ED/SVMDR/EFD-1/DRA-1/21285/2022-23

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under sections 11 and 11B of the Securities and Exchange Board of India Act, 1992.

In respect of Swallow Associates LLP (earlier known as RPG Cellular Investments and Holdings Private Limited) in the matter of acquisition of shares of Zensar Technologies Limited.

BACKGOUND

1. Securities and Exchange Board of India (hereinafter referred to as **"SEBI"**) had conducted investigation into the possible violation of the SEBI Act, 1992 and regulations framed thereunder in the matter of acquisition of shares of Zensar Technologies Limited (hereinafter referred to as **"Zensar" / "Target company" / "ZTL"**) by M/s Swallow Associates LLP (hereinafter referred to as **"Swallow" / "acquirer" / "Noticee"**). The investigation had prima facie revealed that the Noticee (erstwhile RPG Cellular Investments and Holdings Limited) was a promoter group entity in Zensar and held 14.41% of the shares of the target company. On January 04, 2010, the Noticee has purchased 4,30,000 shares of the company constituting 1.79% of the share capital of the target company, which resulted in increasing the shareholding of the Noticee in the target company from 14.41% to 16.20%. Subsequently, between January 04, 2010 to January 12, 2010, the acquirer has purchased another 14,30,000 shares of the target company. In view of the said acquisitions, the total shareholding of the Noticee in the target company has increased by 5.96 percent and thereby reached to 20.37 percent. By the end of February, 2010, the shareholding of

the Noticee further increased to 27.92% from 20.37% with the merger of M/s Jubilee Investment and Industries with the Noticee.

2. In terms of Regulation 10 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the **"SAST Regulations 1997"**), if any acquirer acquires fifteen percent or more shares or voting rights in a company, such acquirer shall make a public announcement to acquire shares of the company in accordance with the regulations. Further, Regulation 11 of the SAST Regulations, 1997 mandates that if any acquirer, who already hold 15 percent or more and not exceeding 55 percent acquires additional 5 percent of shares or voting rights during any Financial Year, such acquirer shall make a public announcement to acquire shares in accordance with the provisions of SAST Regulations, 1997.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

3. Since the shareholding of the acquirer crossed the ceiling prescribed under Regulation 10 of the SAST Regulations, 1997, SEBI issued a Show Cause Notice dated December 12, 2012 (hereinafter referred to as **"the SCN"**) to the acquirer to show cause as to why suitable directions, including that to make an open offer in respect of the said acquisitions, under Sections 11 and 11B of the SEBI Act read with Regulations 44 and 45 of the SAST Regulations, 1997 and Regulations 32 and 35 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as **"Takeover Regulations, 2011"**) should not be issued against the Noticee for the above mentioned alleged violations.

4. Subsequently, a Supplementary SCN dated July 31, 2015 (hereinafter referred to as **"Supplementary SCN"**) was also issued to the acquirer for the alleged violation of Regulation 11(1) of the SAST Regulations, 1997 for the acquisition

of 5.96% of the shares of the target company during financial year and the consequential increase in shareholding to 20.37%.

5. The Noticee, vide reply dated April 08, 2013 had submitted reply to the SCN dated December 12, 2012 and vide reply dated October 26, 2015 had submitted its reply to the Supplementary SCN. The Noticee was granted a personal hearing before the Whole Time Member, SEBI on February 02, 2016. The Noticee had also submitted its note on submissions vide letter dated February 11, 2016. Since similar issues involved in the instant matter was pending before the Hon'ble Supreme Court of India (hereinafter referred to as **"the Hon'ble Supreme Court"**) for final adjudication in the matter of SEBI Vs. Sunil Khaitan & Ors. (Civil Appeal No. 8249 of 2013) and SEBI Vs. Madhuri Pitti & Ors. (Civil Appeal No. 1762 of 2014), the proceedings in the instant matter was not proceeded with. The Hon'ble Supreme Court, vide order dated July 11, 2022 have passed final order in the said matters. Thereafter, the competent authority of SEBI, in view of the reallocation of cases, transferred the present matter to the undersigned for further proceedings. Pursuant to the same, the Noticee was granted an opportunity of hearing on September 21, 2022 at 02.30 PM. The Noticee vide email dated September 15, 2022 had requested for an adjournment of the hearing and accordingly, the personal hearing was rescheduled to October 14, 2022 at 03.00 PM. The Authorized Representative of the Noticee had appeared for the personal hearing through video conference on October 14, 2022 and made submissions. The Noticee had also submitted post hearing submissions vide email dated October 27, 2022. The summary of the oral and written submissions made by the Noticee is as under:

