WTM/GM/EFD/42/2018-19

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 and Regulations 32 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

In the matter of M/s. Patels Airtemp (India) Ltd.

In respect of: -

NOTICEE	**PAN**
M/s. Therm Flow Engineers Private Limited	**AABCT7264M**

Background

1. M/s. Patels Airtemp (India) Limited, (hereinafter referred to as "the Target Company") is a company having its registered office at 'Kalpana Complex, 5th Floor, Nr. Memnagar Fire Station, Ahmedabad, Gujarat, 380009', and its securities are listed on the Bombay Stock Exchange.

2. As per the shareholding pattern of the Target Company disclosed to the BSE, as on quarter ending March 2014 and December 2014, Promoter Group of the Target Company included Therm Flow Engineers Pvt Ltd (hereinafter referred to as "TFEPL" or "the Noticee"), Devidas Chelaram Narumalani, Narendrabhai Gopalbhai Patel, Patel Narayanbhai Gangaram, Patel Prakash Narayanbhai, Patel Sitaben Narayanbhai, Narendra Gopal Patel, Sanjiv Narayanbhai Patel, Aarty P Patel, Zinnia Narendra Patel, Rashmika Narendra Patel, Pushpa D Narumalani, Prakash N Patel, Kanayalal Gagandas Narumalani and Khushal Gagandas Narumalani. Further, shareholding pattern showed that there was an increase in TFEPL's holding in the Target Company from 21.08% as on March 31, 2014 to 26.91% as on December 31, 2014 leading to a breach of the threshold limit of 25% under regulation 3(1) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("Takeover Regulations, 2011").

3. It was observed from the disclosures made on December 4, 2014 under regulation 29(2) of the Takeover Regulations that TFEPL's holding in the Target Company increased from 12,54,512 (24.74%) shares to 12,69,512 (25.04%) shares as on December 3, 2014 pursuant to an acquisition of 15,000 (0.30%) shares from Prakash Patel through an inter se transfer between promoters made in the open market and the total promoter holding remained the same, i.e., 23,32,633 (46.01%). The said acquisition allegedly triggered regulation 3(1) read with 3(3) of the Takeover Regulations. However, the same would have been exempt from open offer obligations, under regulation 10(1)(a)(ii) of the Takeover Regulations, 2011, if the conditions specified therein were satisfied. The said conditions, specified under the proviso to regulation 10(1)(a), require compliance with disclosure requirements under Chapter V of the Takeover Regulations, 2011 and prescribe certain price limit for the acquisition price, for the purpose of availing the exemption under regulation 10(1)(a)(ii).

4. The said acquisition of 0.30% shares from the last disclosure made under regulation 29(2) of Takeover Regulations, 2011 did not require any disclosure under Chapter V of the Takeover Regulations, 2011. Further, the shares of the Target Company were frequently traded during the 12 calendar months preceding the month in which the inter se transfer was carried out, i.e., December 2014 since the traded turnover during the period was more than 90% of the total paid-up share capital.

5. The volume-weighted average market price ("VWAMP") for the sixty trading days preceding the date of issuance of notice for the proposed inter se transfer under regulation 10(5), i.e., preceding November 26, 2014 was Rs.141.40/- per share. The acquisition price, as disclosed under SEBI (Prohibition of Insider Trading) Regulations, 1992, was Rs.180.15/- per share. Since the acquisition price was more than 125% of the VWAMP, the aforesaid acquisition was allegedly not exempt under regulation 10(1)(a)(ii) from the open offer obligations arising under regulation 3(1) read with 3(3) of the Takeover Regulations, 2011. Since TFEPL breached the threshold limit of 25% pursuant to the acquisition dated December 3, 2014 at the price of Rs.180.15/- per share, it allegedly triggered regulation 3(1) read with 3(3) of Takeover Regulations, 2011.

6. In view of the above, a notice dated July 29, 2016 (SCN) was issued by SEBI to the Noticee calling upon to show cause as to why suitable directions under Sections 11 and 11B of the

Securities and Exchange Board of India Act, 1992 and regulation 32 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 should not be issued against it for the alleged violations referred to hereinabove.

7. The Noticee replied to the SCN vide letter dated October 24, 2016. Subsequently, an opportunity of personal hearing was provided to the Noticee on August 02, 2017 which was attended by it. The Noticee filed further written submissions dated August 21, 2017.

