**WTM/RKA/CFD-DCR/ 12 /2012**

**BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA**
**CORAM: RAJEEV KUMAR AGARWAL, WHOLE TIME MEMBER**

**ORDER**

**In the matter of request of Mr. Pramod Jain and Pranidhi Holdings Private Limited (the acquirers) along with J. P. Financial Services Private Limited (person acting in concert) to permit withdrawal of the public offer envisaged in the Public Announcement dated November 12, 2009 made by them to acquire shares of Golden Tobacco Limited (the target company).**

Dates of hearing: January 17, 2012 and February 08, 2012

**Appearance:**

For the acquirers and PAC:

1. Pramod Jain, director, Pranidhi Holdings Private Limited
2. Mr. Manoj Chandak, director, J.P. Financial Services Private Limited
3. Mr. Vijay Chandak, Managing Director, VC Corporate Advisors Private Limited
4. Mr. Sushil Chhawcharia, Chartered Accountant
5. Mr. Kshitiz Chhawcharia, Chartered Accountant
6. Mr. Arindam Ghosh, Advocate, M/s. Khaitan & Co.
7. Mr. Moin Ladha, Advocate, M/s. Khaitan & Co.
8. Mr. Ankit Lohia, Advocate, i/b M/s. Khaitan & Co.
9. Ms. Rishika Harish, Legal Assistant

For the Securities and Exchange Board of India:

1. Shri V.S. Sundaresan, Chief General Manager
2. Shri Santosh Shukla, Joint Legal Adviser
3. Shri T. Vinay Rajneesh, Assistant Legal Adviser
4. Ms. Rashmi Menon, Manager

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1. Golden Tobacco Limited (hereinafter referred to as 'the target company') is a company having its registered office at Tobacco House, S.V. Road, Vile Parle (West), Mumbai - 400 056. The

equity shares of the target company are listed on the Bombay Stock Exchange Limited (BSE) and the National Stock Exchange of India Limited (NSE).

2. On November 12, 2009, Mr. Pramod Jain and Pranidhi Holdings Private Limited (the acquirers) along with J. P. Financial Services Private Limited [the person acting in concert (PAC)] made a Public Announcement through VC Corporate Advisors Private Limited (the merchant banker) in accordance with regulations 10 and 12 read with regulation 14 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as 'the Takeover Regulations'). As on the date of the Public Announcement, the acquirers and PAC collectively held 11,39,002 equity shares (6.47%) of the target company. The public announcement is voluntarily made by the acquirers and PAC to acquire 44,02,201 equity shares (25%) of the target company from its equity shareholders at a price of ₹101/- (the offer price) per equity share.

3. The acquirers and PAC, through the merchant banker, filed the draft letter of offer (DLO) with SEBI on November 26, 2009. During examination of the DLO, certain complaints were received against the acquirers and PAC as well as against the target company and its promoters. Various correspondences were exchanged between SEBI and the merchant banker, acquirers, PAC, the target company and certain other entities in respect of such complaints. After making different requests to keep the public offer in abeyance as well as to permit withdrawal of public offer, the acquirers through merchant banker's letter dated October 11, 2011, requested for permission to withdraw the open offer under regulation 27(1) (d) of the Takeover Regulations. The merchant banker and the acquirers also requested for a personal hearing in the matter.

4. In the peculiar facts and circumstances of this case, it was felt necessary to grant an opportunity of personal hearing as requested by the merchant banker and the acquirers in respect of the request for withdrawal of the public offer envisaged in the Public Announcement dated November 12, 2009. On January 17, 2012 and again on February 08, 2012, the authorised representatives of the merchant banker, acquirers and PAC appeared and made oral as well as written submissions. The submissions made by the merchant banker , acquirers and PAC are summarised under the following heads:-

**A. Delay in issuing observations on the draft letter of offer :**

The open offer process is held up for no fault of the acquirers/merchant banker since all the information required by SEBI from time to time was duly furnished. SEBI has given importance only to the frivolous complaints that were filed with *mala fide* intentions by

interested parties with sole intention of delaying the open offer and has not considered the repeated complaints made by the acquirers against the target company and its management.

**B. *Mala fide* intention of the management of the target company :**

During the delay in completing the open offer, the management of the target company has succeeded in systematically siphoning off the funds from the target company, depleting the valuable fixed assets and eroding the net worth substantially, with the intention of making it a shell company.