   a. Proceedings contemplated by the SCN are not warranted in view of pending adjudication proceedings for the same cause of action.
   b. The Noticee had acquired 14,30,000 shares constituting 5.96% of the shares between January 04, 2010 and January 12, 2010 on the floor of the exchange and the shares so acquired were from another promoter group

entity namely Pedriano Investment Limited and therefore aggregate shareholding of the promoter group did not undergo any change. Every obligation under the SAST Regulations is premised on aggregating the holdings of all the persons acting in concert and regardless of individual shareholding of any person, the holdings of all persons acting in concert has to be reckoned as collective aggregated shareholding or voting power. In view of that, no open offer obligation under the SAST Regulations, 1997 have been triggered.

c. SAST Regulations, 1997 have always envisaged aggregation of collective holding of persons acting in concert and therefore the interpretation of the SAST Regulations, 1997 in the SCN is contrary to the legislative intent.
d. Regulation 10 of the SAST Regulations, 1997 uses the term 'acquirer' and there is nothing in the SAST Regulations, 1997 that would warrant interpreting the definition in any other manner. As the collective holding of the promoter group in ZTL did not change following the acquisition, no open offer obligation arose in the present case.
e. Since there is no corresponding provision such as Regulation 3(3) of the SAST Regulations, 2011 in the SAST Regulations, 1997, the application thereof can only be prospective and not retrospective.
f. The subject transaction did not trigger Regulation 11(1) of the SAST Regulation,1997. Though the subject transaction resulted in the individual shareholding of Swallow increasing from 14.41% to 20.37%, there was no change in the collective shareholding of the promoter group of which Swallow is a part. The collective shareholding of the promoter group of Zensar, after the subject transaction remained unchanged at 53.09%. It is the shareholding of the promoter group (who are "persons acting in concert" with each other) that is in fact relevant to the consideration of whether obligations under the Takeover Regulations, 1997 arose.
g. Without prejudice to other submissions, any order directing an open offer at a delayed stage would be unjust.

h. The Hon'ble SAT in Sunil Krishna Khaitan & Ors Vs. SEBI (Appeal No. 23 of 2013) observed in the context of Regulation 10 that, "*therefore, for determining the crossing of the threshold limit of 15% prescribed by Regulation 10, it is the collective holding of the entire unit which would be benchmark for identifying the increase in shareholding and not KLL's shareholding as an individual*."

i. In Madhuri Pitti & Ors Vs. SEBI (Appeal No. 2 of 2013) the Hon'ble SAT affirmed the decision of Sunil Krishna Khaitan and held, "*shareholdings of all members of the group of persons acting in concert would have to be reckoned as a whole*."

j. Though the observations of the Hon'ble SAT were in connection with Regulation 10, the same principle ought to be applicable to Regulation 11. The aggregation of holdings of an acquirer and persons acting in concert with him is integral to the scheme of 1997 Takeover Regulations.

k. The Noticee had also placed reliance on the orders passed by the Hon'ble SAT in the matter of Swallow Associates (date of order 06.04.2021), Hanumesh Realtors Vs. SEBI (order dated July 25, 2012), the order of the Hon'ble Supreme Court in the matter of Swedish Match (order dated August 25, 2004) etc.

CONSIDERATON OF ISSUES AND FINDINGS

6. I have considered the allegations made in the SCN, Supplementary SCN along with the replies, oral and written submissions made by the Noticee and other material available on record. The SCN had alleged that, by virtue of the acquisition of 1.79% of the shareholding of Zensar on January 04, 2010, the shareholding of the Noticee had increased from 14.41% to 16.20% and therefore the Noticee was liable to make public announcement in terms of Regulation 10 of SAST Regulations, 1997. The Supplementary SCN has alleged that, during the period from January 04, 2010 to January 12, 2010, the Noticee had purchased another 14,30,000 shares of the target company and

consequently, the total shareholding has increased to 20.37%, which resulted in increasing the shareholding of the Noticee in the target company by 5.96%. Since said increase has resulted in increase of more than 5% in a financial year of the shareholding in the target company, the said acquisition has triggered violation of Regulation 11 of the SAST Regulations, 1997.

7. The aforementioned provisions viz. Regulation 10 and Regulation 11 of the SAST Regulations, 1997 are reproduced below:

> ***"Regulation 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.*
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> ***Regulation 11(1):*** *No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than 55 per cent of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5% of the voting rights, with post acquisition shareholding or voting rights not exceeding 55 percent, in any financial year ending 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the regulations."*

8. In view of the allegations made in the SCN and the Supplementary SCN, the replies, oral and written submissions made by the Noticee and other material available on record the issues which arise for my consideration are as under:

a. Whether the acquisition made by the Noticee have triggered the provisions of Regulations 10 and 11 of the SAST Regulations, 1997?

b. Whether the Noticee is liable to make public announcement for acquisition of shares in the target company?

9. Upon perusal of the material available on record, I note that, the Noticee had declared itself as a promoter group entity and the Noticee along with persons acting in concert together held 53.09% shareholding in the target company during the relevant time. The individual shareholding of the Noticee in the target company was 14.41%. The Noticee, on January 04, 2010 has acquired 1.79% of the shareholding in the target company and thereby the individual shareholding of the Noticee in the target company has become 16.20%.

10. A reading of Regulation 10 of the SAST Regulations, 1997 makes it clear that, any acquirer if acquires fifteen percent or more shares or voting rights in a company, such acquirer shall make a public announcement to acquire shares of the company in accordance with the regulations. Therefore, I note that it is mandatory on the part of the acquirer to make a public announcement if the acquisition exceeds fifteen percent of the shares or voting rights.

11. I further note that, the Noticee had acquired a total of 5.96 percent of shares in the target company during the FY 2009-10 and by virtue of the said acquisition, the total shareholding of the Noticee in the target company has become 20.37 percent as on January 12, 2010.

12. In this regard I note that, in terms of Regulation 11 of the SAST Regulations, 1997, if any acquirer, who already hold 15 percent or more and not exceeding 55 percent of the shares or voting rights in a company acquires additional 5 percent of shares or voting rights during any FY, such acquirer shall make a public announcement to acquire shares in accordance with the provisions of SAST Regulations, 1997.

13. In this regard, I note that, the Hon'ble Securities Appellate Tribunal (hereinafter referred to as "**the Hon'ble SAT**"), vide order dated June 19, 2013 in the matter of Sunil Khaitan Vs. SEBI (Appeal No. 23 of 2013) held in the context of Regulation 10 that, "…*therefore, for determining the crossing of the threshold limit of 15% prescribed by Regulation 10, it is the collective holding of the entire unit which would be benchmark for identifying the increase in shareholding and not KLL's shareholding as an individual*." The relevant extracts of the Hon'ble SAT's order is reproduced herein below:

> *"30. A perusal of regulation 10 reveals that it deals with the subject "Acquisition of 15% or more of the shares/voting rights of any company". It provides that no acquirer shall acquire shares/voting rights which taken together with shares/voting rights earlier held by him or by persons acting in concert with him which may entitle such acquirers to exercise 15% or more of the voting rights in a company. And if all these requirements are met, a public announcement to acquire shares of such a company is a must. The point to be noted here is that KLL has not acquired the shares in question individually. Admittedly, KLL has acted in concert with the other three Appellants for the said purpose. Therefore, for determining the crossing of the threshold limit of 15% prescribed by Regulation 10, it is the collective holding of the entire unit which would be the benchmark for identifying the increase in shareholding and not KLL's shareholding as an individual. Once an individual becomes part of a group acting in concert with the intention of acquiring shares, it loses its identity as an individual and takes on the identity of the group as a whole. The individual is no longer regarded as a separate entity independent of the group, but a part of the entire unit as one cohesive structure. This is the logical inference since all the Appellants acting in concert with each other agreed to pull their holdings together in respect of the Company in a common basket and, hence, all the four Appellants in our opinion have acted as a unit/group and not in their individual capacity, at least for the limited purpose of the acquisition of*

shares/voting rights in question. It is not denied by the Respondent that the shareholdings of all the four Appellants taken together have all along been more than 15%. Therefore, it is our considered opinion that the Appellants have not violated the provision of Regulation 10 of the SAST Regulations, 1997.

31. In this connection, it may also be pertinently noted that the SAST Regulations, 1997 allow certain persons/ entities to act in concert for the purpose of acquisition. Even the definition of "persons acting in concert" as provided in Regulation 2 (e)(1) clearly provides that this expression includes persons who agree to cooperate with each other to acquire shares/voting rights in a target company or control over the target company pursuant to a formal or informal understanding between them, directly or indirectly. Thus, the definition is wide enough and gives ample scope to persons to act in concert as one unit for the purpose of acquisition of shares/voting rights. Further, Regulation 2(e)(2) also enumerates various persons who could act in concert and they, inter alia, include a company, its holding company, a subsidiary, directors, mutual fund with sponsor or trustee, foreign institutional investors, merchant bankers, so on and so forth. In this context, if we look at the new SAST Regulations, 2011, we note that Regulation 3(3) specifically provides that acquisition of shares by any person within the meaning of sub regulations 3(1) and 3(2) would be attracting the obligation to make an open offer for acquiring shares of the target company irrespective of its aggregate shareholding with persons acting in concert if the shareholding of such individual person exceeds the threshold limit prescribed by regulation 10. It is pertinent to note that such a specific and unambiguous provision making an individual liable to make a public offer in case the individual shareholding increases during the course of the acquisition even while acting in concert with other persons is conspicuously missing in the SAST Regulations, 1997….."

14. I further note that, the Hon'ble SAT in its order dated October 31, 2013 in the matter of Smt. Madhuri S Pitti & Ors. Vs. SEBI (Appeal No. 2 of 2013) has held as follows:

> *"22. A simple reading of the definition of the word "acquirer" makes it clear that an acquirer may act alone or as part of a group of persons acting in concert. On the other hand, the definition of "persons acting in concert" reveals that people who cooperate with each other in order to acquire substantial voting rights in a particular company would be considered persons acting in concert….*
>
> *23. Therefore, it is evident that the framers of the Takeover Regulation, 1997 intended to bring out a clear distinction between individual acquiring of shares on one hand and shares acquired by persons acting in concert on the other. The benchmark of 15% would, thus, apply to an individual when the individual is acquiring shares/voting rights on his behalf alone. Similarly, when we attempt to determine whether or not the said limit has been crossed, shareholdings of all members of the group of persons acting in concert would have to be reckoned as a whole. Any other interpretation which would serve to dilute the distinction between an individual acquirer and a group of "persons acting in concert" as an acquirer. It would, indeed, make the concept of "persons acting in concert" nugatory, which could never have been the intention of the law makers."*

15. In the above referred order, the Hon'ble SAT has also relied upon its earlier judgment in the matter of Sunil Khaitan (supra.). I also note that SEBI had preferred appeal against the said orders of the Hon'ble SAT before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide its order dated July 11, 2022, dismissed the said appeals filed by SEBI and held as follows:

> *"44. We agree with the interpretation. Regulation 10 states that no 'acquirer' shall acquire voting rights, which taken together with the shares or voting rights*

held by him or by a 'person acting in concert' would entitle the 'acquirer' to exercise 15% or more of the voting rights in the company, unless such 'acquirer' makes public announcement to acquire shares in accordance with the regulations. The word 'acquirer' used in Regulation 10 takes its meaning from the definition clause (b) to Regulation 2(1), which refers to the shareholder as an individual and also 'person acting in concert' with him, which expression has been very widely defined vide clause (e) to Regulation 2(1) of the Takeover Regulations 1997. The Appellate Tribunal has, therefore, rightly held that the word 'acquirer', which is a term of art, should not be restricted to shares or voting rights of the individual shareholder as the term as defined includes the 'person acting in concert' with the shareholder. The shareholding/voting rights of the 'acquirer', that is the individual shareholder together with the 'person acting in concert' decides whether the 'acquirer' is required to make a public offer/announcement in terms of Regulation 10, which applies when the voting rights of the 'acquirer' before acquisition were less than 15 %, but on fresh acquisition exceed 15% of the voting rights in the company. Regulation 10 does not apply when the collective voting rights of the individual shareholder and the 'person acting in concert', taken together is 15% or more on the date when fresh shares or voting rights are acquired. The bracketed portion of Regulation 10, namely "taken together with shares or voting rights, if any, held by him or by persons acting in concert with him" affirms and endorses this interpretation.

45. When a word/term has been defined in a statute in a particular manner then the interpreter can assume the word/term must be understood in the stipulated sense. The principle applies with greater vigour when the definition of the word/term is given a legal and substantive meaning, different from the common meaning, as then the writer demands that the reader should understand the term/word in the sense defined. When the content and meaning given is technical, the interpreter is entitled to infer that the intention of the draftsmen is to deviate and depart from the ordinary, literal or customary meaning. Therefore, when a statutory enactment consciously defines a word or expression

by enlarging or restricting the ordinary meaning, in the absence of clear indication to the contrary, the term as defined shall cover what is proposed, authorised, done or referred to in the enactment. This principle can be also discarded when the definition read and applied would not agree with the subject and context thereby making the provision unworkable or otiose.

46. In the context of Regulation 10, we do not think that the draftsmen had committed a mistake or had forgotten the definition clauses while wording Regulation 10, wherein they have consciously used the expression 'acquirer', after having defined the same, instead of the word a 'person', which word has been used in Regulations 6 and 8 of the Takeover Regulations 1997. To accept the interpretation given by the Board, we would have to stretch the language of Regulation 10 and not read it as it reads, by assuming that the intent is to apply Regulation 10 in two situations (i) when the acquirer as a single entity, without taking into consideration the shareholding or voting rights of the person(s) acting in concert; as well as (ii) when the single entity together with the person(s) acting in concert, acquire voting rights, and in either case to cross the stipulation of 15% of the voting rights. But this would require us to ignore or rewrite the word 'acquirer' which as defined includes the 'person(s) acting in concert'. It defeats the object and purpose behind the 'term of art' definition. Regulation 10 applies to the 'acquirer' acquiring voting rights, with reference to the existing holding as a person and in concert with other persons, because the acquisition is to be "taken together with shares or voting rights held by the acquirer himself or by person acting in concert with him". The combined holding of the person and the 'person acting in concert' determines application of Regulation 10. If an 'acquirer' already holds more than 15 % shares or voting rights in concert with other persons, such holding is not be fragmented to calculate the shares or voting rights of the 'acquirer' in his personal capacity under Regulation 10.