8. The Noticee vide its letters dated October 24, 2016 and August 21, 2017 and during the course of the personal hearing submitted *inter alia* the following:

    a) The Noticee was part of the total promoters/promoter group shareholding, since more than last 3 years prior to the transaction in question, right since FY 2002-03.

    b) The allegation that due to increase in shareholding of the Noticee there is a breach of threshold of 25% under regulation 3(1) of the Takeover Regulations, 2011 is not true. A careful reading of the comparable provisions under the old Takeover Regulations, 1997 as against the current Takeover Regulations, 2011 will show that while under the old Regulation 10, the reference to the acquirer was as a singular person "him", under the new Takeover Regulations, 2011 in regulation 3(1), the reference is made to the collective plural "them".

    c) It is clear that the acquisition by an acquirer as contemplated in regulation 3(1) refers to a collective acquisition by an "acquirer together with persons acting in concert (PAC)" as one consolidated collective unit. Thus, in this case, the acquisition made by a promoter entity TFEPL during the relevant fiscal year 2014-15 should be viewed as a collective acquisition made by the whole of the promoter group of the Target Company and not individually by the Noticee alone.

    d) The promoter group is a homogenous unit and acts in concert for acquisition of shares, as held by Hon'ble SAT in the case of Rajesh Toshniwal Vs. SEBI (Appeal No. 139 of 2011). The Noticee has always been shown as an entity forming part of the promoter group and the acquisition made by the promoter group has always been shown as collective acquisition.

e) The Noticee is promoted by the same promoters who are also the promoters of the target company. Thus, the Noticee is an investment company and for all practical purposes, it is nothing but an extended investment arm of the promoters themselves.

f) Regulation 3(1) read as a whole also requires the shareholding/voting rights of the acquirer to be clubbed with that of all persons acting in concert with the acquirer and it is only if, and as and when, such combined shareholding entitles them to exercise 25% or more of the voting rights of the target company does the obligation to make a public announcement to acquire shares in accordance with the Takeover Regulations, 2011 arise. Regulation 3(1) however will have no application to any acquisition made by an acquirer when the combined shareholding of the acquirer and the persons acting in concert with him prior to such acquisition entitles them to exercise more than 25% of the shareholding / voting rights of the target company. Hence, regulation 3(3) has no application. Similarly, since the overall limit of the acquisition has not exceeded the 5% permissible threshold, regulation 3(2) has no application as well. Therefore, there is no question of any requirement to make an open offer.

g) As per the provisions of regulation 2(1)(q) of the Takeover Regulations, 2011, the definition of persons acting in concert is deemed to include promoters and members of the promoter group.

h) The Noticee is a private limited company, promoted by the promoters of the Target Company. It is not having any active commercial business. However, it has been regularly acquiring shares of the Target Company and is acting as an investment vehicle of the promoters of the Target Company and is forming part of the promoter group of the Target Company. The shareholders of the Noticee are either the promoters or relatives of the promoters of the Target Company. All the shareholders of the Noticee are also therefore forming part of the promoter/promoter group of the Target Company.

i) Since the Noticee as a promoter along with other promoters who are persons acting in concert with it already hold more than 25% i.e. 45% of the shares / voting rights of the Target Company, the question of Noticee acquiring any shares under regulation

3(1) does not arise. The Noticee and other promoters of the Target Company squarely fell within the provisions of regulation 3(2), since they held more than 25% but less than 75% of shares / voting rights and consequently could only acquire 5% shares of the target company within an accounting year without triggering the provisions of regulation 3(2). Since the acquisition could only be made and was made under the provisions of regulation 3(2), the question of invoking regulation 3(1) for purposes of regulation 3(3) does not arise.

j) Since the Noticee as a promoter and part of the promoter group held 45% shares of the Target Company, the Noticee and the other promoters squarely fell within the provisions of regulation 3(2) of the Takeover Regulations, 2011, as they held more than 25% but less than 75% of the shares / voting rights of the Target Company and subsequently could only acquire 5% shares of the Target company in an accounting year without triggering the provisions of regulation 3(2). The acquisition by the promoter group of the Target Company during FY 2015-16 was amounting to only about 1% of the total paid up share capital of the Target Company. Thus, the same is well within the limits of creeping acquisition as set out in regulation 3(2) of the Takeover Regulations, 2011.

k) The question of applying the test of exemption provision as provided under regulation 10 of the Takeover Regulations, 2011 would arise only if the provisions of regulation 3 are triggered. Since regulation 3 is not triggered, the question of applying the provisions of regulation 10 does not arise.

l) Even assuming without admitting that the inter se transfer of shares has breached the ceilings prescribed under regulation 3(1) and the conditions prescribed for exemption under regulation 10(1)(a) are required to be met for exemption from making an open offer, there would still be no difficulty, since the inter se transfer of 15000 shares had happened through open market mechanism at the prevailing market price on that particular date on the floor of the Stock Exchange. Thus, although this is an inter se transfer, the mechanism adopted was open market trade mechanism wherein the selling promoter has sold the sharers through open market through one broker and

the Noticee has simultaneously purchased the same quantity of shares through another broker, on the floor of the exchange, at the prevailing market price.

m) As per SEBI's allegation in the SCN, as a result of purchase of 15,000 shares by the Noticee on December 03, 2014 by way of inter se transfer from the other promoter, Mr. Prakash N. Patel, the Noticee's holding exceeded the thresh hold of 25% shareholding set forth in regulation 3(1) of the Takeover Regulations, 2011 by only 0.04% of the share capital of the target company. The said 0.04% shares constituted merely 2028 shares, which is a very small quantity.

n) The acquisition has not resulted in any change in control in any manner.

o) The provisions of regulation 10(1)(a) prescribing methodology of pricing tantamount to artificial restriction on the free transferability of the shares.

p) Going by SEBI's own calculation, 125% of the preceding 60 days' VWAMP comes to Rs.176.75 per share (Rs.141.40 x 125% = Rs.176.75). As against the same, the average market price at which the said 15000 shares have been purchased is Rs.180.15 per share. Thus, the actual price is higher by just Rs.3.40 per share. By implication, the total consideration paid is higher by only Rs.51,000/- (15000 shares x Rs.3.40 = Rs.51,000/-. The amount comes to Rs.7072/- only, if one takes the 2028 shares that were in excess of the 25% limit prescribed under regulation 3(1) of the Takeover Regulations, 2011, as only 0.04% shares in excess of 25% limit were acquired, which corresponds to 2028 shares.

q) The Noticee is also ready and willing to pay the said amount of Rs.51,000/- to the investor protection fund of BSE, if so directed by SEBI.

r) The said acquisition in issue was made by the Noticee on the stock exchange i.e. the BSE at the then ruling market price of Rs.180.15 per share. The Noticee did not have any choice or option to control the price at which the trade was executed as the same was purely a market driven price at which the said purchase was made. The stock exchange does not permit purchase or sale of shares at a price arrived at by the methodology prescribed under regulation 10(1)(a).

s) It the Noticee was aware at the time of execution of the impugned transaction that it would be violating regulation 3(1) and regulation 3(3), it would have reversed or sold the excess shares above 25% on the stock exchange immediately. The Noticee is ready and willing to reverse or sell the excess 0.04% shares equal to 2028 shares on the stock exchange even today voluntarily or if so directed by SEBI.

t) The SCN is defective in so far as it does not indicate what the final order that SEBI proposes to pass out of the several orders that can be passed under regulation 32 of the said Regulations.

u) The Noticee has referred to a number of judicial pronouncements in support of their arguments.

9. Vide letter dated April 12, 2018, another opportunity was provided to the Noticee to file written submissions, if any. The Noticee vide letter dated April 21, 2018 reiterated the submissions already made by it earlier.

10. I have gone through the charges against the Noticee as set out in the SCN and the submissions made by the Noticee in respect thereof.

11. I note that the charge against the Noticee in the SCN is that as a result of the Noticee's acquisition of a total of 15000 (0.30%) shares of the Target company on December 03, 2015, the Noticee's individual shareholding in the target company increased from 24.74% to 25.04%, thereby breaching the threshold limit of 25%, as provided under regulation 3(1) read with 3(3) of the Takeover Regulations, 2011.

12. The Noticee has vehemently argued that the abovementioned acquisition does not trigger the applicability of either regulation 3(1) or 3(3) of the Takeover Regulations, 2011, as the said acquisition of 15000 shares by the Noticee was an inter se transfer among the promoter entities and the overall shareholding of the promoter group, of which the Noticee is a part, has remain unchanged after the said acquisition. It has further submitted that the entire promoter group has always been considered as a homogenous unit and is also deemed to be acting in concert in the acquisition of the said shares in issue under the provisions of regulation 2(1)(q)(iv) of the Takeover Regulations, 2011.