**(1) Depleting valuable fixed assets-**

i) The management of the target company had availed huge high cost borrowings from banks and non-banking financial institutions including Indiabulls Housing Finance Limited and Indiabulls Financial Services Limited, against mortgage of the target company's property at Marol (Andheri, Mumbai) and pledging of 18.7% shares of the target company. The pledged shares include 26.57% of the promoter's shareholding. These borrowings are not in any manner benefiting the target company and are now subject matter of Arbitration. This shows that promoters do not find their shareholding in the target company of much value and they want to make it a shell company. All these acts of promoters are detrimental to public shareholders of the target company.

ii) The promoters of the target company have resorted to settle their personal borrowings by sale of prime properties of the target company as is evident from the FIR dated July 25, 2009 lodged by Indiabulls Financial Services Limited.

iii) These acts of promoters of the target company have affected the price of its shares and in turn the interests of the shareholders.

iv) In the Extra-Ordinary General Meeting of the target company held on January 18, 2010, a general authority was granted to a committee to undertake necessary steps for development of properties situated at Vile Parle, Marol, Hyderabad and Guntur, either by joint development agreement or sale. For joint development of the Vile Parle property, agreements (*MoU*) dated December 26, 2009 were entered into by the target company with Sheth Developers Private Limited and Suraksha Realty

Limited and an advance of ₹125 crore was already received on various dates. However, these facts were not disclosed to the shareholders of the target company in the EGM dated January 18, 2010. Even in the following AGM held on September 18, 2010 shareholders' approval for the said agreements was not obtained. Specific approval of shareholders on these agreements under section 293(1)(a) of the Companies Act was obtained through postal ballot only on February 12, 2011.

v) This clearly shows that the shareholders' approval was not in place when those agreements were entered into. Therefore, the target company had contravened regulation 23(1) (a) & (c) of the Takeover Regulations.

vi) The significant fact of entering into agreements dated December 26, 2009 was not informed to the stock exchanges, as required under clause 36 of the Listing Agreement and intimation was only made after approval of shareholders by Postal Ballot in February 2011. This clearly shows that there was intentional suppression of material fact.

vii) Subsequently, by a Board Resolution dated May 25, 2011, the target company unilaterally decided not to proceed with the *MoU* dated December 26, 2009 with the aforesaid developers. Consequently, the target company is under liability to return the advance. Since the target company is unable to do so, the original title deeds of the said property are still in possession of the developers.

viii) Thus, the management of the target company has encumbered the most valuable assets of the target company in gross violation of the SEBI regulations and the Listing Agreement and against the interests of the minority shareholders.

ix) The target company had ownership of several properties including unencumbered property at Vile Parle (Mumbai) as on the date of the public announcement which was subsequently stripped off.

x) In this regard, a suit (S. C Suit No. 817 of 2011) was filed by the acquirers against the target company and others before the Hon'ble City Civil Court (Dindoshi Branch), Mumbai wherein an *interim* order granting stay to not to create any third party interest on the property was passed.

**(2) Siphoning off the funds-**

i) After borrowings against mortgage of its valuable immoveable properties and receiving advance against consideration money on Vile Parle property, the target

company has advanced substantial amount (₹172 crores) to its subsidiaries namely, Golden Reality and WEIL on the pretext of some development rights which those subsidiaries are exploring with some other landowners. In the accounts of the subsidiary company (Golden Reality) it is stated that the company has no operational income.

ii) The *modus operandi* of siphoning of the funds of the target company is by first extending advance to the subsidiary companies and then diverting the money to the entities owned/controlled by the promoters of the company. This is further evidenced by the fact that none of the subsidiaries of the target company had any turnover during the preceding financial year. Finally the money has gone to Indiabulls Financial Services as evident from the FIR dated 25.07.2009 lodged by it.

iii) The funds have also been siphoned off by the promoters of the target company by way of advances that have been given to the front companies which are then diverted to other entities in the pretext of acquisition of development rights.

iv) The siphoning of funds was carried out by way of fictitious loans and advances which are now stated to be not recoverable, whereas there were no irrecoverable amounts before making of the public announcement.

v) SEBI has ample powers under sections 11, 11B, 12 and 12A of the SEBI Act to investigate into these affairs of the target company.

**(3) Deteriorating financial health of the target company**-

i) The acquirers took into account the book value and the EPS before fixing the price at ₹101/- per share. There has been a decline of 138.59% in the book value of the shares of the target company and the Earnings Per Share (EPS) has declined to (-19.27). The profitability of the target company has significantly deteriorated from profit in the periods just prior to making the public announcement to huge losses in the last one year and a half after the public announcement resulting in negative EPS.

ii) Due to the unrelated borrowings, the liabilities of the target company have increased substantially. As disclosed in its Annual Report for the year ended March 31, 2011, the target company has made an application for extension of the BIFR scheme and an appeal is pending before the AAIFR.

**C. Submissions on grounds for permission to permit withdrawal of public offer :**

i. The Public Announcement was made voluntarily and it was not mandated/triggered by the Takeover Regulations. The voluntary offer made by the acquirers and PAC does not give any vested right to the shareholders like in the case of a triggered offer. This case, therefore, should not be accorded the same treatment as the case of a triggered offer and withdrawal of open offer should be permitted under regulation 27(1) (d) of the Takeover Regulations.

ii. Clause (d) of regulation 27(1) vests SEBI with plenary discretion to allow withdrawal of an open offer. The general words *"such circumstances ….."* in clause (d) do not take colour from clauses (a), (b) or (c). The principle of *ejusdem generis* should not be applied while interpreting the provision of clause (d) because all clauses do not form part of single genus. Prior to the amendment on 09.09.2002, regulation 27(1)(a) provided a ground of withdrawal, viz; *"(a) the withdrawal is consequent to any competitive bid;"*. Under this clause, an acquirer would be entitled to withdraw the offer in case of competitive offer though it is possible for him to complete the public offer. Clause (b) deals with a situation which makes it impossible to make the public offer. Under clause (c), legal heir of the deceased acquirer could otherwise be able to make the open offer, nonetheless this clause grants exemption from general rule of regulation 27(1). Thus, clause (d) as originally framed was clearly not intended to be read *ejusdem generis* with other clauses of regulation 27(1). Merely by deleting clause (a) the meaning of clause (d) which has not been altered cannot change. Even if clause (a) is ignored, there is no genus found in clauses (b), (c) and (d) of regulation 27(1).

iii. Relying upon judgments reported in AIR 1998 CAL 288 *[Jaya Sen vs. Sujit Kr. Sarkar],* AIR 1976 SC 1766 *(Regional Manager Vs Pawan Kumar Dubey)* and AIR 1983 SC 1155*(Deena Vs. Union of India)]*, it has been submitted that the ratio of a decision has to be looked at in the light of the facts before the court deciding the matter**.** Quoting the following observations of Hon'ble Supreme Court in Pawan Kumar Dubey's case -*"one additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts"*, it has been contended that the judgement of Hon'ble Securities Tribunal (SAT) in the case of Nirma Industries Limited (the Nirma's case) should not be applied in this case because facts and circumstances in this case are different from those in Nirma's case.

iv. In Nirma's case, the open offer was triggered and the offer was mandatory, whereas in the instant case, the open offer is made voluntarily. Further, in Nirma's case, by conducting proper due diligence prior to making the Public Announcement, the acquirer could have discovered the alleged fraud. However, in the present case, the promoters perpetrated fraudulent activities after the Public Announcement was made. The above mentioned fraudulent activities of the promoters were not within

the knowledge of the acquirers before making the Public Announcement. This is a very important distinguishing factor from the facts in Nirma's case.

v. The public offer would have to be necessarily governed by the provisions of the Indian Contract Act, 1872 in addition to other applicable provisions. The public offer in this case has not been accepted by the shareholders of the target company and, therefore, it can be revoked by the acquirers. SEBI may, under regulation 27(1)(d), permit withdrawal of a voluntary offer which has not resulted in conclusion of contract by acceptance of offer of acquirers.

vi. In view of an earlier decision of Hon'ble SAT in Appeal No. 11/2001 (*B.P.Amco Plc* and *Castrol Limited Vs SEBI),* if for any reason the acquisition did not materialise, the acquirer is entitled to take recourse to withdraw the Public Announcement under regulation 27.

vii. Regulation 27(1) (d) gives discretion to permit withdrawal of a public offer in genuinely difficult situations like that faced by the acquirers in this case. In the matter of *Luxottica Group SPA and others vs. SEBI (the Luxottica's case* ), SEBI had argued before the Hon'ble SAT that regulation 27(1) (d) is available to an acquirer who seeks to withdraw an open offer and this argument of SEBI was accepted by Hon'ble SAT in its order dated August 29, 2003 in that case. This is consistent with the direction issued by SEBI in the matter of *Zim Laboratories Limited*, by a letter dated December 03, 2009, wherein SEBI had advised withdrawal of the open offer under regulation 27(1) (d) although it was not impossible for acquirer in that case to make the open offer.

viii. The inability of the acquirers and PAC to go ahead with the open offer has defeated the primary objective of taking management control over the target company, which was identified as an asset-rich company with great potential and whose performance deteriorated primarily due to poor management of the target company.

ix. In this case, the offer price had been determined under regulation 20 (4) of the Takeover Regulations taking into account the market price that prevailed in the preceding two weeks and in the alternate in the preceding 26 weeks with reference to the date of the Public Announcement. The Takeover Regulations do not envisage a situation like the present one wherein, if the open offer is insisted, the offer price would be fixed with reference to a date two years prior to the date of public announcement. The drastic changes that have taken place, subsequent to making the voluntary Public Announcement, in the key financial parameters of the target company have rendered the public offer difficult. Further, changes in the book value and EPS, current assets and liabilities, loans and advances extended by the target company, having regard to the significant time gap since the date of making of the

Public Announcement have made the very basis of arriving at the offer price unrealistic and infructuous.

x. In view of these submissions, it has been requested that SEBI should permit withdrawal of public offer envisaged in the Public Announcement.

5. During hearing, Mr Pramod Jain agreed to submit details of alleged encumbered properties of the target company including the date of incurring liabilities, creation of encumbrance, etc. and the actions taken/litigations filed by the acquirers against the target company and its promoters/management. However, he has not furnished such details.

6. I have considered the oral and written submissions of the acquirers and PAC and other relevant material available on record to decide the issue whether they may be allowed to withdraw the public offer, under regulation 27(1)(d) of the Takeover Regulations in the instant case.

7. It is noted from the records that on receipt of the DLO, SEBI vide its letter dated December 07, 2009 sought certain clarifications thereon and the merchant banker filed its reply vide letter dated December 23, 2009. Mr Pramod Jain, vide his letter dated December 24, 2009 and Pranidhi Holdings Private Limited vide its letter dated December 30, 2009, alleged *inter alia* that the promoters of the target company were making attempts to sell or dispose of the properties of the target company in order to discharge their personal liabilities and requested SEBI to inquire/investigate into the same. Vide email dated January 18, 2010, Mr. Pramod Jain again complained, *inter alia* that the conduct of voting and the process undertaken in the Extra-Ordinary General Meeting (EGM) of the target company held on January 18, 2010 was highly suspect. SEBI vide email dated January 19, 2010 had replied stating *inter alia* that at that stage there was no scope for SEBI to interfere since it noted that as per regulation 23 (1) of the Takeover Regulations, the target company can dispose of any of its assets with approval of its shareholders after the date of the Public Announcement. Moreover, Mr. Pramod Jain had already filed a petition before the Company Law Board (CLB) for stalling the EGM.

8. Mr. Pramod Jain, vide his email dated January 20, 2010 once again complained regarding the alleged creation of third party interest on the immovable properties of the target company and alleged violation of regulation 23(1) of the Takeover Regulations by the target company. The merchant banker, vide its letter dated January 29, 2010 reiterated the allegations made by the acquirers against the target company and its promoters. Upon examination of the allegations,

SEBI vide letter dated February 03, 2010 advised the merchant banker that SEBI is not the competent authority to administer the authenticity of the process of passing the resolution and the decision taken in the EGM held on January 18, 2010 and that CLB is examining the issue related to the EGM of the target company and resolution passed therein. The merchant banker, vide letter dated May 05, 2010, informed SEBI that the acquirers have reached an amicable settlement with the target company and their petition before CLB challenging the resolutions passed in the EGM dated January 18, 2010 has been withdrawn.

9. I note that having confirmed that the acquirers had reached amicable settlement with the target company, as mentioned above, the merchant banker vide its letter dated February 24, 2011 forwarded a complaint dated February 22, 2011 from Mr. Pramod Jain again alleging violation of regulation 23 of the Takeover Regulations by the target company with regard to alleged sale of the assets of the target company. In this letter, Mr. Pramod Jain had also stated that he was "*fully conscious that there is no provision within SEBI Guidelines to permit withdrawal of open offer*". By letter dated March 11, 2011, SEBI had advised the merchant banker that it has not provided any material inputs from its side and has merely forwarded the same allegations which have already been responded to by SEBI vide letter dated February 03, 2010 and which have been amicably settled as informed by the merchant banker vide its letter dated May 05, 2010. I also note that vide letter dated May 19, 2011, the merchant banker informed SEBI that the acquirers have filed a suit in a Civil Court praying, *inter alia*, for restraining the target company and promoters from creating third party interest/disposing of the property and other assets of the target company.

10. I further note that SEBI had received various complaints against the acquirers and PAC also on various dates during examination of the complaints of the acquirers and PAC and also during examination of the DLO. The merchant banker was requested, from time to time, to furnish necessary information/documents while inquiring into the complaints. SEBI had also sought information/documents from third parties to inquire into the said complaints.

11. After examining the complaints, replies/comments of the merchant banker and other third parties, when SEBI was about to issue its observations on the DLO , the PAC vide its letter dated August 2, 2011 requested SEBI to permit the acquirers to withdraw the public offer under regulation 27(1) (d) of the Takeover Regulations. However, Mr. Pramod Jain vide his letter dated August 9, 2011, again raised the issue of alleged violations of Takeover Regulations by the target company and requested SEBI to direct the target company to inform its shareholders about the

exact status of its prime assets valuing over ₹1000 crores and the possession of the original title deeds of these assets and fund usage. He had requested that until the acquirers and PAC are assured that these concerns are addressed, the process of open offer be kept in abeyance. On receipt of such different requests from Mr. Pramod Jain and PAC**,** SEBI, vide letter dated August 16, 2011 advised them to make their representations in the matter only through the merchant banker. The merchant banker, vide letter dated September 6, 2011 forwarded the complaint dated September 01, 2011 from Mr. Pramod Jain and submitted that it did not have any means or authority to verify the various allegations and charges levied by Mr. Pramod Jain against the target company and its management .The merchant banker, in this letter, requested SEBI to issue observations on the DLO under regulation 18(2) of the Takeover Regulations. SEBI vide email dated September 09, 2011 replied stating, *inter alia*, that no specific allegation has been made and, therefore, advised the merchant banker to provide a tabulated list of all the allegations of the acquirers and PAC. The merchant banker did not furnish the list and instead vide its letter dated October 11, 2011, forwarded a copy of the request dated October 08, 2011 of the acquirers seeking permission to withdraw the public offer.

12. From the above, I find that SEBI has been corresponding with the merchant banker/ acquirers/ PACs from time to time in relation to the DLO and the complaints received in the matter from the acquirers/PAC and third parties. Therefore, in my view, the allegation that there was delay on the part of SEBI is not correct. I also find that the acquirers had been agitating the issues relating to the resolution passed by the shareholders of the target company in its EGM held on January 18, 2010 and the alleged mismanagement in the affairs of the target company before the authorities/court having jurisdiction in the matter. Admittedly, the acquirers have filed S. C. Suit No. 817 of 2011 against the target company before the Hon'ble City Civil Court (Dindoshi Branch), Mumbai, wherein an *interim* order granting stay not to create any third party interest on the property was passed. I also find that, at one point of time, the acquirers confirmed that they have entered into an amicable settlement in the matter before CLB and later on they had been complaining to SEBI to take action against the target company and its management for alleged mismanagement of the affairs of the target company, despite SEBI having informed them through the merchant banker that it does not have any jurisdiction in these matters.

13. After considering the facts and circumstances of this case I am of the view that while determining the merit of a case under regulation 27(1)(d), the entire scheme of the Takeover Regulations has to be kept in mind. In this context, I think a brief reference to the governing regulatory regime is necessary. The Takeover Regulations provide certain ground rules to be

followed by the concerned parties in the matters relating to substantial acquisition of shares and control in a target company. The Takeover Regulations were framed on the basis of the recommendations of Justice Bhagwati Committee Report dated January 18, 1997 which pointed out that the Takeover Regulations should operate principally to ensure fair and equal treatment of all share holders in relation to substantial acquisition of shares and takeovers and the Regulations should ensure that such process do not take place in a clandestine manner without protecting the interest of the share holders. The Committee had also recognised that there should be a set of 'General Principles' which should guide the interpretation and operation of the Regulations, especially in circumstances which are not explicitly covered by the Regulations. These principles are:

1. *Equality of treatment and opportunity to all shareholders.*
2. *Protection of interests of shareholders.*
3. .....
4. .....
5. .....
6. *An offer to be announced only after most careful and responsible consideration*
7. *The acquirer and all other intermediaries professionally involved in the offer, to exercise highest standards of care and accuracy in preparing offer documents.*
8. *Recognition by all persons connected with the process of substantial acquisition of shares that there are bound to be limitations on their freedom of action and on the manner in which the pursuit of their interests can be carried out during the offer period.*
9. *All parties to an offer to refrain from creating a false market in securities of the target company.*
10. *No action to be taken by the target company to frustrate an offer without the approval of the shareholders."*

The Committee had also recommended that *"In the event of any ambiguity or doubt as to the interpretation of the regulations, the concerned authority shall pay adequate attention to and be guided by any one or more of the aforesaid general principles having a bearing on the matter".*

14. Regulations 10, 11 and 12 are the core regulations that deal with substantial acquisition of shares and control. They govern voluntary as well as mandatory Public Announcement in case of

substantial acquisition of shares and/or acquisition of control. The Public Announcement contemplated in these regulations must be in accordance with the Takeover Regulations. All the allied regulations of the Takeover Regulations apply to both types of Public Announcements.

15. As per regulation 22 (1), *'the public announcement of offer to acquire the shares of the target company shall be made only when the acquirer is able to implement the offer.'* Thus, an acquirer should make Public Announcement only after most careful considerations and must ensure that he is able to implement the offer.

16. Regulation 27 provides for withdrawal of public offer. Regulation 27(1) as applicable in this case, is reproduced hereunder:

> *"**Withdrawal of offer**.*
>
> *27. (1) No public offer, once made, shall be withdrawn except under the following circumstances:-*
>
> *(a) (Omitted w.e.f. 9.9.2002)*
>
> *(b) the statutory approval(s) required have been refused;*
>
> *(c) the sole acquirer, being a natural person, has died;*
>
> *(d) such circumstances as in the opinion of the Board merit withdrawal.*
>
> *(2) ……..."*

17. The background under which this regulation should be read has been observed by Hon'ble SAT in the above mentioned Nirma's case which is as follows:

> *" …….. having regard to the scheme of the takeover code, it is clear that it has a threefold purpose (a) to ensure that the target company is aware of the substantial acquisition, (b) to ensure that in the process of substantial acquisition or takeover, the securities market is not distorted or manipulated, and (c) to ensure that the small investors are given an option to exit, that is, they are offered a choice to either offload their shares at a price as determined in accordance with the takeover code or to continue as shareholders under the new dispensation. In other words, the takeover code is meant to ensure fair and equal treatment of all shareholders in relation to substantial acquisition of shares and takeovers and that the process does not take place in a clandestine manner without protecting the interest of the shareholders."*

18. Regulation 27(1) starts with a negative command, that as a general rule, a public offer once made should not be allowed to be withdrawn. The public offer can be withdrawn only in exceptional circumstances specifically provided in clause (b) and (c) and under the residuary clause (d) with general words *"such circumstances as in the opinion of the Board merit withdrawal"*. As held by the Hon'ble SAT in Nirma's Case, the provisions of clause (b) to (d) are exceptions to the general rule and they have to be construed very strictly. Clause (d) does not permit automatic withdrawal of public offers. Withdrawal under clause (d) requires permission of SEBI. In the above mentioned Luxottica's case, the Hon'ble SAT had observed that *"Unchecked automatic withdrawal of offer being capable of misuse, the authorities deliberately put the checks and control through the requirement of obtaining SEBI approval."*.

19. Regulation 27(1) equally applies to all kinds of public offers and does not contemplate different treatment to voluntary offers and mandatory/triggered public offers. Therefore, I do not agree with the argument that the since the acquirers herein have made a voluntary public offer, they should be given different treatment under regulation 27(1)(d). In my view, the law contained in regulation 27(1) shall apply in this case also in the same manner as it applies to any other case.

20. In the Nirma's case, Hon'ble SAT has held that while applying clause (d), the rule of *ejusdem generis* gets attracted and the general words "*such circumstances….*" referred to in clause (d)) have to be construed as limited to the kind of circumstances mentioned in clauses (b) and (c) . In that case , Hon'ble SAT held as under :

> *"**……** The framers of the takeover code could not anticipate all such situations which would make it impossible to complete the public offer and, therefore, left it to the Board to decide on a case to case basis whether "such circumstances" exist which may require withdrawal of the offer. <u>It goes without saying that the opinion of the Board in this regard has to be formed on a reasonable basis having regard to the interest of the investors.</u> Far from having a different legislative intent, we are of the view that the object of the takeover code would be better achieved if a restricted meaning, as discussed above, is assigned to the exceptions contained in clauses (b) to (d) of Regulation 27(1). If a liberal meaning is assigned to the words "such circumstances" appearing in clause (d), then not only will the objects of the takeover code get frustrated but the public shareholders will be deprived of their rights thereunder. If an acquirer is allowed to withdraw from the public offer on the asking or even on the ground that he discovered some adverse facts pertaining to the financial health of the target company subsequent to the acquisition/public offer, the interest of the public shareholders will be seriously jeopardised as they will be deprived of their right to*

*exit from the target company which is a valuable right given to them by the takeover code. …….In view of our discussion hereinabove, we have no hesitation in holding that "such circumstances" referred to in clause (d) of Regulation 27(1) have to be limited to the kind of circumstances mentioned in the preceding clauses (b) and (c) which would make it impossible for the acquirer to go through with the public offer. ……."*

21. The acquirers have contended that the rule of *ejusdem generis* does not apply while applying clause (d) because no same genus can be found in clauses (a) *[prior to its deletion]* (b), (c) and (d) of regulation 27(1). In this regard, I note that clause (a) in regulation 27(1) was omitted by the SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2002 with effect from 09.09.2002. As per legislative practice, a provision of law can be amended in various ways such as deletion (omission), substitution, modification, etc. The Hon'ble Supreme Court in *Bhagat Ram Sharma v. Union of India, 1988 Supp SCC 30,* has held that it is a matter of legislative practice to provide, while enacting an amending law, that an existing provision shall be deleted (omitted). Such deletion/omission has the effect of repeal of the existing provision. After the amendment, clause (a) has been repealed and the circumstances of withdrawal provided in clause (b) to (d) are the only exceptions available under regulation 27(1). Regulation 27(1) as it exists on the date of request shall apply in this case and in my view, reliance on an omitted/repealed provision is misplaced.

22. As far as clauses (b) and (c) are concerned they also have the element of impossibility- clause (b) envisages the situation where statutory approvals required have been refused and clause (c) envisages the situation where the 'sole' acquirer dies. Hon'ble SAT also in its Judgement in *Nirma's Case* has taken the view that clauses (b) and (c) have the element of impossibility. It is why Hon'ble SAT held that the interpretation of the words "such circumstances" mentioned in clause (d) should also be limited to the circumstances mentioned clauses (b) and (c) which would make it impossible for the acquirer to go through with the public offer.

23. I note that the judgement of SAT in Nirma's case, has given ruling on the interpretation and scope of law enunciated in regulation 27(1). The judgement is not fact specific. Therefore, the judgement of the Hon'ble SAT in Nirma's case is very relevant for applying regulation 27(1) on any withdrawal request. I, therefore, do not agree with the contention that the ratio of the judgement in Nirma's case does not apply in this case.

24. According to the acquirers, it is evident from the FIR dated July 25, 2009 lodged by Indiabulls Financial Services Limited that promoters of the target company have resorted to settle their personal borrowings by sale of prime properties of the target company. If, it is so, in my view the acquirers should have exercised their due diligence into the affairs of the target company before making the voluntary Public Announcement on November 12, 2009, which is much after the filing of the FIR by Indiabulls on July 25, 2009. These facts are similar to the facts in Nirma's case.

25. I also note from the records that the PAC had lent ₹8.5 crore to the target company against pledge of shares forming 5.05% of the target company's total share capital. Further, the acquirer and PAC together have purchased shares worth ₹63.33 lakhs from the securities market before making the Public Announcement. In such circumstances, it is highly unlikely that anyone who had invested a huge sum of ₹8.5 crore and intending to acquire substantial stake and control in the target company would make the Public Announcement without exercising due diligence regarding the financial condition and quality of management of the target company. The acquirers in this case are not strangers to the target company. The acquirers and PAC also hold significant stake (6.47%) in the target company they, therefore, should have exercised due diligence before making the Public Announcement. In view of the obligation under regulation 22 (1), the acquirers and PAC should have made the Public Announcement only after most careful and reasonable considerations and they must have ensured that they are able to implement the offer. Having made the public offer they are bound by the limitations and obligations created under the Takeover Regulations. As mentioned above in this regard, Hon'ble SAT has very clearly opined in the *Nirma's Case* that –' *If an acquirer is allowed to withdraw from the public offer on the asking or even on the ground that he discovered some adverse facts pertaining to the financial health of the target company subsequent to the acquisition/public offer, the interest of the public shareholders will be seriously jeopardised as they will be deprived of their right to exit from the target company which is a valuable right given to them by the takeover code. …"*

26. The Takeover Regulations which is a special law to regulate "*substantial acquisition of shares and takeovers*" in a target companies lays down a self contained code for open offer including the requirements relating to the disclosures in Public Announcement, Letter of Offer, offer price, escrow account, withdrawal of open offers, tendering of shares (acceptance) by shareholders, payment of consideration etc. If withdrawal of public offer is permitted as per the general law of

contract provided in the Indian Contract Act, 1872 the acquirers shall be free to make any Public Announcement envisaging the public offer and withdraw the same at their free will and such Public Announcement/public offer would lead to distortion or manipulation in the securities market. It is for this reason that regulation 27(1) allows withdrawal of public offer in exceptional circumstances. If the argument of acquirers is accepted, the acquirers can withdraw the public offer even after opening of the offer and when some shareholders have tendered their shares and other have not. If such a withdrawal is allowed it would defeat the very objective of the Takeover regulations. In my view, the provisions of regulation 27 would exclusively apply in case of withdrawal of public offers under Takeover Regulations. I, therefore, do not agree with contention of the acquirers in this regard too.

27. Now coming to the reliance of the acquirers on the judgements of the Hon'ble SAT in *B. P. Amoco case* (order dated April 27, 2001) and in *Luxottica's case (*order dated August 29,2003) I find that they were in the context of acquisitions prior to the amendment to regulation 27(1) on 09.09.2002. Besides, the reference to *B.P. Amoco case* is out of context since in that case the Hon'ble SAT was not examining the scope of regulation 27(1) (d). In that case, Hon'ble SAT while dealing with a public offer which was subject to fulfilment of certain conditions including statutory approval, observed that if statutory approvals could not be obtained, the acquirer need not have proceeded with the offer process as regulation 27 takes care of such an eventuality.

28. In *Luxottica's case*, the public offer in question was subject to fulfilment of certain conditions. The Hon'ble SAT rejected the contention of the appellant that regulation 27(1) does not provide for withdrawal of offer on the ground that "condition precedent" was not fulfilled and only exception is a situation where statutory approval was refused. Hon'ble SAT recognised SEBI's discretionary power in regulation 27(1)(d) and observed that "*reasonable conditions put in the offer document and the difficulty in fulfilling those conditions for no fault of the offeror could be one of those circumstances for granting withdrawal. It is not an automatic withdrawal. The offeror has to convince SEBI the genuine difficulty in fulfilling the condition."* I note that this judgement was delivered in the context of regulation 27(1) as it existed prior to September 09, 2002. Further, it was in relation to a public offer that was subject to fulfilment of certain conditions. In the present case, there is no condition precedent in respect of the public offer as was in *Luxottica's case.* In view of this judgement of Hon'ble SAT, I further note that if the condition precedent cannot be fulfilled by the acquirer it will not be possible for him to continue with the offer and therefore withdrawal of the public offer could be permitted by SEBI under regulation 27(1)(d), if applied for.

29. As regards the submission of the acquirers that SEBI in the matter of Zim Laboratories Limited had permitted withdrawal of the offer under regulation 27(1)(d), I have perused the Public Announcement dated April 21, 2009 made by the acquirers (promoter group of Zim Laboratories Limited). I note that in that case, the acquirers had acquired 44,40,590 equity shares (74.01%) of the company in the past and made the voluntary Public Announcement dated April 21, 2009 under regulation 11(1) and 11(2) of the Takeover Regulations. As on the date of the said Public Announcement, the acquirers along with other promoter group entities were holding 44, 99,960 equity shares (75%) in the said company and they announced to acquire further 12, 00,000 fully paid up equity shares representing 20% of the paid up equity capital of the said company through open offer under the Takeover Regulations. The shares of the said company were listed only on Over the Counter Exchange of India (OTCEI) and were not traded during the six calendar months preceding the month in which the Public Announcement was made. In terms of clause 40A of the Listing Agreement, the company had to maintain minimum 25% public shareholding. I also note that, in the Public Announcement as well as during examination of the case by SEBI, the acquirers had expressed their intention to delist the shares of the said company from the OTCEI. The Takeover Regulations (as they applied on the relevant date in that case) did not permit a public offer for acquiring further shares of a Target Company by a person already holding seventy five percent shares in that company . Further, delisting of shares of a company is not permitted through an open offer under the Takeover Regulations as it has to be in accordance with the SEBI (Delisting of Equity Shares) Regulations, 2009 (the Delisting Regulations). Thus, it was not possible for the acquirers to make a public offer under the Takeover Regulations. Therefore, in the facts and circumstances of that case and in the interests of investors, SEBI advised the acquirers therein to withdraw the Public Announcement dated April 21, 2009 under regulation 27 of the Takeover Regulations and directed them to provide exit option to the shareholders of the company by making a delisting offer under the Delisting Regulations. SEBI also directed the acquirers to include the offer price ( ₹35.22/ per equity share), disclosed by the acquirer in respect of public offer under Takeover Regulations, as one of the parameters for determining the floor price under the Delisting Regulations. In my view, the decision of SEBI in that case was within the scope and ambit of regulation 27(1)(d) as it was impossible for the acquirer to go through the public offer envisaged in the Public Announcement dated April 21, 2009 under the Takeover Regulations. Further, the facts of the instant case are different from the facts of the case of the acquirers in Zim Laboratories Limited.

30. I note that the acquirers and PAC have sought to withdraw the public offer made by them primarily because, as alleged by them, the performance of the target company has deteriorated due to poor management and the cost involved in the acquisition pursuant to public offer at the offer price of ₹101 per share determined w.r.t date of Public Announcement as against the prevailing market price is turning out to be high. In terms of regulation 20 as applicable in this case, the offer price is to be determined with reference to the date of the Public Announcement. Merely because the public offer is delayed, for whatsoever reasons, the reference date for determining offer price cannot be different. Subsequent fall in the market price or devaluation of EPS, etc. cannot be reasons to permit withdrawal of public offer under regulation 27(1) (d). This view of mine is fully supported by the finding of the Hon'ble SAT in the Nirma's case as discussed in previous paras.

31. I, therefore, after considering all the facts and circumstances, the submissions of the acquirers made before me and various judgments discussed in the previous paras, find that the grounds stated by the acquirers and PAC do not merit withdrawal of the public offer envisaged in the Public Announcement dated November 12, 2009, under regulation 27(1)(d) of the Takeover Regulations.

32. I, therefore, in exercise of the powers conferred upon under section 19 of the Securities and Exchange Board of India Act, 1992 read with regulation 27(1)(d) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, do not permit withdrawal of the public offer made by Mr. Pramod Jain and Pranidhi Holdings Private Limited (the acquirers) along with J. P. Financial Services Private Limited (person acting in concert) vide Public Announcement dated November 12, 2009 with respect to their voluntary offer to acquire 44,02,201 equity shares of the target company viz; Golden Tobacco Limited.

33. Having held that the alleged conduct of the target company and its management will not affect the obligation of the acquirers to continue with the public offer once the public announcement has been made, I am of the opinion that the alleged violations of regulation 23 of the Takeover Regulations and clause 36 of the Listing Agreement in the case of the target company should not go un-investigated and violators, if any, should not go unpunished. Accordingly, SEBI shall investigate into the matter to find out any violation of the Takeover Regulations, Listing Agreement and the Securities Contracts (Regulation) Act, 1956 by the target company, as alleged in this matter and thereafter, take appropriate action as it may deem appropriate.

**DATE: April 13, 2012**
**PLACE: MUMBAI**

**RAJEEV KUMAR AGARWAL**
**WHOLE TIME MEMBER**
**SECURITIES AND EXCHANGE BOARD OF INDIA**