**BEFORE THE ADJUDICATING OFFICER**

**SECURITIES AND EXCHANGE BOARD OF INDIA**

**[ADJUDICATION ORDER NO.: - SD/AO/01/2008]**

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**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**

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|---|---|
| **M/s Weizmann Limited** | **PAN : AAACW1260H** |
| **And Persons Acting in Concert, namely:** | |
| **Weizmann Financial Resources (Cochin ) Pvt.Ltd** | **PAN : AAACW2955P** |
| **Chetan D Mehra** | **PAN : AABPM4010H** |
| **Radhika Mehra** | **PAN : AIZPM8435A** |
| **Nirmal D Mehra** | **PAN : ABMPM5482F** |
| **Dharmedra G Siraj** | **PAN : AADPS0939D** |
| **Anju Siraj** | **PAN : AAMPS8160M** |
| **S G Siraj** | **PAN : ABEPS5550Q** |
| **Isha Siraj** | **PAN : ABHPS6728F** |
| **Sweta Siraj** | **PAN : AADPS0940E** |
| **Mitra Fidelity Ltd.** | **PAN : AAACT5757C** |
| **Sitex India Pvt. Ltd.** | **PAN : AAACS7463G** |
| **Om Mitra Securities Ltd.** | **PAN :AAACW0533H** |

**FACTS OF THE CASE IN BRIEF**

1. M/s Weizmann Fincorp Limited (hereinafter referred to as the **'Target Company'** or **'WFL'**) is a Public Limited Company having Regd. Off at Empire House, 214, Dr. D N Road, Ent. A K Nayak Marg, Fort, Mumbai-400001. The shares of the Target Company were listed on Bombay Stock Exchange (hereinafter referred to as the BSE). M/s Weizmann Limited

(hereinafter referred to as the **WL**) is one of the promoter entity who along with several other Persons Acting in Concert (**PACs**) had acquired the voting rights of the Target company.

2. In terms of the facts of the case, M/s Trade Apartments Ltd.('hereinafter referred to as **TAL)** had entered into an MOU with WL along with PACs for acquisition of 40% shares of the target company for which it had filed Letter of Offer as per the SEBI (Substantial Acquisitions of Shares and Takeover) Regulations, 1997 (hereinafter referred to as Takeover Regulations) with SEBI for the acquisition of 20% of the equity shares of the Target company for giving an exit opportunity to the shareholders.

3. During the course of examination of Letter of Offer, the following facts were noticed which are described below.

   i. The Paid up equity capital of the Target Company was comprised of 2,45,000 equity shares of Rs 10/- each, out of which 1,60,900 shares were held by the Promoter group i.e. WL and its PACs. The detailed share holding pattern of Target Company as on 30th June, 2002 had been provided by the Merchant Banker M/s Ashika Capital Limited which was as follows:

| **Category** | **No of shares Held** | **% of Share Holding** |
|---|---|---|
| **Promoter Group** | | |
| **C D Mehra** | **12850** | **5.24** |
| **R C Mehra** | **11500** | **4.69** |
| **D D Mehra** | **11950** | **4.88** |
| **N D Mehra** | **10000** | **4.08** |
| **D G Siraj** | **12250** | **5.00** |
| **A D Siraj** | **6950** | **2.84** |
| **S G Siraj** | **21750** | **8.88** |
| **Isha Siraj** | **10750** | **4.39** |
| **Shweta Siraj** | **10300** | **4.20** |
| **Mitra Fidelity Ltd** | **9950** | **4.06** |
| **Weizmann Financial Resources (Cochin)Pvt.** | **10000** | **4.08** |

| | | |
|---|---|---|
| **Ltd.** | | |
| **Weizmann Ltd** | **10000** | **4.08** |
| **Sitex India Pvt. Ltd** | **10550** | **4.31** |
| **Om Mitra Securities Ltd.** | **10200** | **4.16** |
| **Sub Total** | **160900** | **65.67** |
| **Non Promoter's Holding** | | |
| **Indian Public** | **84100** | **34.33** |
| **Sub Total** | **84100** | **34.33** |
| **Grand Total** | **245000** | **100.00** |

ii. That the Target company had also issued 4,75,000 1% Cumulative Redeemable Preference Share of Rs 100/- each on 25/11/1996 which were allotted to the promoter group. The said Promoter group includes WL and its PACs as mentioned earlier.

iii. The dividends on these preference shares remained unpaid for two years. Thus, as per the provisions of Section 87(2)(b) of the Companies Act, 1956 the voting rights were accrued on these preference shares on 01/07/2002 due to non payment of dividend for two years.

4. As the preference shares were held by the promoter group, due to accrual of voting rights to the said shares on account of non payment of dividend, the voting rights of the promoter group had increased from 65.67% to 98.32% of the total paid up equity voting capital of Target company.

5. As a result of the said acquisition of voting rights of the target company, WL along with other PACs (hereinafter collectively referred to as the "**Acquirers** or **Noticees"**) triggered the Regulation 11(1) read with 14 of the Takeover Regulations. Regulation 11(1) of the Takeover Regulations puts an obligation on acquirer to make a public announcement prior to the acquisition of more than 5 % of voting rights in the Target Company. However, since the acquirers failed to make a public announcement in accordance with the provisions of Takeover Regulations, as required in terms of Regulation 11(1) read with Regulation 14 of Takeover Regulations, the acquirers were alleged to have violated the provisions of the said Regulations and therefore, were liable for monetary penalty under section 15H(ii) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the '**Act'**) for which the present proceeding has been initiated.

**APPOINTMENT OF ADJUDICATING OFFICER :**

6. Ms. Babita Rayudu was appointed as the Adjudicating Officer vide order of SEBI dated 16th October, 2006 under section 15-I of the Act r/w rule 3 of SEBI (Procedure for holding Inquiry and Imposing Penalty by Adjudicating Officer) Rules,1995 (hereinafter referred to as the Adjudicating Rules) to inquire into and adjudge under Section 15H(ii) of the Act, the alleged violation of the provisions of Regulation 11(1) read with Regulation 14 of the Takeover Regulations by the Acquirers.

7. Consequently, the then Adjudicating Officer was sent on deputation and thereafter the undersigned was appointed as the Adjudicating Officer in the instant matter vide SEBI order dated November 23, 2007.

**SHOW CAUSE NOTICE/REPLY/PERSONAL HEARING**

8. Accordingly, a notice to show cause dated April 27, 2007 under Rule 4(1) of the Adjudicating Rules was issued to the Acquirers asking them to show cause as to why an enquiry should not be held against them and penalty be not imposed under Section 15H(ii) of the Act for their failure to make a public announcement before acquiring the voting rights of WFL in terms of Regulation 11(1) read with Regulation 14 of the Takeover Regulations.

9. After receiving the said show cause notice, a common reply was filed by the Acquirers vide letter dated May 15,2007 through their company secretary Amit Buch. They had desired for the personal hearing through the said reply. The extracts of the reply of the Noticees, *inter alia*, are stated below:

- That WL along with the other Promoters had already been holding over 65% control of Equity capital and did not take any steps specifically to increase their control through acquisition of shares or voting rights. That the voting rights had accrued to WL by operation of law and not by any specific action of the promoter group of WL.

- The voting rights accrued to WL on account of the target company WFL failing to declare any dividend or pay any dividend on the Cumulative Preference Shares, 100% of which were held by WL and WFL could not declare or pay the preference dividend on account of paucity of profits.

- That WFL had declared dividend at its Annual General Meeting held on 31.01.2001 for the financial year ended on 30.06.2000 and thereafter WFL was not in a position to declare Preference dividend on account of paucity of distributable profits. Thus, as per section 87 of the Companies Act,1956, the voting rights accrued to the Preference Shareholders of WL two years after the last declaration of dividend i.e. in January, 2003.

- That WL was already in control of WFL and this accrual of voting rights by operation of law, does not result in any change in control. As the public shareholding in WFL was 34.33% of the total listed equity share capital of the company, such accrual of voting rights was not intended by the promoters at any stage as the same would have resulted in the company becoming delisted.

- That acquisition of voting rights accrued to WL was just by operation of Law and hence necessary resolutions were passed by the Board of Directors of WL to waive the voting rights. Thus it did not affect the interest of any investors at large.