13. The Noticee has argued that under the provisions of regulation 3(1), the shares acquired by the acquirer together with the shares held by him and by persons acting in concert with the acquirer are to be taken into account for determining whether such collective shareholding breaches the threshold of 25% specified therein. The threshold of 25% is to be viewed as a collective thresh hold of shares held by the promoter group, and not the individual shareholding of one of the parties forming part of the promoter group, as in the case of the Noticee. Since the Noticee as a promoter along with other promoters who are persons acting in concert with it already held more than 25% i.e. 45% of the shares / voting rights of the Target Company on the relevant date, the question of the Noticee acquiring shares under regulation 3(1) does not and cannot arise. Since the Noticee along with the other promoters who are persons acting in concert already held more than 25% but less than 75% of the shares / voting rights of the Target Company, they could acquire shares only under regulation 3(2) within prescribed limits. The Noticee have further submitted that when an acquisition could only be made under the provisions of regulation 3(2), the question of invoking the provisions of regulation 3(1) for the purpose of regulation 3(3) cannot and does not arise, as no acquisition was admittedly done under regulation 3(1).

14. In order to analyse the issue at hand, it is important to have a look at the relevant provisions of regulation 3 of the Takeover Regulations, 2011, which are quoted below:

*"**Substantial acquisition of shares or voting rights.***

"3. (1) No acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by persons acting in concert with him in such target company, entitle them to exercise twenty-five per cent or more of the voting rights in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.

(2) No acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations:

***Provided** that such acquirer shall not be entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding.*

Explanation.— For purposes of determining the quantum of acquisition of additional voting rights under this sub-regulation,—

(i) gross acquisitions alone shall be taken into account regardless of any intermittent fall in shareholding or voting rights whether owing to disposal of shares held or dilution of voting rights owing to fresh issue of shares by the target company.

(ii) in the case of acquisition of shares by way of issue of new shares by the target company or where the target company has made an issue of new shares in any given financial year, the difference between the pre-allotment and the post allotment percentage voting rights shall be regarded as the quantum of additional acquisition .

(3) For the purposes of sub-regulation (1) and sub-regulation (2), acquisition of shares by any person, such that the individual shareholding of such person acquiring shares exceeds the stipulated thresholds, shall also be attracting the obligation to make an open offer for acquiring shares of the target company irrespective of whether there is a change in the aggregate shareholding with persons acting in concert."

15. I note that the Noticee has primarily based its abovementioned contentions on the assumption that that for the said acquisition of 15000 shares, the Noticee was acting in concert with other promoters and promoter group entities. As per regulation 2 (1) (q) of the Takeover Regulations, 2011, the term "persons acting in concert" means-

"(1) Persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company.

(2) Without prejudice to the generality of the foregoing, the persons falling within the following categories shall be deemed to be persons acting in concert with other persons within the same category, unless the contrary is established-

(i) … … …

(ii) … … …

(iii) … … …

(iv) Promoters and members of the promoter group

(v) … …

… … …"

16. From the above provisions, it emerges that for qualifying as being "person acting in concert" under regulation 2(1)(q)(1), the persons must have a common objective or purpose of acquisition of shares or voting rights. However, I note that in the instant case, the acquisition in question was an inter se transfer of shares from one promoter entity (i.e. Shri Prakashbhai

N. Patel) to another promoter entity (i.e. the Noticee), which implies that the promoter entities, including the Noticee, did not have a common objective or purpose of acquisition but were rather acting in opposite directions, where one promoter entity had purchased the shares and another entity had sold the same shares. Further, I note that even the deeming provision provided under regulation 2(1)(q)(2) does not make the Noticee and the other promoter entities "persons acting in concert" as the opposite nature of transaction on part of the Noticee and the selling promoter entity clearly establishes the contrary. In this regard, it is relevant to refer to the judgment of the Hon'ble Supreme Court in the matter of *Daiichi Sankyo Company Ltd. vs. Jayaram Chigurupati & Ors. (AIR 2010 SC 3089)*, where it has been held that –

> *"44. … … 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, dehors 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 common objective or purpose is the sin qua non for the relationship of "persons acting in concert" to come into being.*
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> *45. … … …*
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> *46. … … …*
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> *47. … … …*
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> *48. It needs further to be noted that the presumption created by virtue of the deeming provision is expressly left open to rebuttal as indicated by the concluding words "unless the contrary is established" occurring in sub-regulation (2). … … …"*

17. Considering the above, I find that the Noticee's claim that it was acting in concert with other promoter entities, while acquiring the said shares cannot be sustained.

