WTM/GM/EFD/DRAIII/20/MAR/2017

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under sections 11B and 11(4) of the Securities and Exchange Board of India Act, 1992 and regulation 44 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with regulations 32 and 35 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

In respect of: -

1	**Clearwater Capital Partners (Cyprus) Limited**	**PAN: AACCC9756A**
2	**Clearwater Capital Partners Singapore Fund III Private Limited**	**PAN: AADCC2238C**

In the matter of Kamat Hotels (India) Limited

Background

1. Kamat Hotels (India) Limited (hereinafter referred to as "Target Company" or "KHIL") is a company registered under the Companies Act, 1956 having its registered office at KHIL House, 70 C Nehru Road, Near Santacruz Airport, Vile Parle (East), Mumbai – 400099 and its securities are listed on the Bombay Stock Exchange and the National Stock Exchange.

2. Clearwater Capital Partners (Cyprus) Ltd. along with Clearwater Capital Partners Singapore Fund III Private Limited (hereinafter referred to as "the Noticees") subscribed to the Foreign Currency Convertible Bonds issued by KHIL for an amount of US$ 18 million with an option to convert those bonds into equity shares of the Target Company as per the terms and conditions specified in the document dated March 13, 2007.

3. Subsequently, pursuant to Press Note F No. 9/3/2009 ECB dated February 15, 2010 providing for the revision of conversion price, the shareholders of KHIL at the EGM held on June 10, 2010 passed a special resolution approving and authorising the Board of Directors to revise the original conversion price of Rs.225/- per equity share and to amend the terms and conditions of the bonds and the trust deed. The Board of Directors revised the conversion price to Rs.135/- per equity share for mandatory conversion of the bonds. Thereafter, on August 13, 2010, an inter-se agreement was executed between KHIL, certain promoters of KHIL, Clearwater Capital Partners (Cyprus) Ltd. and Clearwater Capital Partners Singapore Fund III Private Limited.

4. Noticees exercised their right to convert the bonds into equity shares and as a result of conversion of bonds on January 11, 2012, the shareholding of the Noticees in the Target Company increased from 24.50% to 32.23%. This conversion of bonds obligated the Noticees to make a public announcement in terms of regulation 3(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Regulations, 2011). Accordingly, Noticees made a public announcement of open offer on January 11, 2012 for acquisition of 26% shares of the target company from the public shareholders.

5. The merchant banker appointed for the offer (Systematix Corporate Services Limited), vide letter dated January 25, 2012 forwarded a draft letter of offer to SEBI for making an open offer pursuant to regulation 3(1) of the Takeover Regulations, 2011 by the Noticees. After examination of the documents furnished by the merchant banker, SEBI issued certain observations vide letter dated November 30, 2012, pointing out, *interalia,* that the Noticees had acquired control in the target company in view of certain clauses in the inter-se agreement dated August 13, 2010 which necessitated making public announcement in terms of regulation 12 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (Takeover Regulations, 1997). Having not complied with this requirement, the Noticees were in breach of regulation 12 of the Takeover Regulations, 1997. Therefore, the Noticees were advised, through the merchant banker, to make suitable amendment in the draft offer document incorporating the following:

a. That the open offer is pursuant to regulation 12 of Takeover Regulations, 1997 as well.

b. To disclose that SEBI may initiate appropriate penal action against the noticees for the above mentioned alleged violation in terms of the provisions of Takeover Regulations and the Securities and Exchange Board of India Act, 1992 (SEBI Act).

c. To revise the offer price, which shall be higher of:

i. The price calculated on account of trigger of regulation 12 pursuant to entering into inter-se agreement on August 13, 2010 plus interest @10% p.a. for delay thereon. The period of delay shall be from the date on which the public announcement ought to have been made for the trigger of regulation 12 and the current public announcement date. Or,

ii. The price calculated for the present offer.

6. The Noticees did not mention in the final letter of the offer that the open offer is made pursuant to regulation 12 of the Takeover Regulations as well. However, SEBI's observations were mentioned in detail in the final letter of offer and the offer price was also determined after taking into consideration the observations on pricing. It was also stated in the letter of offer that the Noticees are aggrieved by the observations made by SEBI and would challenge it before Securities Appellate Tribunal (SAT).