- That w.e.f. 09.09.2002 share has been defined to mean "shares in the share capital of the company carrying voting rights including any security which would entitle the holder to receive shares with voting rights but shall not include preference share". "Preference shares" being excluded from the definition of shares, automatically voting rights thereof too is to be excluded from the ambit of Takeover code.

- That WL alongwith promoter group already had a controlling stake of 65% of the equity capital of the target company and with the voting right accruing, there is no addition or change in control of the company and therefore it has not adversely affected the public shareholders. Further, the said preference shares were not listed on any stock exchange.

10. After receiving the reply, the then Adjudicating Officer Ms. Babita Rayudu had given an opportunity of hearing to the **Acquirers** on June

11, 2007 which was attended by Mr. T V Subramanian, Head of Finance,WL , Mr. Sanjay Chavan, Asst. Company Secretary, WL and Ms Shalashri Bhaskar, Consultant. After the hearing proceedings, the **Acquirers** had submitted the written submission reiterating the contentions taken earlier. In addition to this, Acquirers had also quoted the matter of Jayaswal Neco Limited in which SEBI vide its order dt 07.02.2008 had held that the acquirer and PACs would not be required to make a public announcement.

11. Consequent to my appointment as Adjudicating Officer in place of Ms Babita Rayudu, another opportunity of personal hearing was given to the **Acquirers**. During the said hearing proceedings the Acquirers had reiterated their contention that the voting right would accrue only after 31.01.2003 i.e. two years after last dividend was declared.

**CONSIDERATION OF ISSUES AND FINDINGS**

12. 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 :

a. Whether the accrual of voting rights on preference shares in terms of Section 87(2)(b) of the Companies Act, 1956 happened 2 years after the end of financial year for which the dividend was declared or 2 years after the date of declaration of dividend?

b. Whether the date of change of definition of share is relevant to the present matter?

c. Whether the Noticees were obligated to make a public announcement to acquire 20% of the post-issued voting capital of WFL in compliance with Regulations 11(1) read with 14 of Takeover Regulation?

d. Whether the failure on the part of the Noticees to comply with Regulations 11(1) read with 14 of Takeover Regulations attracts monetary penalty under section 15H(ii) of SEBI Act?

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

***Consideration of the Issues:***

13. As observed from the facts of the case, WFL had declared the dividend on 31.01.2001 on cumulative preference shares held by WL for the financial year ending June 30th June 2000. Thereafter, WFL did not pay any further dividend on the said shares, due to which, by operation of Section 87 (2) (b) of the Companies Act,1956 voting rights accrued on the said shares. It is important to determine the exact date on which such accrual is happening. For this purpose, Sec 87(2)(b) of the Companies Act,1956 as it existed at the relevant time, is reproduced below.

**Section 87 (2) (b):**

"*Subject as aforesaid, every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, be entitled to vote on every resolution placed before the company at any meeting, if the dividend due on such capital or any part of such dividend has remained unpaid -*

*(i) in the case of cumulative preference shares, in respect of an aggregate period of not less than two years preceding the date of commencement of the meeting; and*

*(ii) in the case of non-cumulative preference shares, either in respect of a period of not less than two years ending with the expiry of the financial year immediately preceding the commencement of the meeting or in respect of an aggregate period of not less than three years comprised in the six years ending with the expiry of the financial year aforesaid.*

***Explanation** : For the purposes of this clause, dividend shall be deemed to be due on preference shares in respect of any period, whether a dividend has been declared by the company on such shares for such period or not. -*

*(a) on the last day specified for the payment of such dividend for such period, in the articles or*

*other instrument executed by the company in that behalf; or*

*(b) in case no day is so specified, on the day immediately following such period.*

14. After analyzing the *explanation* as provided in the above-mentioned provision of the Companies Act,1956, it is clear that the dividends payable on the said preference shares became due not later than July 01, 2002 in any case. Acquirer have taken the contention that as the WFL had declared dividend for the last time in the AGM of the company held on 31.01.2001 for the year ending 30.06.2000; the dividends became due for the said year only on 31.01.2001. Acquirers have argued that voting rights would accrue to the said shares only when dividends remain unpaid for a

period of 2 years after the date of declaration of last dividend. However, the said contention of the Acquirers cannot be accepted as the date of declaration of dividend has no significance for determining when the dividend becomes due. The clauses (a) and (b) contained in the said ***explanation*** makes it quite clear that the dividends became due not later than July 01, 2002 and by virtue of the same, in terms of the provisions of Section 87 (2) (b) of the Companies Act,1956 the voting rights would accrue to the said preference shares not later than the said date i.e. July 01, 2002. The details of how the voting rights have accrued on these preference shares are calculated as under.

| | |
|---|---|
| Total Share capital before acquisition | 245000 shares |
| Shares held by WL and PACs | 160900 shares |
| % of Holding | (160900/245000)*100=65.67% |
| No of Preference Shares of Rs 100 per each | 475000 shares |
| Converted into Preference shares of Rs 10 each | 4750000 shares |

Now after acquisition, total no of shares (245000+4750000)=4995000 shares

| | |
|---|---|
| No of Shares held by WL and its PACs | (160900+4750000)=4910900 |
| % of Holding | (4910900/4995000)*100=98.32% |

15. Besides that, I have gone through the "Letter Of Offer" filed by TAL and para no.5.1.4 of page 10 of the said Letter Of Offer, inter alia, states- "The Voting Rights which accrued to WL from 1st July,2002 i.e. immediately from the FY ending 30/06/2002 ……..."So, the offer document on record, clearly admits that the period of accrual of Voting Rights starts from 1st July, 2002 and not from date of AGM.

16. After considering the facts and examination of Section 87( 2 ) ( b )of the Companies Act,1956 I find that the submissions made by Acquirers in their reply as well as the contentions made at the time of hearing with respect to accrual of voting rights are not valid and I do not find any merit in them.

17. In view of these, it is very clear to me that the voting right accrued on these preference shares not later than 01.07.2002 in any case.

18. It is seen that the Acquirers have taken the contention that the said voting rights accrued to the said preference shares were waived off by passing necessary resolutions in terms of Section 106 of the Companies Act, 1956. In support of this, they have submitted copies of resolutions passed by sub-committee of Board of Directors of the company WL.

19. At this juncture, I am not going into the question of whether such waiver of voting rights as above in terms of Section 106 of the Companies Act,1956 is valid or not. However, even if we presume for the sake of argument that such waiver is valid in terms of Section 106, even then the facts and circumstances of the present case suggest that such waiver can be deemed to have taken place only on November 01, 2002 as the first resolution for the said waivers was passed only on November 01, 2002. As explained in the above paragraphs, the voting rights had accrued to the said preference shares for non-payment of dividend not later than July 01, 2002 whereas, the said voting rights can be said to have been waived (presuming for the sake of argument that they can be waived) only on November 01, 2002. Thus, even assuming that the said voting rights were waived w.e.f November 01,2002 (date of resolution) under Section 106, it is very clear that during July 01, 2002 to October 31, 2002 the said preference shares can be said to have carried voting rights due to non-payment of dividends, in terms of Section 87 (2) (b) of The Companies Act.

20. As the said preference shares carried voting rights since July 01, 2002, the same was sufficient to trigger the application of Regulation 11 (1) read with Regulation 14 of the Takeover Regulations. The Acquirers have taken the contention that the said accrual of voting rights was not intentional and had happened merely by operation of law. However, in my view the same has no relevance as far as the applicability of the said provisions of the Takeover Regulations is concerned. Further, I feel that for the cases which are of different nature than the usual ones, there is always an exit route provided to such cases in the form of Takeover Panel as brought out in Regulation 4 of the Takeover Regulations whereby SEBI is vested with the power to grant exemption in such cases. This procedure is extremely transparent.

21. Further, Acquirer have taken contention that definition of "share" as contained in Regulation 2 (1)(k) of the Takeover Regulation has been amended and that the amended definition specifically excludes "preference shares" from the ambit of the said definition. However, I find that the amended definition of "share", as contained in the Takeover Regulations, is not relevant to the present set of facts and circumstances. It is noted that preference shares have been excluded from the definition of

"share" by amending the said definition. It is further noted that the said amendment is applicable w.e.f. September 09, 2002 only. As explained above, the accrual of voting rights on the preference shares had already place by July 01, 2002 which is earlier than the date on which the said amendment came into effect. Thus, the amended definition of "share" has no relevance to the instant case. Further, the Takeover Regulation deals with the concept of voting rights or voting capital. So, when voting rights accrue to the preference shares for non-payment of dividend, the preference shares acquire the character of equity shares having voting rights. Thus, even if we take that the amended definition is applicable to the present case, the exclusion of preference shares from the definition of "share" becomes immaterial in the instant case. Further, even after the said amendment of the definition of "share", it is clear, as observed from the decision of the Hon'ble SAT in the matter of Arun Kumar & Others vs. SEBI (Appeal No. 62 of 2008, date of Decision 13-10-2008), that "share" as envisaged under the Takeover Regulations, would include all securities carrying voting rights.

22. In terms of the facts of the case, Acquirers had held 160,900 shares of WFL out of a total of 2,45,000 shares constituting 65.67% of the total paid up equity shares. In addition to this, they had also held 4,75,000 1% redeemable cumulative preference shares of Rs 100 each on which the voting right was accrued due to non-payment of dividend. Thus, after the said accrual of voting rights on the said preference shares the voting rights of Acquirers had increased from 65.67% to 98.32% which has been calculated as above. Hence, WL was liable to make the public announcement under Regulation 11(1) read with 14 of the SEBI Takeover Regulation. Further, it is seen that the said increase in the voting rights of the Acquirer gave an absolute control to the Acquirers over the Target Company. In view of the same, it would have been appropriate to provide an exit opportunity to the existing shareholders by way of an open offer.

23. In this regard , it is pertinent to quote the applicability of provisions of Takeover Regulations which, at the relevant time, read as under :-

> ***"Consolidation of Holdings***
> ***Sec 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 [Seventy five per cent (75%)]] 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] per cent 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.*"

24. It is observed from the abovementioned provisions of the Takeover Regulations applicable at the relevant time that when an acquirer together with persons acting in concert held more than 15% but less than 75% of the shares or voting rights of a company and intended to exercise more than 5% of voting rights of the company then the acquirer had the obligation to make the public announcement within prescribed period.

25. Apart from the above facts and discussion, I would like to elaborate upon some issues precisely for easy understanding of the matter. Acquirers have taken the contention that they were already in control of the target company WFL and any further acquisition of voting rights wouldn't result in any change in control. Acquirers have contended that there was also no intention to acquire any further voting rights in the target company. I do not find any merit in the contentions of the Acquirers as the intention of the Acquirers and the control of the target company remaining unchanged has no relevance while deciding the issue of triggering the applicability of the abovementioned provisions of the Takeover Regulations. It would have been very appropriate for the Acquirers to go and seek exemption from the takeover panel, which has been constituted for the sole purpose of deciding such matters.

26. The Acquirers have cited the case of Jayaswal Neco Limited wherein exemption was granted to the applicants in similar facts and circumstances. However, I find that the facts of the said case are not entirely similar to the instant case for the following reasons.

27. As per the provisions of the Takeover Regulations, the acquires have to apply to Takeover Panel for exemption before acquisition of shares or voting rights. It is observed that in the Jayaswal Neco Ltd case, the exemption from Takeover panel was sought after the acquisition of shares or voting rights. As the acquisition of voting rights had already taken place in the said matter, the Takeover panel denied exemption to the applicants and held - "……..the acquisition of shares in respect whereof the exemption is now sought had already taken place and even the acquired convertible shares had embedded voting rights, grant of exemption as sought is not recommended". However, ultimately exemption was granted to the applicants in the said case by an order of the Whole Time member of SEBI on the ground that enforcing the provisions of Regulations 11 and 14 in respect of vesting of voting rights

would put extra cost on making public announcement, appointment of merchant banker etc. on the acquirers who were already under financial burden to infuse funds in the target company in terms of the stipulation of restructuring package under CDR Scheme. The WTM had further held that – '' …, the peculiar facts and circumstances of this case as mentioned above suggest that had an exemption application been filed before vesting of voting rights, the transaction would have been eligible for being considered for exemption from open offer under Takeover Regulations."

28. Even though the Acquirers in the instant case have sought to compare their case with the abovementioned case, I find that the two cannot be compared. In the Jayaswal Neco Ltd case, the acquirers had sought exemption from the Takeover panel even though the said exemption was sought after accrual of voting rights. Further, the exemption was granted in the said case also in view of the peculiar circumstances of the said case. But, in the instant matter, from the records it is seen that Acquirers did not seek any exemption from the Takeover panel either before or after the accrual of voting rights of the Target Company. When the Acquirers have failed to file for exemption before or even after the said accrual of voting rights, the decision in the Jayaswal Neco Ltd case will have no bearing on the instant case.

29. In their reply, the Acquirers have contended - "Even in case we are forced to make an open offer, the price at which the offer to be fixed cannot be determined because the shares of the target company, WFL were scarcely traded and all the financial parameters like EPS, Book Value and Return on Net worth were negative." This contention of the Acquirers cannot be accepted as the question here is not whether making of public announcement was feasible or nor but the issue is whether the Acquirers were required to make a public offer or not. Even the contention of the Acquirers that the determination of offer price in case of public offer would not have been possible because of the scrip being illiquid and its financial parameters being negative cannot be accepted. Regulation 20 (5) of the Takeover Regulations provides for the method for calculating the offer price for an illiquid scrip and the same could have been applied to the instant case. Further, accepting the contention of the Acquirer would also go against the interest of public investors as the purpose of the public announcement is to provide an exit option to public investors. In this regard, the observation of the Hon'ble SAT in the matter of M/s B.P. Plc (formerly B.P.Amoco) & Foseco Plc Vrs Securities & Exchange Board of India (Appeal No. . 30/2001 and Date of Decision September 7, 2001 ) is relevant which I quote here - " *It is not the monetary gain to the Indian shareholders, that is to be taken as the guiding factor. It is the governing legal*

*provision, that is required be followed. If under the regulations the shareholders are entitled to benefit, it should be granted, if the regulation is not in favour, the benefit cannot be granted. Therefore the impugned order has to be tested from the legal angle."*

30. The Acquirers have also taken the contention that said Preference shares were not listed on any exchange and according to their belief Takeover Regulation is not applicable for unlisted shares. The said contention of the Acquirers cannot be accepted. The provisions of the Takeover Regulations dealing with the concept of shares containing voting rights do not distinguish between listed and unlisted shares. Thus, in the present instance when the voting rights have accrued on preference share, the same can be taken to have triggered application of Regulation 11 (1).

31. In view the abovementioned findings and observations and after considering all the materials on record, I conclude that the Acquirers, by failing to make a public announcement in terms of abovementioned provisions of the Takeover Regulations in respect of the said accrual of voting rights on the said preference shares, have violated Regulation 11 (1) of the Takeover Regulation for which makes them liable for monetary penalty under Section 15H (ii) of the Act.

32. In view of the above, the next issue for consideration is as to what would be the monetary penalty that can be imposed on the Acquirers for the violation of abovementioned provisions of the Takeover Regulations.

33. 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 Acquirers has been established, I hold that they are liable for monetary penalty.

34. The provisions of section 15H(ii) of SEBI Act as prevailing at the relevant time 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)disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or*

*(ii)make a public announcement to acquire shares at a minimum price; or*

*he shall be liable to a penalty not exceeding five lakh rupees.*

35. 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."*

36. In this matter, the Acquirers had not made any open offer to the public shareholders as required under the said provisions of law and had not given any opportunity to the existing public shareholders to exit. It is observed that for making the public announcement/open offer various provisions of the Takeover Regulations have to be complied with**.** These provisions are important for the purpose of quantifying the penalty as the unfair gains so made by the Acquirers would be equal to the expenses otherwise incurred in making the said public offer. Thus in the present case, a need arises to compute the expenses which would have been required in making an open offer to be made by Acquirers to the shareholders of WFL in July 2002. the following factors are important for quantification of cost of open offer:

a. In terms of Regulation 21(1) of takeover regulations "*The public offer made by the acquirer to the shareholders of the target company shall be for a minimum twenty percent of the voting capital of the company*". As per the details of the voting capital of the company the Acquirers were already holding 98.32% of the voting capital after the said accrual of voting rights and they had to procure the remaining shares having voting rights of 1.68% which are represented by 84,100 equity shares.

b. The offer price has to be determined based on the parameters specified in regulations 20(4) or 20(5) of the Takeover Regulations, depending upon whether the shares of WFL were frequently or infrequently traded, as the case may be. It is observed from the available trading data (source: BSE) that the shares of WFL were 'infrequently traded' in terms of Explanation to regulation 20(5) of

the Takeover Regulations, for the purpose of determining the offer price. Thus, the parameters specified under regulation 20(5) of Takeover Regulations would be applicable in the instant case for this purpose. On Further analysis it is observed that the pricing of the open offer would have to be in accordance with Regulation 20(5)(c) of the Takeover Regulations. In the instant matter a compounding calculation in relation to pricing of open offer would have to be made and it is beyond the purview of this order to make such calculations. Considering the bad financial state of the Target Company, let us presume, for the sake of calculation, the pricing of open offer to be Re. 1/- per share.

c. Considering all the above presumptions, the total consideration of the offer would have been Rs. 84,100/-, i.e. 84,100 shares X Rs. 1 per share.

d. Further the interest on the offer price should be calculated as this liability of open offer relates to July 2002 and substantial time has elapsed. This is an opportunity loss to the existing shareholder.

e. In addition to this, the Acquirers 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. This cost at the very minimum would be approximately Rs. 3,00,000/-(Rupees Three Lakh only).

f. 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 Takeover Regulations would have been approximately Rs. 4,00,000/- (Rupees Four lakhs only).

37. The fact remains that had the Acquirer made a public announcement to acquire the remaining 1.68% of the shares of WFL, the shareholders of WFL 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 Takeover Regulations. This opportunity/option was denied to them. Thus, the exit opportunity available to the shareholders through the open offer which the Noticees ought to have made under the Takeover Regulations would have been the only practical exit route as exit route through the secondary market did not have much significance due to the infrequent trading of the scrip. There was definitely an opportunity loss to the shareholders at large inasmuch as the

Acquirers denied an exit opportunity to the shareholders through the open offer process which was legitimately due to them.

38. However, from the material on record it is observed that an open offer by TAL was made to the equity shareholders of WFL at a rate of Rs. 63.50/- in October 2006, which was a reasonably good price taking into consideration the financial condition of the Target Company as discussed above. Thus, the shareholders got an exit opportunity later, although this was after a considerable period of time.

39. Thus, by not having complied with the mandatory requirement of the Takeover Regulations, the Acquirers have 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 made unjust gains or got unfair advantage.

40. However, it can be seen that the Acquirers were already in the control of the Target Company and the additional voting rights so acquired by them were because of operation of law and were not due to any act of the Acquirers.

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

42. In view of the foregoing, I am convinced that it is a fit case to impose monetary penalty under section 15H(ii) of the Act which mandates imposition of a penalty not exceeding Rs. 5 Lakh.

**ORDER**

43. In view of the above, after considering all the facts and circumstances of the case and exercising the powers conferred upon me U/s 15-I(2) of the Act, I hereby impose a penalty of Rs. 1,30,000/- (Rupees One Lakh Thirty Thousand only) on the acquirer WL and its PACs. The WL and other noticees shall be jointly and severally liable to pay the said monetary penalty.

44. The above penalty amount shall be paid through a duly crossed demand draft drawn in favour of "SEBI – Penalties Remittable to Government of India" and payable at Mumbai, within 45 days of receipt of this order. The said demand draft should be forwarded to Ms. Soma Majumdar , Deputy

General Manager, CFD, Securities and Exchange Board of India, SEBI Bhavan, Plot No, C4-A, "G" Block, Bandra Kurla Complex, Bandra(East), Mumbai-400 051.

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

**Date: October 24, 2008** **SANDEEP DEORE**

**Place: Mumbai** **ADJUDICATING OFFICER**