

- 1.4 Subsequently, vide letter dated February 10, 2006 Wealth Sea intimated SEBI that it had convened an Extra Ordinary General Meeting (EGM) of the shareholders of both DIL and FTL on 25th and 30th, January, 2006 respectively and had also sought approval of the shareholders through postal ballot. It is further informed that the Resolution regarding change of management was approved by the shareholders in the Extra Ordinary General Meetings of both DIL and FTL.
- 1.5 On perusal of the information received from Wealth Sea, it was found that Wealth Sea had triggered Regulation 10 and 12 of the Takeover Regulations. It was also found that the acquirer had not made any public offer to the shareholders of the target companies as required under Regulation 10 of the Takeover Regulations. It was however noted that Wealth Sea can be exempted from the compliance of Regulation 12 as it had passed a special resolution in EGMs of DIL and FTL (target companies) in terms of the proviso to Regulation 12.

2.0 Show Cause Notice, Reply and Personal Hearing

- 2.1 Accordingly, SEBI issued a detailed Show Cause Notice dated April 13, 2006 to the acquirer inviting its attention to the relevant provisions of the SEBI Act and the relevant Takeover Regulations. Vide the aforesaid show cause notice it was alleged that on a cumulative analysis of the whole set of transactions, it is clear that the acquirer had indirectly acquired the shares /voting rights of DIL and FTL. It was further alleged that as no public announcement was made as mandated by the Takeover Regulations, the acquirer has violated the provisions of Regulation 10 read with Regulation 14 (4) of the Takeover Regulations and therefore it was advised to show cause as to why appropriate actions under SEBI Act and relevant Regulations should not be taken against it.
- 2.2 The acquirer, vide their letter dated April 28, 2006 while requesting for personal hearing inter alia made following submissions:
- a) That the provision of Regulation 10 read with Regulation 14(4) had not been violated by it as no public announcement required to be made in the instant case.
 - b) That the show cause notice has not even mentioned the documents on which SEBI has placed reliance and therefore the show cause notice suffers from the vice of non compliance with the Principles of Natural Justice.
 - c) That the acquirer, a company incorporated in Singapore has acquired from Jumbo its entire equity shareholding of DRW. Jumbo is a company incorporated in British Virgin Islands. The provisions of Indian laws will not be applicable as Wealth Sea had entered into an agreement with a company incorporated outside India to acquire the shares of company incorporated outside India. The Hon'ble Supreme Court in the case of Technip S.A. AIR 2005 SC 545 has held that the laws of a country in which a company is incorporated will be applicable with respect to that company and therefore with respect to acquisition of shares from Jumbo by Wealth Sea, the two companies incorporated outside India, there is no question of violation of the provisions of Regulation 10 of the Takeover Regulations.
 - d) that Regulation 10 did not contain any provision for indirect acquisition of shares of a listed company. In the present case the acquirer did not directly acquire any shares of the company which is listed in India. Therefore the acquirer has also not violated the provisions of Takeover Regulations
 - e) that the Regulation 10 casts an obligation on the acquirer to make a public announcement prior to the acquisition of shares in a company. However the acquisition by the acquirer in the instant case is an indirect acquisition. Regulation 14(4) of Takeover Regulations deals with indirect acquisition and permits an acquirer to make a public offer within 3 months of the consummation of such acquisition or change in control. Assuming the contention of SEBI to be correct that Regulation 10 is applicable then, after reading the provisions of Regulation 10 and 14(4) together, it is apparent that the two are in contradiction and in conflict with each other. Regulation 10 casts an obligation on the acquirer to make public announcement before the acquisition and Regulation 14(4), after the acquisition. It is not possible to comply with both the requirements simultaneously.
 - f) that Regulation 10 and 11 deal exclusively with acquisition of shares. Regulation 12 deals with acquisition of control over a company. As per the provisions of Regulation 12, the control over a company can be acquired either by acquisition of shares or by acquiring control over it, as defined in Regulation 2 (1)(c) of the Takeover Regulations. It was further submitted that in the facts of the case neither Regulation 11 nor Regulation 12 are applicable and therefore the reliance on Regulation 10 in the show cause notice is misplaced.
 - g) that indirect acquisition of control supported by a shareholder's resolution is exempted under the provisions of Regulation 12. There was no obligation to make an open offer and the provisions of Regulation 14(4) would not be applicable in the facts of the present case. Hence there is no violation of Regulation 14(4) as alleged by SEBI.
 - h) that the decision of the Hon'ble Supreme Court in the case of Swedish Match AB cannot be made applicable in the facts of the present case.