18. Further, even if it is assumed for the sake of argument that the Noticee was acting in concert with other promoter entities, having perused the abovementioned provisions, I note that

regulation 3(3) clearly provides that the threshold of 25% provided under regulation 3(1), the breach of which triggers the obligation to make an open offer for acquiring shares, shall also apply to a person if his individual shareholding exceeds the said threshold, irrespective of whether there is a change in the aggregate shareholding with persons acting in concert. In this case, I note that the Noticee had acquired 15000 shares on December 03, 2014, as a result of which its individual shareholding had increased from 12,54,512 shares (i.e. 24.74% of the total shareholding of the Target Company) to 12,69,512 shares (i.e. 25.04% of the total shareholding of the Target Company), thereby clearly breaching the threshold limit provided under regulation 3(1) of the Takeover Regulations, 2011. If the Noticee's contention that the provisions of regulation 3(1) do not apply to any acquisition where the pre-acquisition collective shareholding of the acquirer along with persons acting in concert is more than the prescribed limit of 25% is accepted, then it will render the provisions of regulation 3(3) totally redundant and ineffective, in so far as it relates to regulation 3(1). Regulation 3(3), read in the context of regulation 3(1), is explicitly aimed at any individual acquisition of shares which breaches the threshold level of 25%. The prime objective of specifying this limit of 25% by individual persons / entities (even while being a part of a group) is from the perspective that such a person / entity could reasonably be expected to exercise control vis-à-vis when his / its individual holding was below the threshold level. Therefore, regulation 3(3) read with regulation 3(1) is well-conceived so as to protect the investor interests in such eventuality. Therefore, in my opinion, the provisions of regulation 3(1), which refer to 'an acquirer along with persons acting in concert with him', cannot be read in isolation but have to be read and interpreted in harmony with the clear and unambiguous provisions of regulation 3(3).

19. From the above, I find that by acquiring the abovementioned 15000 shares of the Target Company, the Noticee breached the threshold limit of 25% provided under regulation 3(1) read with regulation 3(3), thereby triggering the obligation of making an open offer for shares for the Target Company, in accordance with the provisions of the Takeover Regulations, 2011.

20. The Noticee has argued that even if SEBI's allegation of violation of regulation 3(1) read with regulation 3(3) is correct, the Noticee had exceeded the 25% threshold, provided under regulation 3(1) read with 3(3), only by 0.04% which constitute merely 2028 shares, which is a small quantity. However, in this regard, I note the following from the shareholding pattern of the Promoter and Promoter group of the Target Company, as available on record:

Table 1: Promoter and Promoter Group Shareholding (including the Noticee)

As on March 31, 2014	As on December 31, 2014
22,81,746 (45%)	23,32,633 (46.01%)

Table 2: No. of shares individually held by the Noticee in the Target Company

(A) As on March 31, 2014	**10,68,625 (21.08%)**
(B) As on December 31, 2014	**13,64,512 (26.91%)**
Change in shareholding (B) – (A)	**2,95,887 (5.83%)**

21. From the above, I note that the individual shareholding of the Noticee in the Target Company had increased from 21.08% as on March 31, 2014 to 26.91% as on December 31, 2014. Thus, I note that even after acquiring the said 15000 shares on December 03, 2014 which increased Noticee's shareholding from 24.74% to 25.04% (i.e. beyond the threshold of 25%), the Noticee had acquired further shares of the target company, resulting in his shareholding reaching 26.91% as on December 31, 2014. Thus, the said acquisition of 15000 shares was merely one of the intermediate transactions amongst a sequence of acquisitions which resulted in the immediate breach of 25% threshold provided under regulation 3(1) read with 3(3). However, as noted from the Table above, the Noticee's overall shareholding had reached 26.91% as on December 31, 2014 which means that he had acquired additional 1.91% shares beyond 25%, as against 0.04% claimed by the Noticee. Thus, I do not find merit in the argument of the Noticee that the breach of threshold limit of 25% had occured by a margin of only 2028 shares (0.04%).
22. Having observed as above, it is now important the see whether the said acquisition of 15000 shares, which triggered the obligation of making an open offer by the Noticee under regulation 3, qualifies for exemption from the said obligation, as provided under regulation 10 of the Takeover Regulations, 2011. In this regard, I note that the relevant provisions of regulation 10 state the following:

"General exemptions.

10. (1) The following acquisitions shall be exempt from the obligation to make an open offer under regulation 3 and regulation 4 subject to fulfillment of the conditions stipulated therefor,—

(a) acquisition pursuant to inter se transfer of shares amongst qualifying persons, being,—

(i) immediate relatives;

(ii) persons named as promoters in the shareholding pattern filed by the target company in terms of the listing agreement or these regulations for not less than three years prior to the proposed acquisition;

(iii) a company, its subsidiaries, its holding company, other subsidiaries of such holding company, persons holding not less than fifty per cent of the equity shares of such company, other companies in which such persons hold not less than fifty per cent of the equity shares, and their subsidiaries subject to control over such qualifying persons being exclusively held by the same persons;

(iv) persons acting in concert for not less than three years prior to the proposed acquisition, and disclosed as such pursuant to filings under the listing agreement;

(v) shareholders of a target company who have been persons acting in concert for a period of not less than three years prior to the proposed acquisition and are disclosed as such pursuant to filings under the listing agreement, and any company in which the entire equity share capital is owned by such shareholders in the same proportion as their holdings in the target company without any differential entitlement to exercise voting rights in such company:

***Provided** that for purposes of availing of the exemption under this clause,—*

(i) If the shares of the target company are frequently traded, the acquisition price per share shall not be higher by more than twenty-five per cent of the volume-weighted average market price for a period of sixty trading days preceding the date of issuance of notice for the proposed inter se transfer under sub-regulation (5), as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, and if the shares of the target company are infrequently traded, the acquisition price shall not be higher by more than twenty-five percent of the price determined in terms of clause (e) of sub-regulation (2) of regulation 8; and

(ii) the transferor and the transferee shall have complied with applicable disclosure requirements set out in Chapter V."

23. I note that since the Noticee has been shown as part of the Promoter Group in the shareholding pattern of the Target Company for more than three years and the said acquisition of 15000 shares by the Noticee had happened by way of inter se transfer amongst promoter entities, the same would have qualified for exemption under regulation 10(1)(a)(ii) from the obligation to make an open offer, if it satisfied the conditions mentioned in the proviso to regulation 10(1)(a). Since the shares of the Target Company were frequently traded during the 12 calendar months preceding the month in which the said inter se transfer of 15000 shares was carried out (i.e. December 2014), the following conditions had to be satisfied for being eligible for exemption under regulation 10(1)(a)(ii):

(a) The acquisition price ought not be higher by more than twenty-five per cent of the volume-weighted average market price (VWAMP) for a period of sixty trading days preceding the date of issuance of notice for the inter se transfer under sub-regulation (5) of regulation 10, as traded on the stock exchange where the maximum volume of trading in the shares of the Target Company are recorded during such period.

(b) The transferor and the transferee ought to have complied with applicable disclosure requirements set out in Chapter V of the Takeover Regulations, 2011.

24. As regards the abovementioned conditions, I note from the SCN that the said acquisition of 15000 shares (0.30%) shares from the last disclosure made under regulation 29(2) of the Takeover Regulations, 2011 did not require any disclosure under Chapter V of the Takeover Regulations, 2011. Thus, the said acquisition of 15000 shares had to satisfy only the second condition of having an acquisition price which is within limits prescribed by the proviso to regulation 10(1)(a), in order to qualify for exemption from obligation to make open offer.

25. I note from the SCN that the VWAMP of the scrip of the Target Company for the sixty trading days preceding the date of issuance of notice for the proposed inter se transfer under regulation 10(5), i.e. preceding November 26, 2014, was Rs.141.40 per share. Thus, in order to qualify for exemption, the acquisition price of the shares could not be higher by more than 25% of the VWAMP (i.e. Rs.141.40 *25/100 = Rs.35.35). The same means the acquisition price could not exceed Rs.176.75 per share (i.e. Rs.141.40 + Rs.35.35 = Rs.176.75). However, it is noted from the SCN that the acquisition price in respect of the said 15000 shares, disclosed under SEBI (Prohibition of Insider Trading) Regulations, 1992, was Rs.180.15/- per share, which exceeded the prescribed limit by Rs.3.40/- per share.

26. The Noticee has contended that since the excess shares acquired beyond 25% constitute only 2028 shares and that the acquisition price exceeded the price limit only by Rs.3.40/- per share, the obligation of making an open offer should not be imposed on the Noticee. In this regard, I have already noted above that the Noticee had acquired shares far in excess of 2028 shares, beyond 25%, which is contrary to its claim. Further, as a general principle, in cases where the law provides exceptions to a general provision and such exceptions are available subject to some conditions, then such conditions cannot be relaxed any further. Such exceptions would not be available unless the attached conditions are strictly complied with. I thus note that once

the Noticee has failed to adhere to the condition pertaining to the acquisition price limit prescribed under the proviso to regulation 10(1)(a) for qualifying for exemption from the obligation of making an open offer, then the acquirer cannot claim benefit of exemption thereunder and the excess acquisition price paid becomes immaterial in this regard.

27. From the above, it is clear that the said acquisition of 15000 shares by the Noticee, which breached the threshold limit prescribed under regulation 3(1) read with 3(3), was not exempt from the obligation of making an open offer under regulation 10.

28. Considering all the above, I am satisfied that by acquiring shares in excess of threshold limit prescribed under regulation 3(1) read with 3(3), which is not exempt under the provisions of regulation 10 of the Takeover Regulations, 2011, the Noticee triggered the obligation to make an open offer for the shares of the Target Company, in accordance with the provisions of the Takeover Regulations, 2011.

29. The Noticee in its reply has contended that the specific directions sought to be passed under Sections 11 and 11B of the SEBI Act and regulation 32 of the Takeover Regulations, 2011, in respect of the alleged violations, have not been specified in the SCN. In this regard, while I note that regulation 32 of the Takeover Regulations, 2011 provides a number of directions which may be passed, the same have been provided to deal with various situations, as per the facts and circumstances of each case, once the violations are already established. The same provides a leeway to the Competent Authority to choose the most appropriate penalty, depending upon the facts and circumstances of each case, once the violation is established.

30. I note that the decision of the Hon'ble Securities Appellate Tribunal, in its order dated September 08, 2011 in the matter of *Nirvana Holdings Private Limited vs. SEBI* (*hereinafter referred to as "**Nirvana Holdings case**"*) (Appeal no. 31/2011) is relevant in this case. The said order of SAT held as follows:

> *"The primary object of the takeover code is to provide an exit route to the public shareholders when there is substantial acquisition of shares or a takeover. This right to exit is an invaluable right and the shareholders cannot be deprived of this right lightly. It is only when larger interest of investor protection or that of the securities market demands that this right could be taken away. Therefore, as a normal rule, a direction to make a public announcement to acquire shares of the target company should issue to an acquirer who fails to do that. The Board need not give reasons as to why such a direction is being issued because that is the mandate of Regulations 10, 11*

and 12. However, if the issuance of such a direction is not in the interest of the securities market or for the protection of interest of investors, the Board may deviate from the normal rule and issue any other direction as envisaged in Regulation 44 of the takeover code. In that event, the Board should record reasons for deviation."

31. The aforesaid decision of the Hon'ble SAT makes it clear that for breach of an obligation to make an open offer in terms of regulation 3(1) read with 3(3) of the Takeover Regulations, 2011, the *rule* that SEBI would need to adhere to is to direct the acquirer to make an open offer.

Directions

32. I, therefore, in exercise of powers conferred upon me under sections 11 and 11B read with section 19 of the SEBI Act, 1992, and regulation 32 of the Takeover Regulations, 2011, hereby issue the following directions to the Noticee acquirer :

    a) The Noticee shall make a public announcement to acquire shares of the Target Company in accordance with the provisions of the Takeover Regulations, 2011, within a period of 45 days from the date of this order;

    b) The Noticee shall along with the offer price, pay interest at the rate of 10% per annum from the date when it incurred the liability to make the public announcement till the date of payment of consideration, to the shareholders who were holding shares in the target company on the date of violation and whose shares are accepted in the open offer, after adjustment of dividend paid, if any.

33. This order shall come into force with immediate effect. A copy of this order shall be served upon the Noticee, stock exchanges and depositories for ensuring compliance with the above directions.

Date: July 25, 2018 **G. MAHALINGAM**

Place: Mumbai **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA