BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. SVKM/AO/35-46/2015-16]

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

In respect of

Sr. No.	Name of the Entit	PAN	Order No.
1	**Alok Electricals Pvt. Ltd**	AADCA2701J	SVKM/AO-35/2015-16
2	**Antique Texfab Pvt Ltd.**	AAGCA7223G	SVKM/AO-36/2015-16
3	**Balaji Texfab Pvt Ltd.**	AACCB8369A	SVKM/AO-37/2015-16
4	**Coronation Builders & Engineers Pvt. Ltd.**	AABCC8667R	SVKM/AO-38/2015-16
5	**Durga Fabricators and Engg Pvt Ltd.**	AACCD5661P	SVKM/AO-39/2015-16
6	**Florid Infrastructure Pvt Ltd.**	AABCF0518L	SVKM/AO-40/2015-16
7	**Mahima Developers & Builders Ltd.**	AADCM6501C	SVKM/AO-41/2015-16
8	**Olive Vinimay Pvt Ltd.**	AABCO0690G	SVKM/AO-42/2015-16
9	**Pensive Agencies Pvt Ltd.**	AAECP6720H	SVKM/AO-43/2015-16
10	**Salasar Texfab Pvt Ltd.**	AAJCS8123L	SVKM/AO-44/2015-16
11	**Tanvi Fincap Pvt Ltd.**	AAACT6871B	SVKM/AO-45/2015-16
12	**Vibhut Builders & Engg Pvt Ltd.**	AACCV7326D	SVKM/AO-46/2015-16

In the matter of

M/s Era Infra Engineering Limited

BACKGROUND IN BRIEF

1. Securities and Exchange Board of India (**SEBI**) conducted investigation into the trading activities of certain entities in the scrip of M/s Era Infra

Engineering Limited (hereinafter referred to as "**EIEL / Company**") for the period January 1, 2008 to April 30, 2009. It revealed that Alok Electricals Pvt. Ltd., Antique Texfab Pvt. Ltd., Balaji Texfab Pvt. Ltd., Coronation Builders & Engineers Pvt. Ltd., Durga Fabricators and Engg Pvt. Ltd., Florid Infrastructure Pvt. Ltd., Mahima Developers & Builders Ltd., Olive Vinimay Pvt. Ltd., Pensive Agencies Pvt. Ltd., Salasar Texfab Pvt. Ltd., Tanvi Fincap Pvt. Ltd. and Vibhut Builders & Engg Pvt. Ltd. (hereinafter individually referred to as "**Noticee no. 1, 2, 3 & so on** and collectively as "**Noticees**"), are inter-connected on the basis of common address, common directorship and common contact numbers. All the Noticees are part of the members of Kiran Group who were disclosed as 'Persons Acting in Concert' (**PACs**) to stock exchanges in terms of Regulation 7(1) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations,1997 (hereinafter referred to as "**SAST Regulations, 1997**").

2. The total number of shares of EIEL as on February 27, 2009 (hereinafter referred to as "acquisition day") was 14,30,17,760 and the collective shareholding of Noticees increased from 71,18,046 (i.e. 4.977% of total share capital EIEL) to 72,67,549 (i.e. 5.082% of total share capital of EIEL) as on the said date. The shareholding details of Noticees prior to and after the acquisition are as follows:

Sr.No.	Name of the entity	Pre-acquisition Holding as on February 26, 2009		Post-acquisition Holding at the end of February 27, 2009	
		No. of shares	% of total shares	No. of shares	% of total shares
1	Alok Electricals Pvt Ltd.	1,942	0.001	1,942	0.001
2	Antique Texfab P Ltd.	87,500	0.061	87,500	0.061
3	BalajiTexfab P Ltd.	32,505	0.023	32,505	0.023
4	Coronation Builders & Engineers P Ltd.	1,500	0.001	1,500	0.001

5	Durga Fabricators and Engg Pvt Ltd.	176,984	0.124	176,984	0.124
6	Florid Infrastructure Pvt Ltd.	667,193	0.467	667,193	0.467
7	Mahima Developers & Builders Ltd.	1,828,614	1.279	2,441,481	1.707
8	Olive Vinimay Pvt Ltd.	1,600	0.001	1,600	0.001
9	Pensive Agencies Pvt Ltd.	1,455,858	1.018	991,555	0.693
10	SalasarTexfab Ltd.	26,462	0.019	26,462	0.019
11	Tanvi Fincap Pvt Ltd.	1,782,928	1.247	1,782,928	1.247
12	Vibhut builders & Engg Pvt Ltd.	1,054,960	0.738	1,055,899	0.738
	Total	**71,18,046**	**4.977%**	**72,67,549**	**5.082%**

3. As the collective shareholding of the Noticees in EIEL crossed the threshold limit of 5% on February 27, 2009, they were required to make the statutory disclosure within 2 days of transaction to the company and to the stock exchange/s where the shares of the company are listed regarding such acquisition as stipulated by Regulation 7(1) read with Regulation 7(2) of SAST Regulations, 1997. However, no disclosure in terms of the afore-mentioned regulations was made by the Noticees.

APPOINTMENT OF ADJUDICATING OFFICER

4. The undersigned was appointed as Adjudicating Officer vide order dated May 25, 2015 under section 15I of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as **"SEBI Act, 1992"**) read with Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalty by Adjudicating Officer) Rules, 1995 (hereinafter referred to as the **'Rules'**) to inquire into and adjudge under section 15A(b) of the SEBI Act,1992 for the alleged violations of provisions of Regulation 7(1) read with regulation 7(2) of SAST Regulations, 1997; read with Regulation 35 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as "**SAST Regulations, 2011"**) by the Noticees.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

5. A common Show Cause Notice dated June 29, 2015 (hereinafter referred to as "**SCN**") was issued to the Noticees under Rule 4 of the Rules to show cause as to why an inquiry should not be initiated and penalty be not imposed under section 15A(b) of the SEBI Act, 1992 for the aforesaid allegations specified in the SCN. Copies of the documents relied upon in the SCN were provided to the Noticees along with the SCN. The said SCN was duly delivered to the noticees. However, no reply to the SCN was submitted by the noticees within the time prescribed in the SCN.

6. Thereafter, Noticees were given opportunity of personal hearing on September 29, 2015. Noticees, vide letter dated September 25, 2015 through Mr. Alok Sinha, Advocate, submitted their reply to the SCN and requested for adjournment of hearing. Another opportunity of personal hearing was granted to the noticees on November 17, 2015. On the date of hearing, Shri Alok Sinha and Shri Ashok Kumar Sharma, Advocates appeared on behalf of the Noticees. During the course of hearing, they submitted additional reply dated November 16, 2015 of the noticees. The summary of submissions of the noticees with respect to the charges are as follows:

    - *Noticees have already been penalized ₹ 5,00,000/- by another Adjudicating Officer, SEBI vide order dated August 20, 2013 when they failed to make disclosure to the company and the stock exchanges as per Regulations 7(1) and 7(2) of SAST Regulations, 1997 about crossing of their shareholding in EIEL above 10% limit during the period June 2009 to September 2009. The said penalty has already been deposited by the noticees with SEBI in 2013.*
    - *Default stated in the SCN pertains to the period 27.02.2009, which is prior to previous adjudication of the entities. The default stated in the SCN has already been considered in the previous adjudication and the penalty to that effect has already been imposed on the entities.*

- *Further, Mahima Developers & Builders Ltd., Tanvi Fincap Pvt. Ltd. and Olive Vinimay Pvt. Ltd. do not belong to Kiran Group as stated in the SCN and these three entities have different address and directors. If default is considered after segregating the holding of these three entities the Kiran Group did not cross the threshold limit of 5%.*
- *Violations of regulations were technical in nature and crossing of the threshold limit was also intimated to the company and stock exchange on 20.08.2013. Hence a lenient view may be taken*

CONSIDERATION OF ISSUES AND FINDINGS

7. I have carefully perused the oral and written submissions of the Noticees and the documents available on record. The issues that arise for consideration in the present case are :
    a. Whether Noticees had violated the provisions of regulation 7(1) read with regulation 7(2) of the SAST Regulations, 1997?
    b. Does the violation, if any, attract monetary penalty under section 15A(b) of SEBI Act?
8. Relevant provisions of SAST Regulations, 1997 are as under:-

SAST Regulations, 1997

*"**Acquisition of 5 per cent and more shares or voting rights of a company.***
7. (1) Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent or ten per cent or fourteen per cent or fifty four per cent or seventy four per cent shares or voting rights in a company, in any manner whatsoever, shall disclose at every stage the aggregate of his shareholding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed.
(1A).........
(2) The disclosures mentioned in sub-regulations (1) and (1A) shall be made within two days of,—
(a) the receipt of intimation of allotment of shares; or
(b) the acquisition of shares or voting rights, as the case may be."

Finding

The issues for examination in this case and the findings thereon are as follows:

Issue I - Whether Noticees had violated the provisions of regulation 7(1) read with regulation 7(2) of the SAST Regulations, 1997?

9. Upon perusal of submissions of the Noticees and documents available on record, I note that the shareholding of Noticees as PACs increased from 71,18,046 (i.e. 4.977% of total share capital EIEL) on February 26, 2009 to 72,67,549 (i.e. 5.082% of total share capital of EIEL) on February 27, 2009 and thereby their combined shareholding had crossed the threshold limit of 5% on the said date as stipulated under Regulation 7(1) read with Regulation 7(2) of SAST Regulations, 1997. It is not disputed that disclosure in terms of the afore-mentioned regulations was not made by the Noticees.

10. Learned Counsel for the Noticees submitted that the default stated in the SCN pertained to the period 27.02.2009 and they have already been penalized ₹ 5,00,000/- by another Adjudicating Officer, SEBI vide order dated August 20, 2013 when they failed to make disclosure to the company and the stock exchanges on crossing of their shareholding in EIEL above 10% limit. It was argued that the default stated in the SCN has already been considered in the previous adjudication and the penalty to that effect has already been imposed and also paid by the entities.

11. In this regard, I note that the term 'acquirer' as defined under Regulation 2(b) of SAST Regulations, 1997 includes persons acting in concert (**PAC**) with the acquirer and the requirement of Regulation 7(1) is that the acquirer including the PACs has to make necessary disclosures at ***each stage*** whenever the acquisition by them resulted in their shareholding exceeding the limits of <u>5% or 10% or 14% or 54% or 74%</u> shares or voting rights in a

company. The Adjudication order dated August 20, 2013 referred to by the noticees related to the violations committed by various PACs including all the noticees herein for breaching the limit of 10% on July 29, 2009, whereas the allegation against the noticees in the matter under consideration in the present proceedings is that of crossing the limit of 5% on 27.02.2009 and not making the requisite disclosures as stipulated under Regulations 7(1) read with 7(2) of SAST Regulations, 1997. The PACs referred to in the said earlier order also included certain entities who are not part of the instant proceedings. Hence, the submissions of the noticees that they have already been adjudicated for the violation of Regulation 7(1) of SAST Regulations, 1997 is not correct. The law requires the noticees to make disclosures at each of the several stages of acquisition laid down under Regulation 7(1) of SAST Regulations, 1997.

12. In this context, I would like to rely on the judgment of Hon'ble Securities Appellate Tribunal (**SAT**) in *Premchand Shah and Others V. SEBI* (*Appeal no. 108 of 2010 decided on February 21, 2011*), wherein it was observed that "…….*When a law prescribes a manner in which a thing is to be done, it must be done only in that manner…….Non-disclosure of information in the prescribed manner deprived the investing public of the information which is required to be available with them when they take informed decision while making investments*………………… "

13. Noticees have further submitted that the 3 noticees namely, noticee no. 7, 8 and 11, do not belong to 'Kiran Group' as stated in the SCN as these three entities have different address and directors. Merely because some of the noticees have different address and directors, does it mean that they can never be considered as PAC if the facts point out otherwise? Whether or not two or more persons are acting in concert is a question of fact and is to be

answered on the facts and circumstances of each case. As it is difficult to prove acting in concert by direct evidence, the circumstantial evidence has to be taken into consideration including nearness of relationship etc. while proving the concert. Further, the circumstantial evidence should be sufficient to raise a presumption in its favour with regard to the existence of a fact sought to be proved. Since it is exceedingly difficult to prove facts which are especially within the knowledge of parties concerned, the legal proof in such circumstances partakes the character of a prudent man's estimate as to the probabilities of the case. The law in SAST Regulations also presumes certain categories of people as 'Persons deemed to be Acting in Concert'. Of course, it is a rebuttable presumption.

14. In this regard, the following observations of the Supreme Court of India in *Commissioner of Income-tax, Bombay City-, v. Jubilee Mills Ltd.* {(1963) 48 ITR 9 SC} is relevant "*The test is not whether they have actually acted in concert but whether the circumstances are such that human experience tells us that it can safely be taken that they must be acting together. It is not necessary to state the kind of evidence that will prove such concerted acting. Each case must necessarily be decided on its own facts."*