- i) that the acquirer is not a person who is associated with the securities market. The transactions whereby the shares of DRW were acquired had taken place outside India .. It was further submitted that the acquirer was neither in the business of buying or selling shares in India nor it had sold any shares in India .
- J) that the provisions of section 11 & 11 B empower SEBI to pass directions, pending investigation or inquiry or on completion of investigation or inquiry to take various measures. It is submitted that the measures referred to in section 11 (4) cannot be resorted to against the directors of acquirer who are not amenable to the jurisdiction of Indian Laws as the acquirer is a company incorporated outside the jurisdiction of India.
- k) that provisions of section 15H provide for monetary penalty and while imposing penalty, the factors mentioned in Section 15J, should also be taken into consideration. In the instant case, the acquirer had neither made any profits nor avoided any losses and the acquirer was not a repetitive offender. Therefore under the provisions of Section 15H, monetary penalty cannot be imposed on the acquirer.
 - l) that section 24 of the SEBI Act empowers SEBI to initiate criminal proceedings and in the instant case as there was no mens rea or intention to violate the provisions of the SEBI Act, Takeover Regulations, criminal proceedings cannot be initiated against the acquirer.
 - m) that this was not a fit case to invoke the provisions of Regulation 44 of the Takeover Regulations.

2.3 Accordingly, a personal hearing was accorded to the acquirer on July 20, 2006 when Shri Shyam Mehta and Shri Harminder Chagla, Advocates appeared on behalf of the acquirers. During the personal hearing the advocates by and large reiterated the submissions which were already forwarded by them to SEBI. However, as requested, they were granted time to file written submissions and accordingly the same were filed by them vide their letter dated July 31, 2006.

3.0 Consideration of issues and findings

3.1 Having perused the show cause notice, the reply, oral submissions made during personal hearing, written submissions received and other material on record, I find the following are the main legal & factual issues for consideration. Before I advert to the factual issues in the matter, I first deal with the legal issues raised by the acquirer.

A) Legal Issues:

- i) With regard to the argument that SEBI has no power to issue directions against the acquirer under Section 11 and 11B of the Act, I am of the view that the plain reading of Section 11 itself shows that SEBI has to protect interests of the investors in securities and to regulate the securities market by such measures as it thinks fit. In the instant case the shareholders of the target company, who might have desired to exit out of the company, were deprived of their right to exit due to the failure of the acquirer to make the public offer as mandated by the Takeover Regulations. Moreover section 11B is an enabling provision enacted to empower the SEBI to regulate securities market in order to protect the interest of the investors. Hence, I do not find any merit in this argument of the acquirer.
- ii) I do not agree with the argument that as the acquirer was incorporated outside India it is not amenable to the jurisdiction of the Indian laws. The target companies in question (DIL & FTL) are companies incorporated and listed in India and so far the shareholders of the target companies are concerned Indian law is applicable. In this regard I wish to refer and rely on the ratio of the Apex Court in Technip SA AIR 2005 SC 545 wherein it held that ***in case of an acquisition of a company, incorporated outside India, the laws of its domicile will be applicable. However, Pursuant to the acquisition of such company, control of an Indian listed company changes then such change in Indian company would be governed by the Indian legislature.***

In this case the Apex Court further opined that "***the relationship of Technip to Coflexip whether one of control or not is really a question of their status. The applicable law would be the law of their domicile, namely, French Law. Having determined their status according to French Law, the next question as to their obligation under the Indian Law vis a vis SEAMEC would have to be governed exclusively by Indian law. (in this case the Act and the Regulations)***"

Applying the principles laid down in the abovementioned case to instant case it can safely be concluded that Indian laws will be applicable as the target companies (DIL and FTL) were incorporated in India .

