BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. VSS/AO- 04/2008]

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

Arun Kumar	**PAN No.: AFBPP0461L**
K R Ravishankar	**PAN No.: ADAPR6016N**
Arcolab (India) P. Ltd.	**PAN No.: AAECA9931H**
Caryl Pharma P. Ltd.	**PAN No.: AAACC8021A**

FACTS OF THE CASE IN BRIEF

1. Strides Arcolabs Limited is a company incorporated under the Companies Act, 1956 having its registered office at 201, Devavrata, Sector 17, Vashi, Navi Mumbai – 400703. The shares of M/s Strides Arcolabs Ltd. (hereinafter referred to as **'SAL/Target Company/Company'**) are listed on National Stock Exchange of India Ltd. (hereinafter referred to as **'NSE'**) and Bombay Stock Exchange Ltd. (hereinafter referred to as **'BSE'**). Mr. Arun Kumar and Mr. K. R. Ravishankar are the promoters of the Company. Arcolab (India) Pvt. Ltd. and Caryl Pharma Pvt. Ltd. are the associate companies of the promoters.

2. On June 17, 2002, SAL issued and allotted 30,68,875 convertible warrants on a preferential basis in pursuance of a resolution passed by the members of SAL under section 81(1A) of the Companies Act, 1956 to its promoters and their associate companies, viz., Mr. Arun Kumar, Mr. K. R. Ravishankar, M/s. Arcolab (India) Pvt. Ltd. and M/s. Caryl Pharma Pvt. Ltd. (hereinafter collectively referred to as **'acquirers/Noticees'**). These warrants were issued to increase the promoters' shareholdings in SAL and to meet the funding requirements of SAL.

3. The brief facts with regard to the issue and allotment of 30,68,875 warrants to the acquirers and the subsequent conversion of the said warrants into equity shares carrying voting rights are set out below:

a. The Board Meeting of SAL to issue warrants to the acquirers was held on January 24, 2002.

b. The notice to hold the Extraordinary General Meeting (hereinafter referred to as '**EoGM**') on March 18, 2002 for seeking the approval of the shareholders of SAL to allot warrants to the acquirers was issued on January 24, 2002.

c. The shareholders of SAL, in the EoGM held on March 18, 2002, passed a resolution under Section 81(1A) of the Companies Act, 1956 authorising the Board of Directors of SAL to issue 30,68,875 convertible warrants to the acquirers on preferential basis *inter alia* on the following terms and conditions:

- Each warrant shall entitle the holder thereof to subscribe to and be allotted one fully paid up equity share of Rs.10/- each at a price not less than Rs.70/- per share including a premium of Rs.60/-.

- The warrant holder shall have to exercise the right to subscribe to and be allotted equity shares within a period of 18 months from the date of issue of warrants.

- The premium payable per share by the warrant holder will be enhanced by an amount equivalent to 7% per annum of the issue price from the date of issue of the warrants till the date of subscription for the equity shares arising out of the warrants.

d. The Board of Directors of the Target Company issued and allotted 30,68,875 preferential warrants on June 17, 2002 to the acquirers against the payment of 10% of the issue price being Rs.7/- per warrant.

e. The Board of Directors of the Target Company issued and allotted 30,68,875 equity shares on December 11, 2003 to the acquirers upon exercise of the option of conversion by them against the payment by the acquirers of the balance consideration including the interest of 7% p.a. on the premium.

f. The paid up equity share capital of SAL, before the aforesaid allotment constituted 3,06,88,752 equity shares of the face value of Rs.10/- each, which after the conversion of 30,68,875 warrants into equity shares, became 3,37,57,627 equity shares of the face value of Rs.10/- each.

g. The shareholding pattern of SAL including the acquirers, promoter group and non-promoter group, pre and post allotment of 30,68,875 equity shares, is as under:-

Name of the acquirer/s	Pre allotment		No of shares acquired	Post allotment	
	No of shares	%		No of shares	%
Arun Kumar	11,48,738	3.74	7,67,218	19,15,956	5.67
K. R. Ravishankar	6,50,553	2.12	7,67,218	14,17,771	4.20
Caryl Pharma Pvt. Ltd.	14,02,000	4.57	7,67,221	21,69,221	6.43
Arcolab (India) Pvt. Ltd.	2,50,000	0.81	7,67,218	10,17,218	3.01
Sub-Total	**34,51,291**	**11.25**	**30,68,875**	**65,20,166**	**19.31**
Other persons belonging to the promoter group	4,89,120	1.59	Nil	4,89,120	1.45
Total of promoter group	**39,40,411**	**12.84**	**30,68,875**	**70,09,286**	**20.76**
Non promoter group	2,67,48,341	87.16	Nil	2,67,48,341	79.24
Total	**3,06,88,752**	**100.00**	**N.A.**	**3,37,57,627**	**100.00**

4. As a result of the aforesaid acquisition, the combined shareholding/voting rights of the acquirers in the Target Company increased from 11.25% to 19.31% of the post-issued share/voting capital of SAL. The collective shareholding of the promoter group of SAL increased from 12.84% to 20.76%.

5. BSE, in the course of processing the application for listing of 30,68,875 shares of SAL on the Exchange and on scrutiny of submissions/explanations of SAL, observed, inter alia, that the acquirers had neither filed the report under regulation

3(4) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as '**SAST Regulations'**) to Securities and Exchange Board of India (hereinafter referred to as '**SEBI'**) nor made public announcement to acquire shares in pursuance of regulation 10 of SAST Regulations even though the shareholdings of the acquirers had crossed the threshold limit of 15% specified in regulation 10 of SAST Regulations. BSE vide its letter dated October 21, 2005 communicated the aforesaid observation to SEBI along with copies of letter of SAL dated October 11, 2005, notice of EoGM of SAL dated January 24, 2002, minutes of SAL's EoGM dated March 18, 2002, resolution passed in the Board Meeting of SAL held on June 17, 2002 and minutes of Board Meeting of SAL held on December 11, 2003.

6. SAL, vide its letter dated January 09, 2006, submitted to SEBI, the sequence of events with regard to the aforesaid allotment of shares to the acquirers. This was followed by further submissions vide SAL's letter dated March 14, 2006.

7. On examination, it was observed by SEBI that the acquirers have acquired 30,68,875 shares/voting rights on December 11, 2003 and with the result, their combined shareholding/voting rights in SAL had gone up from 11.25% (pre-acquisition) to 19.31% (post acquisition) and the collective shareholding of the promoter group of SAL had increased from 12.84% to 20.76%. However, since the acquirers failed to make a public announcement in accordance with the SAST Regulations as required in terms of regulation 10 read with regulation 14(2) of SAST Regulations, it was alleged that they had violated the provisions of the said regulations and therefore, liable for monetary penalty under section 15H(ii) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the '**SEBI Act'**).