7. Noticees went ahead with the open offer and filed an appeal before SAT (Appeal No. 21 of 2013). SAT while disposing the said appeal observed in its order dated February 12, 2014 that *"In the circumstances, without expressing any opinion on the merit of the case, we permit SEBI to issue show cause notice, to Appellant, if they choose to do so, regarding the direction contained in the communication dated November 30, 2012 and consequences for noncompliance of those directions. If SEBI issues show cause, then Appellant would be at liberty to file reply. Thereupon SEBI shall pass final order after giving an opportunity of hearing to the Appellant".*

8. In view of the above, SEBI issued Show Cause Notice (SCN) dated July 18, 2014. It was alleged, inter alia, that under the agreement, the Target Company and the specified promoters were restrained from entering into any agreement or arrangement which would conflict with or

restrict the rights of the Noticees. The agreement also mandated KHIL and its promoters to take prior approval of the Noticees for altering in any way the share capital of KHIL, creating any new subsidiaries, entering into any joint ventures, merger or demerger, disposing of or acquiring any material assets, lending or borrowing money beyond certain limits, winding up or dissolving the company, etc., and the Noticees also had right to nominate one director on the board of KHIL. In view of these provisions, it was alleged that the inter-se agreement dated August 13, 2010 contained clauses which indicated that the Noticees had a right to control the policy decisions of the target company and thus had acquired "control" over the target company as defined under regulation 2(1)(c) of the Takeover Regulations, 1997. As the Noticees had failed to make public announcement of open offer in terms of regulation 12 of the Takeover Regulations, 1997, it was alleged that they have violated the same. It was also alleged that the Noticees have failed to carry out the changes suggested by SEBI in the letter of offer in violation of regulation 16(4) of the Takeover Regulations, 2011. In view of these, the Noticees were called upon to show cause as to why suitable directions under sections 11B and 11(4) of the SEBI Act and regulation 44 of Takeover Regulations, 1997 read with regulation 32 and 35 of the Takeover Regulations, 2011 should not be issued against them.

Reply and submissions:

9. Noticees submitted their reply in the matter vide letters dated March 30, 2015 and April 19, 2016. They were granted an opportunity of hearing on December 21, 2016. Mr. Somsekhar Sundaresan, Advocate, made submissions on behalf of the Noticees during the hearing and filed written submissions vide letter dated January 10, 2017. The summary of the replies and written and oral submissions of the Noticees are as follows:

a) That no directions may be issued against them as proposed in the SCN as it will not serve any useful purpose. In this regard it has been submitted that, subsequent to alleged acquisition of control, the Noticees have made an open offer in terms of regulation 3(1) of the Takeover Regulations, 2011, pursuant to conversion of bonds held by them, and the public shareholders were provided with an opportunity to exit from the target company. The offer opened on December 20, 2012 and closed on January 3, 2013 and it

was completed in compliance with applicable provisions of Takeover Regulations. It has been also submitted that the offer price was higher than the price which the shareholders would have obtained if the inter-se agreement were to be held as acquisition of control and an open offer would have been made in terms of regulation 12 of the Takeover Regulations, 1997.

b) That except for mentioning of regulation 12 of the Takeover Regulations, 1997, the noticees had incorporated all comments and changes as directed by SEBI. They did not mention in the letter of offer that the open offer is pursuant to regulation 3(1) of the Takeover Regulations, 2011 as well as regulation 12 of Takeover Regulation, 1997 as they were under bonafide belief that they have not acquired control and accepting that they have acquired control would have resulted in classification of the Noticees as "promoters", which would have subjected them to various promoter related obligations and adversely impacted their working and functioning as financial investors.

c) That the clauses of the inter-se agreement have been wrongly construed to mean vesting of controlling rights on the Noticees. It has been submitted that none of the ingredients of 'control' as defined by Regulation 2(1) (c) of the Takeover Regulations, 1997 are fulfilled. KHIL is in hotel business and Noticees were financial investors and they intended to remain so. The inter-se agreement contained certain investor protection rights in favour of the Noticees for a limited period of time to safeguard their interests as an investor in KHIL. These minority investor protection rights were given to them on some select aspects to protect their interest against the control wielded by the promoters. The Noticees were not having majority shareholding or a right to appoint majority of directors. They could at all times appoint only one out of seven directors.

d) That the Noticees never intended to acquire control over the target company as the inter-se agreement required the promoters to maintain a minimum aggregate shareholding percentage of at least 50.01% of the paid up equity capital of the company, the nominee director was not to be designated as promoter of the company and the agreement was to

terminate automatically upon shareholding of the Noticees falling below 5% of the paid up capital and in any case by July 31, 2014.

e) That there was no clarity/certainty regarding the impact of such affirmative rights in an agreement on the "control" of a company and that SEBI has issued a discussion paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations" seeking comments from the public, which is still pending finalisation.

Consideration of issues and findings:

10. I have considered the SCN, replies and submissions made by the Noticees. In the light of the facts and circumstances of the case and contentions raised by the counsel, the issues that arise for consideration are as follows.

a) Whether the Noticees actually failed to disclose the trigger under regulation 12 of the Takeover Regulations, 1997 in the letter of offer while disclosing that the open offer is pursuant to regulation 3(1) of the Takeover Regulations, 2011?

b) Whether the offer price would have varied if the Noticees were to make an open offer pursuant to the alleged acquisition of control under the inter-se agreement dated August 13, 2010 in terms of regulation 12 of the Takeover Regulations, 1997?

c) Whether the Noticees acquired "control" in the Target Company by virtue of the covenants contained in the inter-se agreement dated August 13, 2010?

11. It is pertinent to mention here the provisions of regulations 12 of the Takeover Regulations, 1997. The regulation reads as under:

"12. Irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquire such shares in accordance with the regulations.

Provided that …

… … …"

12. It is noted that the regulation mandates making of public announcement for open offer not only in cases where an acquirer acquires shares in a target company beyond prescribed limits but also in cases where a person acquires control over a target company. The Takeover Regulations, 1997 recognises in regulation 12 that "control" in a target company can be acquired even without acquisition of shares and even in such circumstances existing shareholders need to be provided with an exit opportunity by the acquirers of such control. The term "control" has been defined in regulation 2(1)(c) of the Takeover Regulation, 1997 as under:

> *"control" shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner."*

13. It is observed from the definition that "control" can be acquired even under a shareholder agreement. In the present case, it has been alleged that the Noticees acquired "control" over the target company pursuant to the shareholders agreement dated August 13, 2010. This agreement obligated the Target Company and the specified promoters not to enter into any agreement or arrangement which would conflict with or restrict the rights of the Noticees. The agreement also mandated that the approval of the Noticees shall be taken before altering the share capital of Target Company, creating any new subsidiaries, entering into joint ventures, disposing or acquiring any material assets, lending or borrowing money beyond certain limits, winding up or dissolving the company, etc. Further, Noticees also had the right to nominate one director on the board of KHIL. It has been alleged that this agreement conferred upon the Noticees certain rights which enabled them to control the policy decisions of the target company.

14. It is pertinent to mention here that almost similar provisions of an agreement came up for consideration before the Hon'ble SAT in the case of *Subhkam Ventures (I) Private Limited vs. SEBI* (Appeal No.8 of 2009 decided on January 15, 2010). In this case, the question was whether the appellant had acquired control under the agreement. SAT held as under:

"Having gone through the agreement carefully with the help of the learned counsel for the parties, we are clearly of the view that none of the clauses therein taken individually or collectively demonstrates control in the hands of the appellant. In this view of the matter, Regulation 12 does not get triggered and the Board was not justified in making the appellant incorporate this regulation in the letter of offer. …"

15. SEBI appealed against this order before the Supreme Court (Civil Appeal No. 3371 of 2010). The Hon'ble Supreme Court disposed the appeal vide order dated November 16, 2011. The observations of the apex court are relevant and are extracted hereunder:

"During the pendency of the appeal before this Court, an application has been filed by the respondent in January, 2011, whereby it is stated that there have been subsequent developments in the matter as stated therein whereby the respondent had not appointed their Director on Board and had not exercised any such power and they had already sold their stake in the Target Company and had retained only about six per cent shareholding of the Target Company. Further, it was also informed that a company by name of M/s. Welspun had already acquired majority stake in the Target Company and the said M/s. Welspun had also taken control of the Target Company and, accordingly, complied with the requirements of both Regulation 10 as well as Regulation 12 of the Takeover Regulations.

Keeping in view the above changed circumstances, it is in the interest of justice to dispose of the present appeal by keeping the question of law open and it is also clarified that the impugned order passed by the SAT will not be treated as a precedent.

The civil appeal is, accordingly, disposed of."

16. It is observed that the provisions of the agreement entered into by the Noticees were similar to the one in Subhkam Case and such provisions have been interpreted by SAT as not triggering control under regulation 12 of the Takeover regulations, 1997. The apex court, in the appeal preferred by SEBI, kept the question of law, pertaining to the effect of such covenants in a shareholders agreement on the "control" of a company, open and thereby stated that the order passed by SAT will not be treated as precedent. Thus, what ultimately emerges from the given set of facts is that the parameters for trigger of regulation 12 were left undecided by apex court. In this backdrop, I have considered the disclosures made by the Noticees in the offer document.

The Noticees in paragraphs 2.1.26 to 2.1.28 of the final letter of offer mentioned in detail about the observations of SEBI and it was stated that they are aggrieved by the observation made by SEBI and would challenge it before SAT. The relevant paragraph (para 2.1.27) of the letter of offer in this regard is as under:

> *"The Acquirer is aggrieved by the observation of SEBI that the rights granted to the Acquirer under the Inter-Se Agreement gives the Acquirer the ability to control the Target Company (as the term "control" is defined under the Takeover Regulations). The Acquirer proposes to file an appeal before the Securities Appellate Tribunal ("SAT") challenging the said observation. Without prejudice to the rights of the Acquirer in such appeal, for the purpose of this Offer, the Acquirer has computed the Offer Price as per the requirements of SEBI as set out in Para 2.1.26(d)(i) above. The price as per this formula is in any case lower than the Offer Price of Rs.135 per Share already offered by the Acquirer for this Offer. Therefore, there would be no variation to the Offer Price, although the Acquirer is challenging the direction of SEBI to treat the Offer as an offer triggered under Regulation 12 of the Old Regulations. Please refer to Para 5.1.4 for detailed computation of the Offer Price as per SEBI's Observation Letter."*

17. It is observed that after making the disclosures as mentioned above, the Noticees went ahead with the open offer mentioning in the letter of offer that the open offer is made pursuant to regulation 3(1) of the Takeover Regulations, 2011. Subsequently, they filed an appeal before SAT (Appeal No. 21 of 2013) challenging the observations of SEBI that the provisions of the inter-se agreement triggers "control" over the Target Company in terms of regulation 12 of the Takeover Regulations, 1997.

18. From the circumstances elaborated above, I observe that the Noticees have disclosed SEBI's observation with respect to regulation 12 on acquisition of control with riders as they intended to challenge such statement on merits. Subsequent to the disclosure, the question of trigger of control was challenged in SAT by the Noticees, as stated above. The public disclosure was adequate enough to enable the investors to take informed decision. In view of this, I am inclined to answer the first issue in the negative.

19. With regard to the question on offer price, it is observed that the Noticees made an open offer to the public shareholder of the Target Company at a price of Rs.135/- per share. Para 5 of the letter of offer deals with justification for the offer price. The para 5.1.3 is reproduced below:

5.1.3. The offer price of Rs. 135/- (Rupees One Hundred and Thirty-Five only) per equity share is justified in terms of Regulation 8(2) and 8(6) of the Regulations as it is highest of the following:

(a)	*Highest Negotiated Price per equity share for any acquisition under the Agreement attracting the obligation to make the PA*	*Not Applicable*
(b)	*The volume-weighted average price paid or payable for acquisition during the 52 week immediately preceding the date of the PA*	*Not Applicable*
(c)	*The highest price paid or payable for any acquisition during 26 weeks period immediately preceding the date of PA*	*Not applicable*
(d)	*The volume weighted average market price for a period of 60 trading days immediately preceding the date of PA on NSE as stated in para 5.1.2*	*Rs.105.55*
(e)	*Outstanding convertible instruments convertible into equity shares of the Target Company as a Specific Price i.e., conversion price of bonds*	*Rs.135.00*
(f)	*Offer Price in accordance with SEBI's Observation bearing reference no. CFD/DCR/SKS/26869/2012 dated November 30, 2012*	*Rs.133.68*

20. It is observed from para 5.1.3 of the letter of offer that while determining offer price, the Noticees have taken into consideration the observations in the SEBI's letter dated November 30, 2012 regarding offer price and that computation of price of Rs. 133.68 has been reached after taking into account interest at the rate of 10% p.a. for the delayed period. Thus, in the open offer made by the Noticees, the offer price was determined by the Noticees after taking into consideration the price which the shareholders would have got if the inter-se agreement were to be held as acquisition of control under regulation 12 of the Takeover Regulations, 1997. In view of the above, investors have not been adversely affected in any manner by the acquirers making the open offer at a price of Rs.135/- per share. Therefore, the second question is also answered in the negative.

21. With regard to the issue of acquisition of control under the inter-se agreement dated August 13, 2010, I have carefully perused the clauses of the said agreement. It is apparent that the scope of the covenants in general is to enable the noticees to exercise certain checks and controls on the existing management for the purpose of protecting their interest as investors rather than formulating policies to run the Target Company. Further, I note that the shareholder agreement got extinguished on July 31, 2014. Thus, the clauses in the agreement, alleged in the SCN to have conferred "control' on the noticees, can no longer be considered binding upon the promoters of the company and hence is not relevant for consideration at present. Thus, in view of the above and the fact that the noticees have made adequate disclosure with respect to the applicability of regulation 12 of the Takeover Regulations, 1997 and offered the best price taking into consideration the alleged trigger under regulation 12, the consideration of the question of 'control' in this case is not material at this point of time. In the light of the above, I find that the allegation of breach of regulation 16(4) of the Takeover Regulations, 2011 in the SCN is not maintainable against the noticees.

22. Thus, taking into consideration the disclosures made by the Noticees in the letter of offer, the manner of computation of offer price adopted by them to make the open offer and the fact that the inter-se agreement was a term agreement, which has already lapsed, and no prejudice has been caused to the investors, I am inclined to drop the charges alleged in the SCN against the Noticees.

23. The show cause notice dated July 18, 2014 shall stand disposed accordingly.

Date: March 31, 2017 **G. MAHALINGAM**

Place: Mumbai **WHOLE TIME MEMBER**