15. In the Adjudication order dated August 20, 2013, it was noted that these 3 noticees namely, Mahima Developers & Builders Ltd., Tanvi Fincap Pvt. Ltd. and Olive Vinimay Pvt. Ltd., were simultaneously also acquiring shares when other noticees were acquiring shares. Further all the noticees including these 3 noticees had themselves declared as PACs in the letters dated August 12, 2013 to the Stock Exchanges. Therefore, by their own declaration and conduct they acted as PACs. They are now estopped from claiming otherwise. Moreover, when I peruse the relationship of the noticees as furnished to the noticees along with the SCN, I find a web of

connection amongst them where one noticee is connected with another which in turn is connected with other and so on and the same has not been disputed by the noticees. For example, Sheenu Banerjee was the common director between noticee no. 1, 7 and 8 and there was fund flow between noticee no. 11 with noticee no. 8 and Compact Texfab Pvt. Ltd. (another member of the 'Kiran Group'). Further, Compact Texfab Pvt. Ltd in turn is connected with noticee no. 2, 4, 6 and 10 as one of their directors is common. Further, when I see the daywise holding statement of the members of the 'Kiran Group' including the noticees in the EIEL for the period January 01, 2009 to April 30, 2009, I find that there is consistent change in the shareholding of the members of the 'Kiran Group' including the noticees and on February 27, 2009, their combined shareholding in EIEL touched 5.082% of total share capital of EIEL.

16. Here, it would be pertinent to refer to the following observation of Supreme Court of India in *Commissioner Of Income-Tax, West Bengal vs. East Coast Commercial Co. Ltd {1967 SCR (1) 821}.*

"*It is the holding in the aggregate of a majority of the shares issued by a person or persons acting in concert in relation to the affairs of the Company which establishes the existence of a block. It is sufficient, if having regard to their relation etc., their conduct, and their common interest, that it may be inferred that they must be acting together: evidence of actual concerted acting is normally difficult to obtain, and is not insisted upon."* (*Emphasis supplied*). In such a background, the preponderance of probabilities leads me to presume in favour of treating all the noticees as PACs negating the submission of the noticees that three of them were not PACs with other noticees. There is no evidence to the contrary.

17. In view of the above, I find that the Noticees did not make the requisite disclosure when their shareholding crossed 5% of total share capital of EIEL on February 27, 2009 within the time specified therefor and thereby violated regulation 7(1) read with regulation 7(2) of SAST Regulations, 1997.

Issue II - Does the non-compliance, if any, attract monetary penalty under section 15A (b) of SEBI Act?

18. By not making the disclosures on time, Noticees failed to comply with their statutory obligation. Timely disclosure is mandated for the benefit of the investors at large. The time limit of 2 days for disclosure prescribed under Regulation 7(2) is sacrosanct. The disclosure of acquisition at each of the several stages under Regulation 7(1) sends out signals to the public at large as to the collective holding of the acquires and enables them to take an informed decision as to whether to stay invested or exit from the scrip of the company. Therefore, there can be no dispute that compliance of Regulations is mandatory and it is duty of SEBI to enforce compliance of these regulations.

19. In this context, I would also like to rely on following observation of Hon'ble SAT in the case of *Mr. Ranjan Verghese vs. SEBI* (Appeal No. 152 of 2009 decided on September 22, 2009)

    "....Failure to furnish the necessary information by way of disclosures under the Takeover Code entitles the adjudicating officer to impose a penalty of Rs. 1 lac for each day during which such failure continues or Rs. 1 crore whichever is less. The law was amended in October, 2002 requiring the adjudicating officer to impose stringent penalties on the defaulters so that they act as deterrent for other market players…… Once it is

established that the mandatory provisions of the Takeover Code were violated, the penalty must follow."

20. As the violation of the statutory obligation under regulation 7(1) read with regulation 7(2) of SAST Regulations, 1997 has been established, I hold that the Noticee is liable for monetary penalty under section 15A(b) of SEBI Act, which reads as under:-

"15A. Penalty for failure to furnish information, return, etc. - *If any person, who is required under this Act or any rules or regulations made there under, -*
a)… … …

b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less"

21. To begin our analysis of the penalty to be imposed, it will be appropriate to refer to the judgment of the Hon'ble Supreme Court of India in the matter of Civil Appeal No.1364 -1365 of 2005 in ***SEBI vs. Roofit Industries Limited*** dated November 26, 2015 wherein while interpreting Section 15A of SEBI Act, 1992, it observed as under:

"5. It would be apposite for us to begin our analysis of the penalty to be imposed by laying out Section 15A(a) as it stood subsequent to the 2002 amendment, for the facility of reference:

15A. If any person, who is required under this Act or any rules or regulations made thereunder, -

