of regulation 13(1) of PIT Regulations and violation of the provisions of regulation 7(1) read with regulation 7(2) of SAST Regulations on the Noticee.

47. The Noticee shall pay the said amount of penalty by way of demand of demand draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, within 45 days of receipt of this order. The said demand draft should be forwarded to Ms. Anita Kenkare, General Manager Investigation Department, SEBI, SEBI Bhavan, Plot No. C – 4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

48. 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 28, 2011 **PARAG BASU**

Place: MUMBAI **ADJUDICATING OFFICER**