APPOINTMENT OF ADJUDICATING OFFICER

8. Mr. Piyoosh Gupta was appointed as Adjudicating Officer, vide order dated September 13, 2006, under section 15 I of the SEBI Act 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 15H(ii) of the SEBI Act the alleged violation of regulation 10 read with regulation 14 (2) of SAST Regulations committed by the acquirers.

9. Consequent upon the transfer of Mr. Piyoosh Gupta, the undersigned was appointed as the Adjudicating Officer vide order dated November 19, 2007.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

10. Show Cause Notice (hereinafter referred to as "**SCN**") dated October 16, 2007 was issued to Mr. Arun Kumar, Mr. K. R. Ravishankar, M/s. Arcolab (India) Pvt. Ltd. and M/s. Caryl Pharma Pvt. Ltd. under rule 4 of the Rules to show cause as to why an inquiry should not be initiated against them and penalty be not imposed under section 15H(ii) of SEBI Act for their failure to make a public announcement to acquire 20% of the voting capital of SAL in terms of regulation 10 read with regulation 14(2) of SAST Regulations when the warrants were converted into equity shares and consequently, voting rights were acquired on December 11, 2003.

11. Advocate Ms. Raksha Kothari of D S K Legal replied on behalf of the Noticees vide letter dated November 16, 2007. The submissions of the Noticees, *inter alia*, are as under:

- SAL allotted 30,68,875 warrants to its promoters and their associate companies on June 17, 2002 by way of preferential allotment.

- The preferential allotment of warrants to the acquirers were exempted from the applicability of regulations 10, 11 and 12 of SAST Regulations in accordance with regulation 3(1)(c) of SAST Regulations which was applicable at the time of issue of 30,68,875 warrants i.e. June 17, 2002.

- The reference to the acquisition of 'shares' under regulations 10, 11 and 12 of the SAST Regulations includes 'warrants' in accordance with regulation 2(1)(k) of the SAST Regulations which contains the definition of 'shares', and, therefore, the subsequent conversion of warrants into shares is merely a legal consequence and not a fresh acquisition and hence, there cannot be any dispute that the preferential allotment of warrants to acquirers on June 17, 2002 was exempted from the applicability of regulations 10, 11 and 12 of SAST Regulations.

- The warrants which were issued on June 17, 2002 under regulation 3(1)(c) of the SAST Regulations were neither equity shares as they only entitled the

holder of the warrants to shares at a later point of time nor carried any voting rights in the company and were clearly excluded from the applicability of regulations 3(4) of the SAST Regulations as at that date. Under the SAST Regulations existing on that date viz., June 17, 2002 the acquirers were required to file the report to SEBI under regulation 3(4) of the SAST Regulations only when these warrants were converted into shares.

- When these warrants were converted into equity shares on December 11, 2003, preferential allotments made under regulation 3(1)(c) were excluded from the applicability of regulation 3(4) of the SAST Regulations which came into effect on September 09, 2002. Further, Explanation introduced to regulation 3(4) of the SAST Regulations reinforces and substantiates the stand taken by the acquirers that where convertible securities were issued, the report to SEBI under regulation 3(4) of the SAST Regulations was to be filed by the acquirers only when these securities are converted into equity shares/voting rights.

- The acquirers did not file the report under regulation 3(4) of the SAST Regulations because at the time of conversion of warrants into shares the relevant regulation 3(1)(c) itself was deleted from the statute book and its reference in regulation 3(4) of the SAST Regulations, omitted.

12. In the interest of natural justice and in terms of rule 4(3) of the Rules, the Noticees were granted an opportunity of personal hearing on December 26, 2007 vide notice dated December 05, 2007. Advocates for the Noticees, M/s DSK Legal, vide their letter dated December 19, 2007 requested for an adjournment in the matter for a period of three weeks. Accordingly, another opportunity of hearing was granted on January 22, 2008 vide notice dated December 28, 2007. Mr. Sajit Suvarna, Mr. Ajay Shaw and Ms. Rukmini Roychowdhury of DSK Legal, appeared on behalf of the Noticees, and submitted, inter alia, as under:

- At the point of time when the preferential allotment of warrants was made pursuant to a resolution passed under Section 81(1A) of the Companies Act, 1956 the said allotment was exempted from the applicability of regulations 10, 11 and 12 of SAST Regulations by virtue of regulation 3(1)(c) of the SAST Regulations which was applicable at the time of issuance of warrants. What was exempted from the applicability of regulation 10, 11 and 12 of the SAST Regulation by virtue of regulation 3(1)(c) was the preferential allotment of

securities of any kind including warrants under Section 81(A) of the Companies Act, 1956. It is a well settled law that accrued rights cannot be affected with retrospective effect by any exercise of sub-ordinate legislative power and hence the amendment to the SAST Regulations subsequently (i.e. the omission of regulation 3(1)(c) as ground for exemption with effect from September 9, 2002) cannot affect such accrued rights in favour of the acquirers of warrant.

- The decisions of SEBI in the matter of *Flex International Pvt. Ltd. and Others* (Order dated August 25, 2004) and *Ramco Industries Ltd. and Others* (Order dated August 24, 2004) were cited in support of their submissions.

- They may be granted time upto January 31, 2008 to make further written submissions.

13. Accordingly, the Noticees made further submissions vide letter dated January 31, 2008, summary of which is as under :

    - The preferential allotment of any kind including warrants under Section 81(1A) of the Companies Act, 1956 was duly exempted from the applicability of regulations 10, 11 and 12 of the SAST Regulations by virtue of regulation 3(1)(c) of the SAST Regulations.

    - It is a well settled law that accrued rights cannot be affected with retrospective effect by any exercise of sub-ordinate legislative power and hence the amendment to the SAST Regulations subsequently (i.e. the omission of regulation 3(1)(c) as ground for exemption with effect from September 9, 2002) cannot affect such accrued rights in favour of the acquirers of warrants.

    - The acquirers did not submit the report under regulation 3(4) of the SAST Regulations pursuant to the issuance of the warrants as the acquirers *bona fide* believed that the report under regulation 3(4) of the SAST Regulations was required to be submitted upon the issue of shares or voting rights and not upon the issue of warrants. The *bona fide* belief of the acquirers is substantiated by the Explanation added to regulation 3(4) of the SAST Regulations on September 9, 2002.

    - An *Explanation* is added to clear up any ambiguity in the main section and should not be so construed as to widen the ambit of that section. On

December 11, 2003, when the warrants were converted into shares, regulation 3(4) of the SAST Regulations, applicable at that time, read as under:

> *In respect of acquisitions under clauses (a), (b), [***], (e) and (i) of sub-regulation (1), the acquirer shall, within 21 days of the date of acquisition, submit a report along with supporting documents to the Board giving all details, in respect of acquisitions which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him) would entitle such person to exercise 15% or more of the voting rights in a company.*
>
> *Explanation--- For the purposes of sub-regulations (3) and (4), the relevant date in case of securities which are convertible into shares shall be the date of conversion of such securities.*

- The amended regulation did not mandate any report to be filed by the acquirers for any exemption under regulation 3(1)(c) of the SAST Regulations. It is a recognized principle of law that a person is required to comply with the law as in force. This is enshrined in the Constitution of India by virtue of Article 20(1). Therefore, when the warrants were converted into shares the reporting requirement under regulation 3(4) of the SAST Regulations, which was applicable prior to the amendment in September 9, 2002, was no longer necessary.

- The case of *S. Sundaram Pillai Vs. R. Pattabiraman* AIR 1985 SC 582 was cited in support of the aforesaid submissions.

- Even if it is assumed that there was an obligation on the acquirers to file a report under regulation 3(4) of the SAST Regulations pursuant to either (i) the issuance of the warrants or (ii) allotment of shares against the warrants, the non compliance by the Acquirers in filing the report under regulation 3(4) of the SAST Regulations is a mere technical non compliance as disclosures at the various stages were made and by virtue of these disclosures it may be stated that essential requirement under regulation 3(4) was duly complied with. In the case of *SEBI Vs. Cabot International Capital Corporation*, while dealing with the aspect of non compliance of regulation 3(4) of SAST Regulations, the Hon'ble High Court of Bombay held that there is no obligation upon the Adjudicating Officer to necessarily impose a penalty

particularly where there is a technical contravention and there are justifiable reasons like the default occurred due to *bona fide* belief that he was not liable to act in the manner prescribed by the statute. Hon'ble SAT in Appeal No. 20 of 2003 in the matter of *Godrej Boyce mfg Company Limited Vs. SEBI* reiterated the above view.

- Assuming but not admitting that there is non compliance with regulation 3(4) of the SAST Regulations, the same does not tantamount to an offence in the absence of *mens rea*.

- In the facts of the case there was no obligation on the acquirers to submit a report under regulation 3(4) of the SAST Regulations.

CONSIDERATION OF ISSUES AND FINDINGS

14. I have carefully perused the written and oral submissions of the Noticees, the documents available on record as well as the case laws cited by the Noticees. The issues that arise for consideration in the present case are :

(i) Whether the acquisition of 30,68,875 warrants by the Noticees on June 17, 2002, attracted the provisions of regulation 10 of the SAST Regulations?

(ii) Whether the aforesaid acquisition was covered under regulation 3(1)(c) of SAST Regulations as existed at that point of time and consequently, eligible for exemption from the applicability of regulation 10 of the SAST Regulations?

(iii) Whether the acquisition of 30,68,875 equity shares by the Noticees consequent upon the conversion of the warrants and the resultant increase in their combined voting rights from 11.25% to 19.31% on December 11, 2003, attracted the provisions of regulation 10 of SAST Regulations?

(iv) Whether the Noticees were obligated to make a public announcement to acquire 20% of the post-issued voting capital of SAL in compliance with regulations 10 read with 14(2) of SAST Regulations, upon acquisition of the voting rights on December 11, 2003?

(v) Whether the failure on the part of the Noticees to comply with regulations 10 read with 14(2) of SAST Regulations attracts monetary penalty under section 15H(ii) of SEBI Act?

(vi) If so, what would be the monetary penalty that can be imposed taking into consideration the factors mentioned in section 15J of SEBI Act?

15. Before examining the issues listed out above, it will be appropriate to recapitulate the relevant facts of the case, which are as under :

- The members of SAL at their EoGM held on March 18, 2002 passed a resolution authorizing the Board of Directors of SAL to issue 30,68,875 convertible warrants of Rs.10/- each to the promoters of the company and their associate companies on preferential basis, pursuant to the provisions of section 81(1A) of the Companies Act, 1956 and subject to other terms and condition. In accordance with the aforesaid approval of the members of SAL, the committee of the Board of Directors of SAL on June 17, 2002 issued and allotted 30,68,875 convertible warrants of Rs.10/- each to the promoters of the company and their associate companies on preferential basis as detailed hereunder:-

Name of the Acquirer/s	No. of Warrants
Mr. Arun Kumar	7,67,218
Mr. K. R. Ravishankar	7,67,218
M/s. Arcolab (India) Pvt. Ltd.	7,67,218
M/s. Caryl Pharma Pvt. Ltd.	7,67,221
Total	**30,68,875**

- It was mentioned in the explanatory note to the Notice of EoGM dated January 24, 2002 that the purpose of and the reason of the said allotment were to increase the promoters' shareholdings in the target company and to meet the funding requirements of SAL. The warrant holders were entitled to exercise their right to subscribe for and be allotted the equivalent number of equity shares within a period of 18 months from the date of issue of warrants, i.e., on or before December 16, 2003. The warrants carried an option to convert each warrant into an equal number of equity share of the Company at a price of Rs.70/- per share (inclusive of premium of Rs.60/- per share). The terms of issue included payment of 10% of the issue price i.e. Rs.7/- on or before the date of allotment of warrants, i.e., June 17, 2002, and the balance 90% on or before the exercise of the option. The Noticees exercised their right of conversion and accordingly, 30,68,875 equity shares were allotted on December 11, 2003. The premium on each equity share to be paid by the

Noticees was Rs.60/- along with interest of 7% p.a. on the premium from the date of issue of warrants till the actual payment for the subscription of the equity shares. The details with regard to the exercise of the option of conversion and consequent acquisition of 30,68,875 shares are as under :

Sr. No.	No. of equity shares	Per share price in (Rs)			Total		
		F/V	Premium	Issue Price	F/V	Premium	Issue price
ARUN KUMAR							
1.	127,217	10	65.92	75.92	1,272,170	8,386,144.64	9,658,314.64
2.	289,000	10	66.02	76.02	2,890,000	19,079,780.00	21,969,780.00
3.	137,150	10	66.27	76.27	1,371,500	9,088,930.50	10,460,430.50
4.	88,500	10	66.43	76.43	885,000	5,879,055.00	6,764,055.00
5.	74,568	10	66.52	76.52	745,680	4,960,263.36	5,705,943.36
6.	50,783	10	66.62	76.62	507,830	3,383,163.46	3,890,993.46
SUB TOTAL	**767,218**				**7,672,180**	**50,777,336.96**	**58,449,516.96**
K. R. RAVISHANKAR							
1.	13,818	10	66.62	76.62	138,180	920,555.16	1,058,735.16
2.	81,400	10	66.64	76.64	814,000	5,424,496.00	6,238,496.00
3.	35,600	10	66.65	76.65	356,000	2,372,740.00	2,728,740.00
4.	430,450	10	66.69	76.69	4,304,500	28,706,710.50	33,011,210.50
5.	205,950	10	66.69	76.69	2,059,500	13,734,805.50	15,794,305.50
SUB TOTAL	**767,218**				**7,672,180**	**51,159,307.16**	**58,831,487.16**
CARYL PHARMA PRIVATE LIMITED							
1.	567,221	10	65.75	75.75	5,672,210	37,294,780.75	42,966,990.75
2.	200,000	10	65.92	75.92	2,000,000	13,184,000.00	15,184,000.00
SUB TOTAL	**767,221**				**7,672,210**	**50,478,780.75**	**58,150,990.75**
ARCOLAB (INDIA) PRIVATE LIMITED							
1.	220,218	10	66.72	76.72	2,202,180	14,692,944.96	16,895,124.96
2.	287,000	10	66.79	76.79	2,870,000	19,168,730.00	22,038,730.00
3.	36,000	10	66.81	76.81	360,000	2,405,160.00	2,765,160.00
4.	193,500	10	66.87	76.87	1,935,000	12,939,345.00	14,874,345.00
5.	30,500	10	66.87	76.87	305,000	2,039,535.00	2,344,535.00
SUB TOTAL	**767,218**				**7,672,180**	**51,245,714.96**	**58,917,894.96**
TOTAL	**3,068,875**	**-**	**-**	**-**	**30,688,750**	**203,661,139.83**	**234,349,889.83**

- With the result of the aforesaid acquisition of equity shares, the pre and post acquisition shareholding of the Noticees as well as the cumulative shareholding of the promoter group of SAL are as under:-

Name of the acquirer/s	Pre allotment		No of shares acquired	Post allotment	
	No of shares	%		No of shares	%
Arun Kumar	11,48,738	3.74	7,67,218	19,15,956	5.67
K. R. Ravishankar	6,50,553	2.12	7,67,218	14,17,771	4.20
Caryl Pharma Pvt. Ltd.	14,02,000	4.57	7,67,221	21,69,221	6.43
Arcolab (India) Pvt. Ltd.	2,50,000	0.81	7,67,218	10,17,218	3.01
Sub-Total	**34,51,291**	**11.25**	**30,68,875**	**65,20,166**	**19.31**
Other persons belonging to the promoter group	4,89,120	1.59	Nil	4,89,120	1.45
Total	**39,40,411**	**12.84**	**30,68,875**	**70,09,286**	**20.76**

- The Noticees, thus, had acquired 30,68,875 equity shares carrying voting rights on December 11, 2003 which increased their combined shareholding/voting rights in SAL from 11.25% to 19.31% of the total voting capital of SAL.

16. The Noticees have not disputed the fact that they had acted in concert with one another. They have also not disputed the collective acquisition of 30,68,875 equity shares on December 11, 2003 upon conversion of 30,68,875 warrants acquired on June 17, 2002 and the resultant increase in their combined shareholding/voting rights in SAL from 11.25% to 19.31%. They have also not disputed the fact that with the said acquisition, they have collectively crossed the threshold limit of 15% shares/voting rights in the Target Company as specified in regulation 10 of the SAST Regulations. They have also not disputed the fact that they have not made the public announcement to acquire 20% of the post-issued voting capital of the company from the public as envisaged under regulation 10 read with regulation 14 of the SAST Regulations.

17. However, what the Noticees have contended is that the acquisition of 30,68,875 shares and the resultant voting rights on December 11, 2003 was on account of conversion of 30,68,875 warrants acquired on June 17, 2002 through preferential allotment pursuant to a resolution passed by the shareholders of SAL under Section 81(1A) of the Companies Act, 1956 which was exempted from the applicability of regulations 10, 11 and 12 of the SAST Regulations by virtue of

regulation 3(1)(c) of the SAST Regulations which was applicable at the time of issue of the 30,68,875 warrants i.e. June 17, 2002. They have also submitted that what was exempted from the applicability of regulations 10, 11 and 12 of the SAST Regulations by virtue of regulation 3(1)(c) was "preferential allotment, made in pursuance of a resolution passed under section 81(1A) of the Companies Act, 1956 (1 of 1956)". Thus, the preferential allotment of any kind including warrants under section 81(1A) of the Companies Act was duly exempted from the applicability of regulations 10, 11 and 12 of SAST Regulations by virtue of regulation 3(1)(c) of SAST Regulations. The Noticees have argued that it is also a well settled law that accrued rights cannot be affected with retrospective effect by any exercise of subordinate legislative power and hence the amendment to the SAST Regulations subsequently (i.e. omission of regulation 3(1)(c) as ground for exemption with effect from September 09, 2002) cannot affect such accrued rights in favour of the acquirers of convertible warrants.

18. In this regard, it is pertinent to refer to the applicable provisions of SAST Regulations, which reads as under:

"Acquisition of fifteen per cent or more of the shares or voting rights of any company.

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 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."

"Timing of the Public Announcement of Offer

14. (1) The public announcement referred to in Regulation 10 or Regulation 11 shall be made by the merchant banker 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 percentage specified therein:

Provided that in case of disinvestment of a Public Sector Undertaking, the public announcement shall be made by the merchant banker not later than 4 working days of the acquirer executing the Share Purchase Agreement or Shareholders Agreement with the Central Government or the State Government as the case may be for the acquisition of shares or voting rights exceeding the percentage of share holding referred to in Regulation 10 or Regulation 11 or the transfer of control over a target Public Sector Undertaking.

(2) In case of an acquirer acquiring securities, including Global Depositories Receipts or American Depository Receipts which, when taken together with the voting rights, if any already held by him or persons acting in concert with him, would entitle him to voting rights, exceeding the percentage specified in Regulation 10 or Regulation11, the public announcement referred to in sub-regulation (1) shall be made not later than four working days before he acquires voting rights on such securities upon conversion, or exercise of option, as the case may be."

19. It is observed from the provisions of regulation 10 of SAST Regulations that any person acquiring shares or voting rights which taken together with shares or voting rights, if any, held by him or by persons acting in concert with him, entitle such person to exercise 15% or more of the voting rights in that company, will be obligated to make a public announcement to acquire shares of such company in accordance with SAST Regulations. The Hon'ble Securities Appellate Tribunal (hereinafter referred to as '**SAT**') in the case of *Ch. Kiron Margadarsi Financiers V/s. Adjudicating Officer, SEBI* – Appeal No. 21 of 2001 – Order dated August 28, 2001 held that,

"*Each and every acquisition by an acquirer need not necessarily attract the provisions of regulation 10. What attracts the regulation is the acquisition of shares/voting rights which will entitle the person acquiring the shares to exercise voting rights beyond certain limits specifically provided in the regulation, say 10 percent in regulation 10. Thus, it is clear that a plain acquisition even if it exceeds 10 per cent of the paid-up capital of the company will not attract regulation 10, unless the acquisition entitled the acquirer to exercise ten per cent or more of the voting rights in the company.*

In this context it is considered necessary to look at the legal provisions which entitles a person to exercise voting rights in a company. Section 87(1) of the Act, inter-alia, states that every member of a company limited by shares and holding any equity share capital therein shall have a right to vote, in respect of such capital on every resolution placed before the company. The expression 'member' has been defined in section 41 as follows:-

41. Definition of "member" - (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members.

(2) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members, shall be a member of the company.
(3) Every person holding equity share capital of company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned company.

Thus, it is clear that voting rights are vested in the members and a person can be considered as a member only if he falls in one of the categories referred to in section 41 of the Act".

20. It will also be appropriate to refer to section 150 of the Companies Act, 1956 which deals with Register of members. The provisions of section 150 are reproduced hereunder :-

Register of members.

150. *(1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars:-*

a. *the name and address, and the occupation, if any, of each member;*
b. *in the case of a company having a share capital, the shares held by each member, distinguishing each share by its numbers except where such shares are held with a depository and the amount paid or agreed to be considered as paid on those shares;*
c. *the date at which each person was entered in the register as a member ; and*
d. *the date at which any person ceased to be a member;*

Provided *……*

21. Thus, details of a person who can be considered as a 'member' in terms of section 41 of the Companies Act can only be entered in the Register of members referred to in section 150. If a holder of a warrant is considered as a member and details of such persons are entered in the Register of members as soon as he is allotted a warrant which will entitle him to acquire shares at a later date, and if he chooses not to exercise his option to convert the warrant into shares, how can his name be removed from the Register of members. It will only create an anomalous situation. Therefore, a holder of a warrant cannot be a 'member' and consequently, his name cannot be entered into the 'Register of members".

22. At best, the Noticees can be said to be members of SAL in so far as they collectively held 34,51,291 equity shares prior to the acquisition of 30,68,875 equity shares on December 11, 2003. Prior to the said acquisition, the Noticees were entitled to exercise voting rights only in respect of 34,51,291 equity shares, which constituted 11.25% of the voting capital of SAL. The 30,68,875 warrants acquired by the Noticees on June 17, 2002 did not entitle the Noticees to exercise any voting rights. This fact has been categorically confirmed by the Noticees vide their reply dated November 16, 2007. The Noticees have stated in para 'e' of their aforesaid reply that " the warrants which were issued on June 17, 2002 under regulations 3(1)(c) of the SAST Regulations were neither equity shares as they only entitled the holder of the warrants to shares at a later point of time nor carried any voting rights in the company….." (emphasis supplied). On the other hand, the acquisition of 30,68,875 equity shares upon conversion of the warrants on December 11, 2003 only entitled the Noticees to exercise voting rights in SAL.

23. It is clear from the above that what is contemplated under regulation 10 of SAST Regulations is 'entitlement to exercise 15% or more of the voting rights' and if voting rights are not acquired by acquisition of any instrument, whether be it shares or warrants, the provisions of the regulation 10 will not get triggered.

24. I have also noted the submission of the Noticees (vide para (d) of their reply dated November 16, 2007) that "reference to the acquisition of 'shares' under regulations 10, 11 and 12 of the SAST Regulations includes 'warrants' in accordance with regulation 2(1)(k) of the SAST Regulations which contains the definition of 'shares', and, therefore, the subsequent conversion of warrants into shares is merely a legal consequence and not a fresh acquisition and hence, there cannot be any dispute that the preferential allotment of warrants to acquirers on June 17, 2002 was exempted from the applicability of regulations 10, 11 and 12 of SAST Regulations".

25. It will be appropriate to refer to the definition of 'shares' as per regulation 2(1)(k) of the SAST Regulations, which reads as under :

2(1) In this regulations, unless the context otherwise requires:-
…..…..
…..…..
(k) – "Shares" means shares in a share capital of a company carrying voting rights and includes any security which would entitle the holder to receive shares with voting right but shall not include preference shares.

…….

26. The SAST Regulations made under SEBI Act was framed basically taking into consideration the recommendations of the committee chaired by Justice P N Bhagwati. It is necessary to go behind the regulatory requirements to discover their *raison de etre* and the fundamental principles on which these regulations are predicated. It will be appropriate to refer to the recommendation of the committee with regard to definition of shares as stated in para 2.27 in the Justice P.N. Bhagwati Committee Report on Takeovers dated January 31, 1997, which reads as under :

2.27 Definition of 'Shares'

The draft report retained the definition of shares as per the existing Regulations which included any security which entitles the holder to receive shares with voting rights at a future date. The Committee decided to retain the same definition. The Committee, however, noted that mere acquisition of securities which would confer voting rights at a later date should not trigger the code at the point of acquisition of the securities before voting rights are acquired and that the Regulations would be attracted only at the point of time when the securities are converted into shares with voting rights and this should be clearly brought out in the Regulations. (Reference : Part II of the Report - sub-regulation (2) of Regulation 14).

27. It is true that the inclusive definition of shares given under regulation 2(k) of SAST Regulations covers "any security which would entitle the holder to receive shares with voting rights". Thus, the convertible warrants issued by the Target Company on preferential basis to the acquirers may be covered by this definition of 'shares' given under regulation 2(k) of the SAST Regulations.

28. However, acquisition of such warrants by itself will not trigger regulation 10 of SAST Regulations until the acquisition entitles the acquirer to exercise voting rights exceeding the threshold limit. Thus, mere acquisition of securities which would confer voting rights on the acquirers at a later date would not trigger the regulations at the point of acquisition of the securities before the voting rights are conferred on the acquirers. The Regulations would be attracted only at the point of time when the securities are converted into equity shares with voting rights.

29. The above fact is also clearly brought out in the SAST Regulations by regulation 14(2) of the SAST Regulations, which reads as under:

> *14(2) "In case of an acquirer acquiring securities, including Global Depositories Receipts or American Depository Receipts which, when taken together with the voting rights, if any already held by him or persons acting in concert with him, would entitle him to voting rights, exceeding the percentage specified in Regulation 10 or Regulation11, the public announcement referred to in sub-regulation (1) shall be made not later than four working days before he acquires voting rights on such securities upon conversion, or exercise of option, as the case may be."*

30. Therefore, the wordings of regulation 10 and regulation 14(2) of SAST regulations make it amply clear and beyond doubt that in case of acquisition of convertible securities, the provisions of regulation 10 would not be triggered on the date of acquisition of such convertible securities, but would get triggered only at the time of acquisition of voting rights upon conversion of such securities. Thus, the provisions of the regulations themselves clearly draw the distinction between convertible and non-convertible securities and the timing of the applicability of the regulations.

31. On acquisition of 30,68,875 warrants on June 17, 2002, let us see whether the voting rights of the Noticees have changed and if so, to what extent. The pre and post acquisition voting rights of the Noticees are given below : -

Name of the Acquirers/ Noticees	**Pre-Acquisition**		**Acquisition**		**Post Acquisition**	
	No. of Shares	**% of Voting Rights**	**No. of Warrants**	**% of Voting Rights**	**No. of Shares**	**% of Voting Rights**
Arun Kumar	11,48,738	3.74	7,67,218	Nil	11,48,738	3.74
K.R. Ravishankar	6,50,553	2.12	7,67,218	Nil	6,50,553	2.12
Caryl Pharma Pvt. Ltd.	14,02,000	4.57	7,67,218	Nil	14,02,000	4.57
Arcolab (I) Pvt. Ltd.	2,50,000	0.81	7,67,221	Nil	2,50,000	0.81
Total	**34,51,291**	**11.25**	**30,68,875**	**Nil**	**34,51,291**	**11.25**

32. It can be seen from the above table that with the acquisition of 30,68,875 warrants, there was no change in the voting rights of the Noticees and it remained at 11.25%

as it was before the acquisition. This is within the threshold limit of 15% specified in regulation 10 of the SAST Regulations.

33. In view of the above, I do not find any merit in the submission of the Noticees that the provisions of regulation 10 were attracted on acquisition of 30, 68,875 warrants on June 17, 2002. On the other hand, I am of the view that the provisions of regulation 10 were not attracted at the time of acquisition of the said warrants on June 17, 2002.

34. The next issue for consideration is as to whether the acquisition of 30,68,875 warrants by the Noticees on June 17, 2002 was covered under regulation 3(1)(c) of the SAST Regulations as it existed at that point of time (i.e. before its omission on September 09, 2002).

35. The provisions of regulation 3(1)(c) of SAST Regulations as it existed prior to omission on September 09, 2002 reads as under:

3(1) Nothing contained in regulations 10, 11 and 12 of these regulations shall apply to:

(a) ……..

(b) ……..

(c) preferential allotment, made in pursuance of a resolution passed under section 81(1A) of the Companies Act, 1956 (1 of 1956):

Provided that:

(i) board Resolution in respect of the proposed preferential allotment is sent to all the stock exchanges on which the shares of the company are listed for being notified on the notice board;

(ii) full disclosures of the identity of the class of the proposed allottee(s) is made, and if any of the proposed allottee (s) is to be allotted such number of shares as would increase his holding to 5% or more of the post issued capital, then in such cases, the price at which the allotment is proposed, the identity of such persons(s), the purpose of and reason for such allotment, consequential changes, if any, in the board of directors of the company and in voting rights, the shareholding pattern of the company,

and whether such allotment would result in change in control over the company are all disclosed in the notice of the General Meeting called for the purpose of consideration of the preferential allotment.

36. On a careful reading of the SAST Regulations, I find that it is the provisions of regulations 10, 11 and 12 which require an acquirer to make a public announcement if his acquisition exceeds the norms and parameters laid down therein. The triggering points for making a public offer in cases of substantial acquisition or takeover has been provided under regulations 10, 11 and 12 of the SAST Regulations. The objective of the SAST regulations is to provide an orderly framework within which the process of substantial acquisition and takeovers could be conducted. Justice Bhagwati Committee Report based on which the SAST Regulations have been drafted, has clearly stated that, while on the one hand the regulations should not impose conditions which are too onerous to fulfill and hence, make a substantial acquisition and takeover difficult, at the same time they should ensure that such process do not take place in a clandestine manner without protecting the interest of shareholders. Regulation 3 providing exemption to certain type of acquisitions was included in the Regulations, precisely in tune with the objectives stated above.

37. In the case of *B.B. Singal V/s. SEBI* – Appeal No. 131 of 2004 – Order dated January 27, 2005, the SAT has agreed with the contention of the Appellants in the case. The contention of the Appellant and the SAT's decision on it are as under:-

> "*It is the contention of the appellants that Regulation 3 comes into play only if a violation of the substantive clauses 10, 11 or 12 is first established because the very first sentence of Regulation 3 reads "nothing contained in Regulations 10, 11 and 12 of these Regulations shall apply to …….". .*
>
> *……..*
>
> *We are therefore in agreement with the appellants that before imposition of any penalty under Regulation 3 a prima facie case has to be established for violation of Regulation 10, 11, and 12. Unfortunately, however, the impugned order does not even remotely allege any violation of Regulation 10 or 11 or 12 which would have necessitated a public announcement by the acquirers. Thus, if there is no requirement of a public announcement, Regulation 3 is not at all attracted and there is no question of imposition of any penalty."*

38. In the light of the above, it can be said that the regulation 3 will come into play only if any of the substantive clauses, i.e. regulations 10, 11 or 12 of the SAST Regulations is/are first attracted. The date of claiming exemption under regulation 3(1)(c) cannot be prior to the date when regulation 10 is attracted. Any acquisition through preferential allotment on or after September 09, 2002 will not fall under automatic exemption category (by virtue of omission of regulation 3(1)(c)) but attract regulations 10, 11 and/or 12 of SAST Regulations depending upon the extent of acquisition.

39. It has already been held by me that when the convertible warrants were acquired by the Noticees on preferential basis on June 17, 2002 the acquisition did not trigger regulation 10 of the SAST Regulations at that point of time because voting rights in respect of those warrants were acquired only on conversion of the warrants into equity shares on December 11, 2003. Since regulation 10 of the SAST Regulations was not attracted when the warrants were acquired on June 17, 2002, the question of claiming exemption under regulation 3(1)(c) of SAST Regulations does not arise at all.

40. The next issue for consideration is as to whether the acquisition of 30,68,875 equity shares carrying voting rights on December 11, 2003 upon conversion of warrants, attracted the provisions of regulation 10 of SAST Regulations.

41. I have noted the contention of the Noticees in this regard that the conversion of warrants into shares is merely a legal consequence and not a fresh acquisition and hence, the same is eligible for exemption from the applicability of the regulations 10, 11 and 12 of the SAST Regulations, as the original acquisition of warrants on June 17, 2002 was exempted under regulation 3(1)(c) of the SAST regulations (as existed at that point of time).

42. Acquisitions can be voluntary or involuntary. On a perusal of the scheme of the SAST Regulations, it appears that both the acquisitions, namely, voluntary acquisition and involuntary acquisition are within the purview of the SAST Regulations. An involuntary acquisition can be due to “operation of law”. Acquisition by way of transmission on succession or inheritance, pursuant to a scheme of amalgamation or merger or demerger under any law, etc., may fall under the category of involuntary acquisitions, i.e. due to operation of law. The provisions of SAST Regulations recognize these acquisitions and accordingly

provide for automatic exemption from the applicability of the regulations 10, 11 and 12 of the SAST Regulations as can be seen from the following : -

"Applicability of the regulation

3.*(1) Nothing contained in regulations 10, 11 and 12 of these regulations shall apply to:*

(a) ……
(b) ……
(c) ……
(d) ……
(e) ……
(f) ……
(ff) acquisition of shares by a person in exchange of shares received under a public offer made under these regulations
(g) acquisition of shares by way of transmission on succession or inheritance
(h) ……
(i) ……
(ia) ……
(j) pursuant to a scheme:
  (i) framed under section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986);
  (ii) of arrangement or reconstruction including amalgamation or merger or demerger under any law or regulation, Indian or foreign
(ja) change in control by takeover of management of the borrower target company by the secured creditor or by restoration of management to the said target company by the said secured creditor in terms of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
(k) ……
(ka) acquisition of shares in terms of guidelines or regulations regarding delisting of securities specified or framed by the Board"

43. It can be seen from the above that involuntary acquisitions do attract the substantive provisions of the SAST Regulations, namely, regulations 10, 11 and 12. However, the applicability of the same is exempted under regulation 3 as detailed above.

44. It is observed from the terms and conditions of issuance of warrants to the Noticees by SAL that the warrant holders were entitled to exercise their right to subscribe for and be allotted the equivalent number of equity shares within a period of 18 months on payment of the balance 90% on or before exercise of the option. It is not in dispute that the Noticees paid the balance amount due and

exercised their option to convert the warrants and acquired the equity shares carrying voting rights on December 11, 2003. Thus, the acquisition of shares and consequent voting rights is out of a voluntary action on the part of the Noticees and it is not due to compulsion under or operation of any law. Therefore, the contention of Noticees that conversion of warrants into equity shares is merely a 'legal consequence' and not a fresh acquisition is not tenable.

45. I have already held that the provisions of regulation 10 of SAST Regulations would get triggered, once a person acquires a security which entitles him to exercise 15% or more of the voting rights of a company. In the instant case, it is observed that with the acquisition of 30,68,875 equity shares on conversion of the warrants on December 11, 2003, the combined voting rights of the Noticees increased from 11.25% to 19.31%, i.e. more than the threshold limit of 15% specified under regulation 10 of the SAST Regulations. The Noticees have not disputed this fact. As the said acquisition resulted in entitling the Noticees to exercise more than 15% of the voting rights of SAL, I am of the view that the acquisition had attracted the provisions of regulation 10 of the SAST Regulations. However, since the provisions of regulation 3(1)(c) was repealed from the statute book with effect from September 09, 2002, the Noticees could not claim exemption under the said provision from the applicability of regulation 10 of SAST Regulations with regard to the aforesaid acquisition of voting rights.

46. I have carefully perused the orders of SEBI, in the matters of (i) *Flex International Pvt. Ltd. and Others* and (ii) *Ramco Industries Ltd. and Others*, relied upon by the Noticees in support of their submissions. I have noted that in the said cases, the respective acquirers have filed reports under regulation 3(4) of the SAST Regulations, which is not the case in the matter under consideration. Moreover, the aforesaid cases were decided vide orders dated August 25, 2004 and August 24, 2004, respectively, whereas in the instant case, the Noticees have acquired voting rights beyond the threshold limit of 15% and violated the provisions of regulation 10 of SAST Regulations on December 11, 2003. I am of the view that the said orders have no application in the instant case inasmuch as the violation was committed by the Noticees prior to the date of the aforesaid orders and the observations and conclusions arrived at by me in the foregoing paragraphs with regard to the timing of applicability/triggering of the provisions of regulations 10 and 14(2) of the SAST Regulations and the availability of benefit of exemption under regulation 3 of SAST Regulations.

47. The next issue for consideration is as to whether Noticees were obligated to make a public announcement in accordance with regulations 10 and 14(2) and comply with other applicable provisions of the SAST Regulations, on acquisition of 30,68,875 equity shares carrying voting rights on December 11, 2003.

48. It has been held by the Hon'ble SAT in the case of *Arya Holdings Limited V/s. P Sri Sai Ram, Adjudicating Officer*, -- Appeals No.3-5 of 2001 – Order dated May 04, 2001 – that "*Once it is held that the acquisition do not have the benefit of exemption as provided under the said regulation, the acquirer is required to comply with the requirement of making a public offer in terms of regulation 10, ……*".

49. Therefore, I do not find any merit in the submissions of the Noticees that there was no need to comply with regulation 10 read with regulation 14(2) of the SAST Regulations when the voting rights were acquired on December 11, 2003. Accordingly, I hold that the Noticees were obligated to make a public announcement in compliance with regulations 10 read with 14(2) and other applicable provisions of the SAST Regulations.

50. In view of the aforesaid findings, I do not think it is necessary to deal with the submissions of the Noticees with regard to non-submission of report under regulation 3(4) of the SAST Regulations.

51. The next issue for consideration is as to whether the failure on the part of the Noticees to comply with the provisions of SAST Regulations attracts monetary penalty under section 15H(ii) of SEBI Act.

52. It is not in dispute that the Noticees did not make any public announcement in compliance with the aforesaid regulations on acquisition of voting rights on December 11, 2003 beyond the threshold limit. It has been held by the Hon'ble SAT in the case of *Arya Holdings Limited V/s. P Sri Sai Ram, Adjudicating Officer*, -- Appeals No.3-5 of 2001 – Order dated May 04, 2001 – that *"……., the acquirer is required to comply with the requirement of making a public offer in terms of regulation 10, and failure to do so would attract the provisons of section 15H(ii)."* I, therefore, hold that the Noticees are liable for monetary penalty under section 15H(ii) of the SEBI Act as they had failed to comply with the requirements of making a public offer in terms of regulation 10 of SAST Regulations.

53. The Hon'ble Supreme Court of India in the matter of *SEBI Vs. Shri Ram Mutual Fund* [2006] 68 SCL 216(SC) held that once the violation of statutory regulations is established, imposition of penalty becomes *sine qua non* of violation and the intention of parties committing such violation becomes totally irrelevant. Thus, as the violation of statutory obligations by the Noticees has been established, I hold that they are liable for monetary penalty.

54. In the light of the above, the next issue for consideration is as to what would be the monetary penalty that can be imposed on the Noticees for the violation referred to above.

55. The provisions of section 15H(ii) of SEBI Act is reproduced hereunder :

"Penalty for non-disclosure of acquisition of shares and takeovers

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

(i) ……..
(ii) make a public announcement to acquire shares at a minimum price,
(iii)……
(iv)……
he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher."

56. While imposing monetary penalty it is important to consider the factors stipulated in section 15J of SEBI Act, which reads as under:

"15J - Factors to be taken into account by the adjudicating officer
While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
(b) the amount of loss caused to an investor or group of investors as a result of the default;
(c) the repetitive nature of the default."

57. On perusal of the various provisions of the SAST Regulations, it is observed that the open offer process includes appointment of a SEBI registered merchant banker as manager to the offer, determination of offer size and price, opening of an escrow account, making a public announcement in newspapers, filing of offer document with SEBI, dispatch of offer document to the eligible share holders, etc. The unfair gain to the Noticees, as a result of the default, can be computed by working out the value of open offer and the cost that would have been incurred by the Noticees had they made the open offer in December 2003.

58. For the purpose of quantification of the disproportionate gain or unfair advantage enjoyed by the Noticees and/or amount of loss caused to the investors, the following factors have been considered as relevant :

- In terms of regulation 14(2) of SAST Regulations, the public announcement ought to have been made not later than four working days before the Noticees acquired the voting rights on conversion of warrants, i.e., on or before December 05, 2003.
- In terms of regulation 21(1) of SAST Regulations, the Noticees were required to make an open offer to acquire shares constituting a minimum of 20% of SAL's post preferential equity share capital of 3,37,57,627, i.e., 67,51,526 shares.
- The offer price has to be determined based on the parameters specified in regulations 20(4) or 20(5) of the SAST Regulations, depending upon whether the shares of SAL were frequently or infrequently traded, as the case may be. It is observed from the available trading data (source: NSE) that shares of SAL were 'frequently traded' in terms of Explanation to regulation 20(5) of the SAST Regulations, for the purpose of determining the offer price. Thus, the parameters specified under regulation 20(4) of SAST Regulations would be applicable in the instant case for this purpose. The parameters under regulation 20(4) are as under:

> *For the purposes of sub-regulation (1), the offer price shall be the highest of-*
> *(a) the negotiated price under the agreement referred to in sub-regulation (1) of regulation 14;*
> *(b) price paid by the acquirer or persons acting in concert with him for acquisition, if any, including by way of allotment in a public or right or preferential issue during the 26 weeks period prior to the date of public announcement, whichever is higher;*

(c) the average of the weekly high and low of the closing prices of the shares of the target company as quoted on the stock exchange where the shares of the company are most frequently traded during the twenty-six weeks or the average of the daily high and low of the prices of the shares as quoted on the stock exchange where the shares of the company are most frequently traded during the two weeks preceding the date of public announcement, whichever is higher:

As the obligation to make the open offer was not triggered due to any agreement, provisions of regulation 20(4)(a) are not applicable. One of the Noticees, namely, M/s. Arcolab (India) Pvt. Ltd. has acquired 2,24,000 (1,93,500 + 30,500) shares, out of the total of 30,68,875 shares, at a price of Rs.76.87 per share, which is the highest price paid by the Noticees, in terms of provisions of regulation 20(4)(b). In the instant case, as the open offer has been triggered pursuant to acquisition by way of preferential allotment, the reference date, in terms of Explanation (ii) to regulation 20(11) of the SAST Regulations, for calculating the 26 weeks' average price or 2 weeks' average price as required under regulation 20(4)(c) would be January 24, 2002, i.e. the date of board resolution which authorized the preferential allotment. The closing market price of the shares of SAL during the period from July 24, 2001 to January 23, 2002 ranged between Rs.49.05 and 94.50 per share. For a very brief period, i.e. during November 29, 2001 to December 11, 2001, the closing market price was in the range of Rs.76.50 to Rs.94.50 per share (Source : NSE).

- Accordingly, based on the aforesaid parameters, the minimum offer price would have been Rs.76.87 per share.
- On this basis, the total consideration of the offer would have been Rs.51,89,89,804/-, i.e., 67,51,526 shares X Rs.76.87 per share.
- In addition to this, the Noticees would have incurred expenditure towards cost of engaging the services of a Merchant Banker, making a public announcement in newspapers, filing of offer documents with SEBI, dispatch of offer documents to the eligible share holders, etc.
- Thus, taking into consideration the above factors, it can be said that the cost for the Noticees had they complied with the provisions of the SAST Regulations would have been approximately Rs.52,25,00,000/- (Rupees fifty two crores and twenty five lakhs only).

59. The fact remains that had the appellants made a public announcement to acquire 20% of the shares of SAL, the shareholders of SAL would have got an opportunity/

option to tender their shares pursuant to such an open offer and exit from the company at a price to be determined under the SAST Regulations. This opportunity/option was denied to them. Further, such an announcement if made would have also impacted the movement of the price of the shares of SAL on the stock exchanges. Thus, the exit opportunity available to the shareholders through the open offer which the Noticees ought to have made under the SAST Regulations would have been in addition to the exit route through the secondary market. Had the public announcement, in terms of regulation 14(2) of SAST Regulations, been made on or before December 05, 2003, the offer could have got completed, in normal circumstances, in 120 days, that is to say by April 13, 2004. I have perused the data relating to market price of the shares of SAL during the period between December 2003 and April 2004 (Source : NSE). I find that the market price was in the range of Rs.125/- to Rs.248/- per share. As the market price during the aforesaid period was higher than the offer price arrived at in terms of regulation 20(4) of the SAST Regulations, it cannot be said that there was any loss caused to the investors. There was only an opportunity loss to the shareholders at large inasmuch as the Noticees denied an exit opportunity to the shareholders through the open offer process which was legitimately due to them.

60. By not having complied with the mandatory requirement of the SAST Regulations, the Noticees have also avoided the expenditure which otherwise they would have incurred towards cost of engaging the services of a Merchant Banker, making a public announcement in newspapers, filing of offer documents with SEBI, dispatch of offer documents to the eligible share holders, etc. To this extent, it can be said that the Noticees have earned disproportionate gain or unfair advantage.

61. Further, with the acquisition of 30,68,875 shares/voting rights, the combined voting rights of Noticees has gone upto 19.31%. With the result, the Noticees have not only crossed the threshold limit of 15% specified under regulation 10 of SAST Regulations (without complying with the mandatory public announcement required under the SAST Regulations) but also became eligible for “creeping acquisition” under regulation 11(1) of the SAST Regulations. It is observed from the shareholding pattern of SAL that the combined shareholding of the Noticees had come down to 15.07% as on December 31, 2007 from 19.31% as on March 31, 2004 and the overall shareholding of the ‘promoter-group’ had come down to 18.82% as on December 31, 2007 from 20.76% as on March 31, 2004 (Source: NSE). Thus, although the Noticees have gained yet another unfair advantage out

of the violation committed by them, they had not actually made use of the same as may be seen from the aforesaid shareholding pattern.

62. I do not find any material on record to establish repetitive nature of the default committed by the Noticees.

63. In view of the foregoing, I am convinced that it is a fit case to impose monetary penalty under section 15H(ii) of the SEBI Act which mandates imposition of a penalty amounting to Rs.25 crores or 3 times the amount of profit made, whichever is higher.

ORDER

64. After taking into consideration all the facts and circumstances of the case and material available on record, I hereby impose a monetary penalty of Rs.25,00,000/- (Rupees twenty five lakhs only) on the Noticees, namely, Mr. Arun Kumar, Mr. K. R. Ravishankar, M/s. Arcolab (India) Pvt. Ltd. and M/s.Caryl Pharma Pvt. Ltd. which will be commensurate with the default committed by them. The Noticees shall be jointly and severally liable to pay the said monetary penalty.

65. 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 shall be forwarded to Ms. Soma Majumder, Deputy General Manager, Corporate Finance Department, Division of Corporate Restructuring, Securities and Exchange Board of India, SEBI Bhavan, Plot No. C4-A, "G" Block, Bandra Kurla Complex, Bandra (East), Mumbai–400 051.

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

Date: **February 27, 2008** **V.S.SUNDARESAN**
Place: **Mumbai** **ADJUDICATING OFFICER**