(a) *to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less; In*

In the connected appeals before us, the Appellant has imposed a penalty of Rs. 75 lakhs despite the failure having continued for substantially more than 75 days. Learned Senior Counsel for the Appellant has contended that the Appellant has discretion to impose a penalty below the number of days of default regardless of the words whichever is less. He has argued that there would be no purpose to Section 15J if the Adjudicating Officers discretion to fix the quantum of penalty did not exist, and that such an interpretation would render certain Sections of the SEBI Act as expropriatory legislation due to the crippling penalties they would impose. We do not agree with these submissions. The clear intention of the amendment is to impose harsher penalties for certain offences, and we find no reason to water them down. The wording of the statute clarifies that the penalty to be imposed in case the offence continued for over one hundred days is restricted to Rs. 1 crore. No scope has been given for discretion. Prior to the amendment, the Section provided for a penalty not exceeding one lakh fifty thousand rupees for each such failure, thus giving the Appellant the discretion to decide the appropriate amount of penalty. In this context, the change to language which does not repose any discretion is even more significant, as it indicates a legislative intent to recall and remove the previously provided discretion. Additionally, Section 15J existed prior to the amendment and was relevant at that time for adjudging quantum of penalty. Once this discretionary power of the adjudicating officer was withdrawn, the scope of Section 15J was drastically reduced, and it became relevant only to the Sections where the Adjudicating Officer retained his prior discretion, such as in Section 15F(a) and Section 15HB. This ought to have been reflected in the language of Section 15I, but was clearly overlooked. Section 15J has become relevant once again,

subsequent to the Securities Laws (Amendment) Act, 2014, which changed Section 15A(a), with effect from 8.9.2014, to read as follows:

15A. ***Penalty for failure to furnish information, return, etc.*** *- If any person, who is required under this Act or any rules or regulations made thereunder,-*

> *(a) to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees;*

The purpose of amendment was clearly to re-introduce the discretion of the Adjudicating Officer which was taken away by the SEBI (Amendment) Act, 2002. Had the failure of the Respondent taken place between 29.10.2002 and 8.9.2014, the penalty ought to have been Rs. 1 crore, without the possibility of any discretion for reduction." (*Emphasis supplied*)

22. The default in the present case occurred on February 27, 2009 when Noticees did not make the requisite disclosure when their shareholding crossed 5% of total share capital of EIEL on February 27, 2009 within the time specified therefor. As the default is for more than 100 days, the penalty is restricted to ₹1 crore @ ₹ 1 lakh per day in terms of Section 15 A(b) of SEBI Act 1992 as it existed then and having regard to the aforesaid judgment of the Hon'ble Supreme Court in Roofit case discussed above in detail.

ORDER

23. After taking into consideration the nature and gravity of the charges established, the order of Hon'ble Supreme Court in the matter of SEBI v. Roofit Industries Ltd. (cited supra) and in exercise of the powers conferred

upon me under Section 15-I of the SEBI Act read with Rule 5 of the Rules, I hereby impose a penalty of ₹ 1,00,00,000/- (Rupees One Crore only) under Section 15A(b) for violation of regulation 7(1) read with regulation 7(2) of SAST Regulations, 1997; read with Regulation 35 of SAST Regulations, 2011 by the noticees i.e. Alok Electricals Pvt. Ltd., Antique Texfab Pvt. Ltd., Balaji Texfab Pvt. Ltd., Coronation Builders & Engineers Pvt. Ltd., Durga Fabricators and Engg Pvt. Ltd., Florid Infrastructure Pvt. Ltd., Mahima Developers & Builders Ltd., Olive Vinimay Pvt. Ltd., Pensive Agencies Pvt. Ltd., Salasar Texfab Pvt. Ltd., Tanvi Fincap Pvt. Ltd. and Vibhut Builders & Engg Pvt. Ltd. The Noticees shall be jointly and severally liable to pay the said monetary penalty.

24. The Noticees shall pay the said amount of penalty by way of demand draft in favour of "SEBI - Penalties Remittable to Government of India", payable at Mumbai, within 45 days of receipt of this order. The said demand draft should be forwarded to The Division Chief (Enforcement Department - DRA-II), Securities and Exchange Board of India, SEBI Bhavan, Plot No. C–4 A, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051.

25. In terms of rule 6 of the Rules, copies of this order are sent to the Noticee and also to the Securities and Exchange Board of India.

Date: December 30, 2015
Place: Mumbai

S. V. Krishnamohan
Chief General Manager &
Adjudicating Officer