- iii) It is clear from the facts of this case though the direct acquisition by the acquirer took place in Singapore , but indirectly this acquisition led to acquisition of shares and control of the target companies which were incorporated in India . Since the entire indirect acquisition has taken place with respect to two companies listed in India whose securities are listed in Indian brochures, it has become a person associated with the securities market within the meaning of section 11B of SEBI Act.

- iv) As regards applicability of section 15H and section 24 of SEBI Act, I am of the view that those are different and independent proceedings and do not warrant any comment at this stage.

B) Now I deal with the factual issues:

- i) On perusal of records, I find that the acquirer had informed SEBI that a Share Purchase Agreement (SPA) was entered between the acquirer and Jumbo on November 28, 2005 and accordingly the acquirer had purchased the entire share capital of DRW. DRW owns 74.50% and 68.98% of the equity shares of DIL and FTL respectively. It was further seen that the acquirer had convened Extra Ordinary General Meeting of the shareholders of DIL and FTL and also sought approval of the shareholders through postal ballots. Subsequently the resolution regarding change of control was approved in the Extra Ordinary General Meetings.
- ii) I further find that by directly acquiring DRW the acquirer had indirectly acquired the control of DIL and FTL and thereby triggered Regulations 10 and 12 of the Takeover Regulations.

Regulations 10 and 12 of Takeover Regulations read as follows :

Regulation 10

"No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in the concert with him), entitle such acquirer to exercise fifteen percent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations....."

Regulation 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 acquires such shares in accordance with the Regulations.

Provided that nothing contained herein shall apply to any change in control which takes place in pursuance to a [Special Resolution] passed by the shareholders in a general meeting.

["Provided further that for passing of the special resolution facility of voting through postal ballot as specified under the Companies (passing of the Resolutions by Postal Ballot) Rules, 2001 shall also be provided"]

Explanation:

[For the purposes of this Regulation, acquisition shall include direct or indirect acquisition of control of target company by virtue of acquisition of companies, whether listed or unlisted and whether in India or abroad]

- iii) On a careful examination of Regulation 12 and its proviso, I am of the view that the acquirer can be exempted from the compliance of Regulation 12 as the acquirer has passed a Special Resolution in EGMs held in the target companies, as required under proviso to regulation 12.
- iv) As regards Regulation 10 of the Takeover Regulations, I find that in the instant case the acquirer had not fulfilled the mandatory requirement of making public announcement. A general meeting of the shareholders of the target company had taken place but the same does not sub-serve the requirements of Regulations 10. When transfer of control over the target company takes place by reason acquisition of shares the acquirer has a statutory obligation to make public announcement. Such a statutory requirement is not capable of being waived by the majority shareholders.
- v) As regards the contention of the acquirer that Regulation 10 of the Takeover Regulations does not contain any provision for indirect acquisition of shares, I am of the view that the explanation to Regulations 10 and 11, as extracted below, indicate that regulation 10 gets attracted not only when shares are acquired directly but also when the acquisition takes place indirectly.

Explanation to Regulations 10 and 11 reads as follows :

"Explanation: For the purposes of Regulation 10 and Regulation 11, acquisition shall mean and include;

a) direct acquisition in a listed company to which the Regulations apply,

b) indirect acquisition by virtue of acquisition of companies, whether listed or unlisted, whether in India or abroad."

- vi) I further find that there is no contradiction in Regulation 10 and 14(4) as alleged by the acquirer and both are independent of each other and can be applied simultaneously.) Regulation 14 provides for the timing of public announcement of offer to the effect that the same shall be made not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentages specified therein. In this regard, I refer to the judgment of Learned Securities Appellate Tribunal (SAT) in the case of **Appeal No.132 of 2005- Hardy Oil Ltd. Vs. SEBI**, wherein SAT opined as under:

"We are unable to accept the contention of the learned senior counsel for the appellant that the word unless denotes that public announcement has to be made prior to the acquisition of shares. If making of a public announcement was a condition precedent as contended on behalf of the appellant, then the Regulation would have read "unless such acquirer has made public announcement ". Use of the word "makes" merely signifies the mandatory nature of the public announcement which could be made before or after the acquisition. Regulation 10 does not prescribe the time frame within which such an announcement is to be made. The time schedule for making such an announcement is prescribed by Regulation 14."

In view of the aforesaid, I am of the view that Regulation 10 is the mandatory requirement of public announcement while Regulation 14 prescribes the manner and the mode in which such announcement shall be made. Hence I find no worth in the argument of the acquirer that Regulations 10 and 14 (4) cannot be applied simultaneously.

- vii) Further I do not agree with the argument of the acquirer that at the most the present case can be considered as an acquisition under Regulation 12 of the Takeover Regulations. Furthermore find that in the instant case both Regulations 10 and 12 get attracted. The compliance with the requirement of regulation 12 is exempted by virtue of proviso of Regulation 12. Nevertheless I strongly hold that passing of a Special Resolution in terms of proviso to Regulation 12 would not exempt the acquirer from making a public announcement as required under Regulation 10.

In this regard, I refer and rely upon the observation made by the Apex Court in **Swedish Match AB & Anr Vs Securities Exchange Board of India & Anr (AIR 2004 SC 4219)** which is as under:

"Regulation 11, therefore, contemplates both situations, namely, where substantial acquisition of shares may result in change of control and where it does not. Only because in a case where acquisition of additional shares may result in change of control, the same by itself would not exempt the acquirer, from complying with the statutory requirement of Regulation 11. Primarily, Regulations 10, 11 and 12 operate in different fields which are manifested from a plain reading of Regulations 14, 15 and 16. We may, however, hasten to add that there may be a situation where Regulations 11 and 12 may overlap with each other, in which event, it would be open to the acquirer to issue a combined notice fulfilling the requirement of both Regulations 11 and 12".

- viii) I do not agree with the acquirer's contention that the direction, if any, will affect detrimentally the inherent right of the equity shareholders of a company and negate the decision of the shareholders and render the proviso infructuous. In this regard, I find that any offer made to shareholders cannot be detrimental to the inherent right of the equity shareholders of the company as it is just an offer not a compulsion to tender anybody's shares. Moreover, the offer gives an opportunity to the shareholders who wishes to exit to do so at a fair price.

- 3.2 In the light of the foregoing discussion, I am of the view that the acquirer had failed to make an open offer as mandated by Regulation 10 of the Takeover Regulations and the requirement of complying with the mandatory requirements of Regulation 10 to make public announcement cannot be dispensed with by virtue of the proviso to Regulation 12.

4.0 ORDER

- 4.1 Therefore, in exercise of powers conferred upon me under section 11 & 11B of SEBI Act, 1992 read with Regulation 44 & 45 (6) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, I hereby direct M/s Wealth Sea Pte. Ltd., the acquirer to make public announcement to the shareholders of the target companies within 45 days of the date of this order.
- 4.2 So far as the reference date for the purpose of calculation of the offer price, I direct the acquirer to calculate and pay the offer price to the shareholders considering either 28.11.2005 or three months from the date of consummation of

the acquisition of the parent company (DRW) by the acquirer, which ever is higher, in terms of Regulation 14(4) read with regulation 20(12) of the Takeover Regulations.

- 4.3 I note that in any case, in terms of Takeover Regulations, all procedures relating to the offer including the payment of consideration to the shareholders of the target companies, whose shares are accepted in the offer, is to be completed within 90 days from the date of public announcement. As stated earlier, the public announcement should have been made either taking 28.11.05 as reference date or on any other date within the period of three months from 28.11.05 when the consummation of the acquisition of the parent company has taken place i.e. by 02.03.06. In such a case, the consideration to the shareholders of the target companies, whose shares would have been accepted in the offer, should have been paid within 90 days from 02.03.06 i.e. by 01.06.06.
- 4.4 Since no public announcement for acquisition of shares of the target companies have been made, which has adversely affected the interest of the shareholders of the target companies, it would be just and equitable to direct the acquirer to pay interest @10% per annum on the offer price determined in terms of para 4.2 above. The acquirer is hereby accordingly directed to pay interest @ 10% per annum to the shareholders for the loss of interest caused to the shareholders from 02.06.06 till the date of actual payment of consideration for the shares to be tendered in the offer directed herein to be made by the acquirer.
- 4.5 This order shall come in to force with immediate effect.

Date: 01.11.06

Place: Mumbai

T. C. NAIR

Whole Time Member

Securities and Exchange Board of India