48. Thus Regulation 10 does not apply when the 'acquirer' already holds more than 15% shares or voting rights in the target company. The 'acquirer', for the purpose of the said Regulation, not only means the individual person but also the 'person acting in concert' with the individual person. In such cases, Regulation 11(1) may apply when the 'acquirer' who hold between 15% to 55% of shares or voting rights, post the acquisition of the additional shares or voting rights is entitled to exercise more than 5% of the voting rights."

16. In the said Judgment, the Hon'ble Supreme Court, while dealing with the applicability of Regulation 3(3) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 have observed as under:

"Further, in the absence of express statutory authorisation, delegated legislation in the form of rules or regulations, cannot operate retrospectively. Certainly, Regulation 3(3) in the Takeover Regulations 2011 clarified and possibly removed the shortcoming of the 1997 Regulations. However, the language of Regulation 3(3) as reproduced above is apparently not of clarificatory or declaratory nature (para 63)."

17. In this juncture, I note that, the Noticee in its reply dated April 08, 2013 has submitted that the present proceedings to be dropped in view of the pending adjudication proceedings initiated against the Noticee for the same cause of actions. In this regard I note that the said Adjudication Proceedings have been concluded, whereby the Learned Adjudicating Officer has passed order dated March 31, 2021 and have imposed a total penalty of ₹12 lakh on the Noticee. I also note that, the Hon'ble SAT vide order dated April 06, 2022 had set aside the said order with respect to the applicability of Regulation 10 of the SAST Regulations, 1997, which is the subject matter in the present proceedings and held that, "*Reading of the provision of Regulation 10 in the light of the decision already made by this Tribunal in the case of Smt. Madhuri S. Pitti & Ors. would show that acquisition within the group in case the group is already held more than 15% of*

the shareholding is not prohibited". I further note that, SEBI has preferred an appeal before the Hon'ble Supreme Court against the said order of the Hon'ble SAT and the said appeal came to be dismissed vide order dated October 14, 2022. The Hon'ble Supreme Court, while dismissing the said appeal had held that, "*Having heard learned counsel for the appellant and having perused the material placed on record, we are satisfied that the view as taken by the Securities Appellate Tribunal, Mumbai ('SAT') is just and proper with reference to the facts of the present case. Therefore, we are not inclined to entertain this appeal"*. The Hon'ble Supreme Court has also held that, "*In this regard, suffice it to observe that the questions of law determined in the case of Sunil Krishna Khaitan (supra) have attained finality with the decision of this Court. The other questions of law, if any, are kept open"*.

18. Having discussed the factual matrix of the matter as above, I find that, the issues involved in the instant proceedings emanated from the SCN dated December 12, 2012 and the Supplementary SCN dated July 31, 2015 are covered in the order of the Hon'ble Supreme Court in the matter of SEBI Vs. Sunil Khaitan & Ors (order dated July 11, 2022) and SEBI Vs. Swallow Associates (order dated October 14, 2022). I therefore find that, no further inquiry is warranted in the matter and in view of the above, I am not examining the allegations levelled against the Noticee in the SCN and the Supplementary SCN and the arguments advanced by the Noticee any further.

19. I therefore proceed to pass the order based on the factual and legal positions which have attained finality in view of the orders passed by the Hon'ble Supreme Court as referred above.

ORDER

20. In view of the facts and circumstances of the case, I, in exercise of the powers conferred upon me under Sections 11 and 11B read with Section 19 of the Securities and Exchange Board of India Act, 1992, I dispose of the SCN dated

December 12, 2012 and the Supplementary SCN dated July 31, 2015 issued to M/s Swallow Associates LLP without any directions.

21. A copy of this Order shall be served upon the recognized Stock Exchanges and the Noticee.

Sd/-

DATE: NOVEMBER 17, 2022 **S. V. MURALI DHAR RAO**

PLACE: MUMBAI **EXECUTIVE DIRECTOR**

SECURITIES AND EXCHANGE BOARD OF INDIA