WTM/GM/EFD/ 62 / 2017-18

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under Sections 11(1), and 11B of Securities and Exchange Board of India Act, 1992 and Regulation 44 and 45 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with Regulations 32 and 35 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, in respect of TCM Ltd.

Sr. No.	Noticees	PAN
1.	Joseph Varghese	ABOPV3793J
2.	George Varghese	ABOPV3794R

in continuation of SEBI Order dated May 29, 2015.

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1. TCM Ltd ("**TCM/target company**") is a company having its registered office at 'Snigdha', No. 32/1111, Chathangat Cross Road, Palarivattom, Cochin - 682025. The shares of the target company are listed on Bombay Stock Exchange Limited ("BSE").

2. SEBI had passed an order dated May 29, 2015 (hereinafter referred to as "**the SEBI Order/ the previous SEBI order**") *inter alia* directing the Noticees, being promoters of TCM, to divest shares acquired by them in contravention of the provisions of regulation 11(1) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("**SAST Regulations**"). The order noted that the promoter group in TCM held 8,96,038 shares constituting 26.36% of its share capital. During the financial year 2009-10, the noticees, namely Joseph Varghese and George Varghese acquired 1,56,424 (4.61%) and 1,51,217 (4.45%) equity shares, respectively of the target company thereby increasing the promoter group holding to 12,03,679 shares constituting 35.42% of the target company's share capital.

3. The SEBI Order found this increase in share capital to be in contravention of regulation 11(1) of the SAST Regulations as it existed then. The SEBI Order found that the Noticees had contravened regulation 11(1) by acquiring more than 5 % in the financial

year 2009-10 without making any open offer of shares. The quantum of additional acquisition in violation was found to be 4.06% of the share capital or 138,000 shares.

4. Further, the SEBI Order noted that if an open offer was to be directed, the open offer price calculated in terms of regulation 20 of the SAST Regulations along with interest at the rate of 10% per annum thereon, would be lesser than the average market price of the shares of the target company*(as on the date of the SEBI Order).* Consequently, it was found appropriate to order divestment of the shares acquired in contravention of regulation 11(1) of the SAST Regulations and transfer the entire proceeds of the sale to the Investor Protection and Education Fund established under the Securities and Exchange Board of India (Investor Protection and Education Fund) Regulations, 2009.

5. An appeal (Appeal No. 399 of 2015) was filed against the SEBI Order in the Securities Appellate Tribunal ("the Tribunal"/"SAT"). Before the Tribunal, the appellants submitted statements issued by the Depository Participants to establish that the shareholding of the promoters was to the extent of 9,91,362 shares and not 8,96,038 shares (prior to the acquisition by the Noticees in 2009-10) as had been recorded in the SEBI Order. These documents had not been placed before SEBI for its consideration. The Tribunal took note of the aforesaid documents, and concluded that it was apparent that the shares of TCM Ltd. acquired by the appellants in violation of regulation 11(1) of the SAST regulations would be 42,488 shares and therefore the finding of WTM of SEBI could not sustained. The Tribunal also noted that the appellants did not have the opportunity to submit their views as to why they should be allowed to make an open offer instead of disinvesting the shares, though the SEBI order has given reasons for directing the appellants to disinvest the shares instead of making an open offer. In view of the aforesaid two issues, SAT by order dated September 23, 2016 (hereinafter referred to as "**SAT Order**") set aside the SEBI order and remanded the matter to SEBI for fresh decision on merits.

6. A fresh opportunity of personal hearing was granted to the noticees on April 06, 2017 with respect to Show cause notice dated July 08, 2014 *(which had culminated in the previous SEBI order).* Written submissions dated April 18, 2017 were also filed by the noticees. On the aspect of the noticees' shareholding in TCM, noticees made the following submissions:

(i) SEBI has only considered the shareholding of the promoter group as on 31st March 2009 comprising of 896,038 shares or 26.36% of the share capital.

(ii) The inadvertent classification was not considered by SEBI despite pointing out that the need for correction in the stock exchange data had been conveyed to BSE also.

(iii) The demat statements enclosed with the written reply point to the actual shareholding position of the noticees.

(iv) The SEBI order was in total disregard of the order of the BIFR dated 06.02.2007 with respect to the directions against the promoters to the effect that they cannot change their shareholding without the leave of the Board. While the promoters may increase their stake in the Company, any disposal of shares without the permission of the BIFR shall be in direct violation of the order.

(v) The shares are infrequently traded at the Stock Exchange and selling substantial shares into the market will have an adverse impact on the market capitalisation of the company as well as the wealth of the existing shareholders of the company. On the other hand, if SEBI had gone for the option of open offer, that would have in fact increased the market capitalisation of the company as well as the wealth of the existing shareholders. The acquirers are ready to come out with a price more than Rs 35.33 or such other price as suitable to SEBI.

(vi) The object of takeover is to give the promoters a sizeable quantity of holding so that they can devote more time and finance for the betterment of the company. However the SEBI order breaches the spirit of the SAST Regulations.

7. The two issues referred by SAT for reconsideration by SEBI and to be addressed in this Order are as follows:

i. What is the correct quantum of shares acquired by the Noticees in contravention of regulation 11(1) of the SAST Regulations?

ii. Whether the noticees should be directed to make open offer in place of the direction *(issued by the SEBI Order)* to divest shares acquired in contravention of regulation 11(1) of the SAST Regulations?

The aforesaid issues are addressed separately in this Order.

7.1 Quantum of shares acquired by the Noticees in contravention of regulation 11(1) of the SAST Regulations

7.1.1 The noticees have admitted both before the SAT and in the course of written and oral submissions made to SEBI, that they have contravened the provisions of regulation 11(1) of the SAST regulations by acquiring shares in excess of the creeping acquisition limit of 5% of share capital during the financial year 2009-10, though the quantum of acquisition is in dispute. While the SEBI order had quantified the same at 138,000 shares, the noticees have submitted that the acquisition in contravention of regulation 11(1) must be quantified as 42,488 shares. SEBI in its earlier order had relied on the shareholding pattern submitted by the company to the stock exchanges to determine the quantum of acquisition in excess of the 5% limit. However, the noticees submitted before SAT and subsequently before SEBI that there was an error in the information submitted to BSE regarding promoter group shareholding as on March 31, 2009. According to the noticees, the promoter group shareholding as on March 31, 2009 was 29.17% of the total shares issued and not 26.36% as had been wrongly intimated by TCM. During the course of present hearing, the noticees submitted copies of certain demat transaction statements from their respective DPs pertaining to financial years 2008-09 and 2009-10 as well as a statement from the Registrar and Share Transfer Agent (RTA). Further, SEBI independently obtained transaction statements from the Depositories - NSDL and CDSL as well as the RTA- Cameo Corporate Services Ltd., for determining the actual number of shares issued by TCM Ltd., the shareholding percentage of the noticees as of March 31, 2009 and March 31, 2010 and the gross acquisitions made by the noticees during the financial year 2009-10. From the aforesaid statements the following details emerge:

(i) The dematerialised shares of the promoter group were only held with NSDL and not with CDSL.

(ii) The total number of paid-up equity shares as on March 31, 2009 and March 31, 2010 was 33,99,035 shares.

(iii) Within the promoter group comprising of T. Thirugnanam, Joseph Varghese and George Varghese, the shareholding of T.Thirugnanam has not changed during the financial year 2009-10.

(iv) The gross acquisition of shares by the promoters, namely Joseph Varghese and George Varghese together, during the financial year 2009-10 amounted to 2,15,167 shares comprising 6.33 % of the share capital. Of the said 2,15,167

shares, Noticee No. 1 i.e. Joseph Varghese had acquired 64,459 shares and Noticee No. 2 i.e. George Varghese had acquired 1,50,708 shares (including dematerialised and physical shares).

7.1.2 The allegation against the noticees addressed in the previous SEBI order and which is under consideration in this Order was that they had violated regulation 11(1) of the SAST Regulations. Regulation 11(1) of the SAST Regulations reads as follows:

> *" Consolidation of holdings*
> *11. (1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than fifty five per cent.(55%) of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5% of the voting rights, in any financial year ending on 31st March, unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations.*

Regulation 11(1) read with regulation 21(1) mandates that any acquirer together with persons acting in concert with him, holding 15% or more shares/voting rights, but less than 55% shares/voting rights in a company, would have to make an open offer to acquire a minimum of 20% of the voting capital of the company, if he acquires more than 5% of the voting rights in a financial year. In paragraph 13 of the previous SEBI order it was held, on the basis of facts on record that the noticees are "persons acting in concert". As brought out in paragraph 7.1.1. above, the noticees had acquired a total of 2,15,167 shares during the financial year 2009-10 as against the total paid up equity shares of 33,99,035 shares. Thus the gross acquisition by the noticees in excess of the stipulated threshold limit of 5% is 45,215 shares, as evidenced by the documents from the depository and the RTA.

7.2 Nature of direction to be issued for acquisition of shares in contravention of regulation 11(1) of the SAST Regulations

7.2.1 The SAT order held that since the appellants (noticees) had not advanced any arguments as to why they may be directed to make an open offer instead of divesting the shares, a fresh order on the merits of this issue as well also had to be passed by SEBI. It is relevant to state that the settled general principle in a matter involving a failure to make an open offer, is to direct an open offer. Deviations to the general norm are made as exceptions in cases where such a direction would not serve

the interest of the investors or would indirectly lead to other violations or amount to interference in the inter se disputes or rearrangements between the shareholders/ creditors etc. The SCN normally keeps the scope of directions that can be issued by the Board under section 11B in an open offer matter wide and open by proposing to issue any of the directions contained in Regulation 44 of the SAST Regulations, as deemed fit upon consideration of the facts. This enables the Competent Authority dealing with the matter to exercise his discretion of finally deciding upon the appropriate direction in a particular case after a judicious evaluation of the facts and circumstances of each case. Such a discretion which is otherwise available under the contours of Section 11B of the SEBI Act to the Board, cannot be stifled by raising the objection that the exact direction proposed to be issued as laid down in the SAST Regulations is not pointed in the SCN. In due deference to the directions of the Hon'ble Appellate Tribunal, the parties were heard on the aspect of the direction to make an open offer as well, though the same was not proposed as a specific direction in the SCN.

7.2.2 As far as the transaction of the acquisition is concerned, the noticees have as stated earlier admitted that their gross acquisition during the financial year 2009-10 had breached the limits stipulated in regulation 11(1) of the SAST Regulations. The noticees in their reply have stated that TCM was a 'sick company' and subject to proceedings before the Board for Industrial and Financial Reconstruction (BIFR). It was further stated that the order of BIFR dated February 06, 2007 (hereinafter referred to as "**the BIFR order**") barred the promoters from changing their shareholding without the leave of the Board but the promoters could increase their stake in the company. The company's shares are infrequently traded and therefore selling substantial number of shares, as directed in the previous SEBI order would have an adverse impact on the market capitalisation of the company. Therefore the direction to make an open offer would, according to the noticees, be more beneficial both for the company and for its shareholders. However, the noticees have conceded in their written submissions that they are prepared to divest shares in the open market to the extent of 42,488 shares.

7.2.3 Though the noticees, in their written submissions, have made a reference to the company being subject to BIFR proceedings, orders passed by BIFR

with respect to the company were not forwarded. The orders were also not available for verification on the official website of BIFR. However, I note that, in Appeal No. 399 of 2015, a copy of the BIFR order has been produced by the noticees before the Hon'ble SAT. The said BIFR order declared TCM Ltd. to be a 'sick' company in terms of the Sick Industrial Companies (Special Provisions) Act, 1985 ("**SICA**") and ordered a scheme of revival to be framed in terms of section 18 of the SICA and guidelines enclosed in the BIFR order. Para 17 of the enclosed guidelines reads as follows:

> *"The promoter/ guarantors should not change their shareholding pattern or dispose of their shares in the company in any manner without the specific prior permission of the Board. The company will not change their accounting year and accounting policies and also will not change any of their Directors or make any changes in their BOD without the specific permission of the Board."*

Therefore, in my view, the order of BIFR restricted both "acquisition" as well as "divestment" of shares in TCM by the noticees, as opposed to the submissions made by the noticees.

7.2.4 Meanwhile, the Insolvency and Bankruptcy Code, 2016 ("**IBC**") which repealed and replaced SICA with respect to the BIFR companies conferring jurisdiction over those companies upon the NCLT came into force with effect from May 28, 2016. By way of a notification, with effect from December 01, 2016, all proceedings before BIFR stood abated and the companies which were earlier subject to BIFR proceedings, were required to make a fresh reference to NCLT within a period of 180 days from the commencement of IBC, 2016. In the case of TCM Ltd. no information regarding any such reference being brought before NCLT has been conveyed to SEBI by the noticees. Infact, the website of TCM Ltd. has published a copy of its Annual Report for the year ending March 31, 2017 wherein at page 63 the Company has explicitly stated that it has not made any move to file a reference or appeal before NCLT. The reply dated April 18, 2017, filed by the noticees, also does not indicate any filing of such a reference by the company before NCLT. Therefore, it appears that the directions of BIFR extracted in para 7.2.3 above do not subsist at present.

7.2.5 In the previous SEBI order, the question as to the nature of directions to be issued to the noticees had been elaborately discussed at para 20 thereof. In para 19 thereof, the details of acquisition of the shares of TCM Ltd. by the noticees were tabulated as follows:

TABLE 1

Name of promoters	Date of acquisition	No. of shares acquired	Price of acquisition
Joseph Varghese	Jan 8, 2010	146875	23
Joseph Varghese	Jan 31, 2010	20000	24.40
George Varghese	March 26, 2010	3583	23.6

The previous SEBI order found that, after factoring in the interest component, the price at which open offer would have been made *(calculated in terms of regulation 20 of the SAST Regulations)* would have amounted to Rs. 35.33 per share. However the average market price of the shares of the target company considering the trading on BSE in the six months preceding the date of the SEBI order, was noted to be Rs 49.92 per share as on the date of the previous SEBI order. Consequently, it was decided that a public announcement to make an open offer would be a mere formality.

7.2.6 As noted in the previous SEBI order, and as provided in regulation 14(4) of the SAST Regulations, the offer price *(given that the shares of TCM Ltd. are infrequently traded)* would be the highest price paid by the acquirers during the twenty six week period prior to the date of public announcement. As can be seen in Table 1, *(reproduced from the previous SEBI order)* the highest price paid by the Noticees was `24.40. Therefore, the price payable to those persons who were holding shares at the point in time when the open offer obligation had been triggered (i.e. January 08, 2010), would be approximately `42.50 (*after adding the interest component @10% per annum*). On BSE, where the scrip of TCM is traded, it appears that the shares are currently being traded at approximately ` 43-44. The average market price of the scrip considering the trading on BSE during the last six months is ` 42.5. It is but obvious that there is hardly any difference between the offer price computed with respect to such continuing shareholders and the average/current market price. However those persons who acquired shares subsequent to January 08, 2010 would be eligible for an open offer price of ` 24.40 per share. As the shares of TCM Ltd. are infrequently traded, the public shareholders who are keen on exiting may not be able to do so, in the normal course. In such a scenario, a direction of the open offer to the noticees would provide an opportunity of exit to those shareholders also. On an overall assessment of the facts and circumstances before me, I find that a direction of open offer in the instant case would be in the interest of investors at large.

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

> *"I**The primary object of the takeover code is to provide an exit route to the public shareholders when there is substantial acquisition of shares or a takeover. This right to exit is an invaluable right and the shareholders cannot be deprived of this right lightly.** It is only when larger interest of investor protection or that of the securities market demands that this right could be taken away. **Therefore, as a normal rule, a direction to make a public announcement to acquire shares of the target company should issue to an acquirer who fails to do that. The Board need not give reasons as to why such a direction is being issued because that is the mandate of Regulations 10, 11 and 12.** However, if the issuance of such a direction is not in the interest of the securities market or for the protection of interest of investors, the Board may deviate from the normal rule and issue any other direction as envisaged in Regulation 44 of the takeover code. In that event, the Board should record reasons for deviation."*

(emphasis supplied)

The aforesaid decision of the Hon'ble SAT makes it clear that for breach of an obligation to make an open offer in terms of regulation 11(1) of the SAST Regulations, the *rule* that SEBI would need to adhere to is to direct the acquirers to make an open offer. Any other direction would be an *exception* or deviation for which SEBI must record reasons. The previous SEBI order wherein the noticees were directed to divest the shares acquired by them in contravention of regulation 11(1) also stated the reasons for the deviation from the normal rule. The said order sought justification in the fact that the price, which could be offered to shareholders, who were holding shares since January 08, 2010, even including interest at the rate of 10% per annum, was lesser than the market price. Consequently there would be no benefit to those shareholders who were denied the opportunity of exit as on the said trigger date. However, the continuing shareholders (i.e those holding shares in TCM since January 08, 2010) can be offered an open offer price (including interest) which is more or less equal to the current market price of the scrip. This, coupled with the fact that TCM's shares are infrequently traded, leads me to conclude that a direction for open offer to the noticees would be beneficial for the public shareholders in the company, especially the small/retail shareholders, who otherwise would not have a liquid market to seek an exit opportunity .

8. I, therefore, in exercise of powers conferred upon me under sections 11, 11B read with section 19 of the SEBI Act, 1992, regulation 44 of the SAST Regulations and regulation 32 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("**Takeover Regulations, 2011**"), hereby issue the following directions to the noticee acquirers :

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

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

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

DATE: October 06, 2017 **G. MAHALINGAM**

PLACE: Mumbai **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA