WTM/KMA/CFD/06/10/2008

SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: DR. K.M. ABRAHAM, WHOLE TIME MEMBER

DIRECTIONS UNDER SECTIONS 11 AND 11B OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH REGULATIONS 44 AND 45 OF SECURITIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 1997, IN THE MATTER OF SURAJ PRODUCTS LIMITED.

Date of hearing: August 14, 2008

Appearances:

For noticee:	Mr. Prakash Shah, Advocate
	Mr. N.L. Bhatia, Practicing Company Secretary
	Mr. Y.K. Dalmia
For Securities and Exchange Board of India:	Ms. Soma Majumdar, Dy. General Manager
	Mr. Vijayakrishnan G, Asst. Legal Advisor
	Mr. Amit Kapoor, Asst. General Manager

1. Securities and Exchange Board of India (hereinafter referred to as SEBI) received a letter dated February 17, 2006 from one Y.K. Dalmia having his address at W-7, Civil Township, Rourkela, Orissa enclosing a report under Regulation 3(4) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short, the Takeover Regulations). The said report was filed in respect of the acquisition of 15,00,000 (25.42%) equity shares of Suraj Products Limited (hereinafter referred to as the target company) on January 8, 2002 by Mr. Y.K. Dalmia

(promoter of the target company) and persons acting in concert with him, namely Mrs. Gayatri Dalmia, Mr. Ghanshyam Dalmia, Mr. K.P. Dalmia, Mrs. Kumudini Dalmia, Miss Nandita Dalmia, Miss Nivedita Dalmia, Mr. R.K. Dalmia, Mrs. Sunita Dalmia and M/s. Narbada Innovative Products Pvt. Ltd., on preferential basis. Mr. Y.K. Dalmia and the aforesaid persons acting in concert with him are hereinafter collectively referred to as the acquirers. The shares of the target company are listed on Bombay Stock Exchange Ltd. (BSE), Calcutta Stock Exchange Association Ltd. (CSE) and Bhubaneshwar Stock Exchange Ltd. (BhSE). As per the said report, the shareholding of the acquirers had increased from 34.34% to 51.03% of the enhanced voting capital of the target company, pursuant to the said acquisition. Subsequent to the receipt of the aforesaid report, SEBI sought further information/documents from the acquirers in respect of their above mentioned acquisition.

2. From the aforesaid report and subsequent correspondence with the acquirers, SEBI observed that the target company had allotted its 15,00,000 equity shares on January 8, 2002 to the acquirers on preferential basis. The said acquisition triggered the provisions of Regulation 11 (1) {as it stood as on the date of acquisition} of the Takeover Regulations. According to the acquirers, the said acquisition was squarely covered under the then existing Regulation 3(1)(c) of the Takeover Regulations and therefore, they were exempted from making a public announcement in terms of Regulation 11(1) thereof. However, it was prima facie observed that the target company had not fulfilled the conditions specified in Regulation 3(1)(c) of the Takeover Regulations so as to avail the grant of exemption from the applicability of Regulation 11(1) thereof. The acquirers had also not made a public announcement in terms of Regulation 11(1) of the Takeover Regulations. In short, SEBI prima facie found that the acquirers, neither made a public announcement in terms of Regulation 11(1) {as it stood as on the date of acquisition} of the Takeover Regulations nor

obtained the necessary exemption from the applicability of the said provisions, in terms of Regulation 3(1) (c) (as it stood prior to September 09, 2002) of the Takeover Regulations, in respect of their acquisition.

3. As the acquirers failed to make a public announcement in respect of their acquisition of 25.42% shares/voting rights of the target company on January 8, 2002, a notice was issued by SEBI on July 20, 2007 asking them to show cause as to why they should not be, *interalia,* directed to make a public offer to the shareholders of the target company, as required under Regulation 11(1) read with Regulation 14 of the Takeover Regulations. It was also specified in the show cause notice that the said action was in addition to any other actions specified under the provisions of Securities and Exchange Board of India Act, 1992 (Act) and Takeover Regulations, as would be deemed fit in the matter.

4. In response to the aforesaid show cause notice, Mr. Y.K. Dalmia (on behalf of the acquirers) vide letter dated August 7, 2007 *interalia* stated that the target company was incorporated during July 1991 and that they commenced operation from September 1993. In the reply, it is stated that, due to the adverse market conditions, the target company continued to operate at reduced level of operations, though, mini cement industry all over the country had closed down. According to the acquirers, in order to overcome the financial crisis and to avail the benefit of existing infrastructure, the target company had diversified into manufacturing of sponge iron plant of 50 TPD with a capacity of 15,000 tons per annum at a capital cost of Rs.408 lakhs by raising term loan of Rs.208 lakhs from Small Industries Development Bank of India (SIDBI), Rs.150 lakhs from promoters' equity and Rs.50 lakhs from internal accrual. The acquirers claimed that, the term loan was sanctioned by SIDBI, vide letter BBBO No.628/Dir-63(SPL) dated September 6, 2001 and that the conditions for the said term loan, *interalia,* was investment of Rs.200 lakhs in the project by

raising Rs.150 lakhs by way of fresh share capital and Rs.50 lakhs by utilizing internal resources of the target company. According to the acquirers, the aforesaid preferential allotment was made in the above background, for reviving the target company and protecting the interest of the stakeholders. The acquirers claimed that the promoters' equity was raised to meet the conditions of 51% (by promoters) in the target company, as stipulated by SIDBI. According to the acquirers, there was no change in management, pursuant to the aforesaid acquisition. With respect to the non compliance of full disclosures, as required under regulation 3(1) (c) of the Takeover Regulations, the acquirers contended that the same was complied with by the target company by a resolution passed at its Extra ordinary General Meeting held on August 22, 2005. The total number of shareholders in the target company, according to the acquirers, is only 9,452. In view of the above submissions, the acquirers requested SEBI to exempt them from making public offer to the shareholders of the target company.

5. An opportunity of hearing was granted by SEBI to the acquirers on August 14, 2008. Mr. Prakash Shah, Advocate, Mr. N.L. Bhatia, Practicing Company Secretary and Mr. Y.K. Dalmia (promoter/acquirer) appeared before me and made submissions on behalf of the acquirers. Submissions were made on the lines of the reply filed by Mr. Y.K. Dalmia vide letter dated August 7, 2007. According to the learned representatives, the preferential allotment of shares of the target company on January 8, 2002, was made not with the objective of market manipulation and price rigging, but to meet the financial crisis. As regards the compliance of Regulation 3(1) (c) of the Takeover Regulations, Mr. Y.K. Dalmia stated the following :

i. The Board Resolution in terms of 3(1)(c) (i) of the Takeover Regulations in respect of the (proposed) preferential allotment was sent to all stock exchanges.

ii. The identity of the proposed allotees (in terms of Regulation 3(1)(c)(ii) of the Takeover Regulations) in the notice was disclosed by specifying that the shares were to be issued to 'promoters'. However, inadvertently the name of the actual allottees was not disclosed.

iii. The total number of shares to be allotted were mentioned as 15,00,000 equity shares of Rs.10 each.

iv. Regarding price, it was mentioned in the notice as 'at par' which means at Rs.10/- only. The purpose of and reason for such allotment, was mentioned viz., *'In order to finance the diversification into manufacturing of sponge iron. The company has secured term loan of Rs.208 lakhs from SIDBI. The terms of sanction interalia included increase in paid-up capital of the company by Rs.150 lakhs by fresh issue of capital.*'

v. There was no change in control as the allotment was made to the promoters of the target company.

6. The learned representative further submitted that in similar cases, SEBI dropped the proceedings against certain entities by levying monetary penalty. They also referred to some of the orders of SEBI, such as Ushin Ltd, K.G. Fabriks Ltd. and Crocodile Ltd. wherein Section 11B proceedings of the Act were converted into adjudication proceedings. Mr Y K Dalmia (on behalf of all the acquirers) also filed written submissions, vide letter dated August 14, 2008 *inter alia* on the above lines.

7. I have considered the show cause notice dated July 20, 2007, the reply of the acquirers dated August 7, 2007, oral as well as written submissions made on behalf of the acquirers and other materials available on record. Admittedly, the acquirers had not made a public announcement, in terms of Regulation 11(1) (as existed on the date of acquisition) of the Takeover Regulations in respect of their acquisition of 25.42% of shares/voting rights of the target company on January 8, 2002. On the other hand, the acquirers, claimed that

they had fulfilled the conditions stipulated in Regulation 3(1)(c) (as it stood prior to September 9, 2002) of Takeover Regulations and hence, their acquisition was exempted from the applicability of Regulation 11(1) thereof.

8. Therefore, in the facts and circumstances of the present matter, the issue for consideration is whether the acquirers had fulfilled the conditions specified in Regulation 3(1) (c) of the Takeover Regulations, in respect of their acquisition of 15,00,000 equity shares of target company on January 8, 2002, on preferential basis. As the shareholding of the acquirers in the target company had increased from 34.34 % to 51.03% of its enhanced voting capital, pursuant to the aforesaid acquisition, the said acquisition triggered the then existing Regulation 11(1) of the Takeover Regulations. In this context, it is necessary to refer to the provisions of Regulation 3 (1)(c) and Regulation 11(1) (as it stood as on the date of acquisition) of the Takeover Regulations which 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, -*

(ii) 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;

(iii) 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 per cent or more of the post issued capital, then in such cases, the price at which the

allotment is proposed, the identity of such person(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."

Regulation 11(1):

"No acquirer, who together with persons acting in concert with him has acquired, in accordance with the provisions of the law, 15% or more but less than 75% of the shares or voting rights in a company, shall acquire either by himself or by persons acting in concert with him any additional shares or voting rights entitling him to exercise more that 10% of the voting rights in any period of 12 months, unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations."

9. It is an admitted fact that the target company had allotted its 15,00,000 equity shares, on preferential basis, to the acquirers on January 8, 2002, subsequent to the Board Resolution dated September 1, 2001. The date of Annual General Meeting of shareholders of the target company in respect of the said resolution was September 29, 2001. According to the acquirers, the target company was required to make the said preferential allotment as per the pre disbursement conditions imposed by SIDBI, while sanctioning the term loan of Rs. 208 lakhs. In order to buttress the said argument, the acquirers submitted the copy of the letter of SIDBI dated September 6, 2001 addressed to the target company. In terms of the said letter, SIDBI had given in principle sanction to the target company, in respect of the said term loan *inter alia*, subject to certain conditions. One of such conditions was that the target company shall, *"finalize and furnish share holding pattern of the company ensuring that the promoters*

have 51% of shares." According to the acquirers, the target company had raised the necessary finance of Rs.408 lakhs as under:

Particulars	Amt. (1)	Amt. (2)
a) Promoters Contribution		
i) 15,00,000 equity shares of		
Rs.10 each to promoters at per	- Rs.150 lakhs	
ii) Internal Generation	- Rs. 50 lakhs	Rs. 200 lakhs
b) Terms loan from SIDBI		Rs. 208 lakhs
Total		Rs. 408 lakhs

10. The acquires contended before me, that the acquisition of 15,00,000 equity shares (on preferential basis) of the target company, in the above back ground, was automatically exempted, in terms of Regulation 3(1)(c) of the Takeover Regulations from complying with the provisions of Regulation 11(1) thereof. Undoubtedly, in terms of Regulation 3(1) (c) of the Takeover Regulations (as it stood prior to September 9, 2002), a preferential allotment made in pursuance of a resolution under Section 81(1A) of the Companies Act, 1956 was exempted from the applicability of Regulation 10, 11 or 12 (as the case may be), thereof, subject to the compliance of certain conditions specified therein.

11. In the light of the legal and factual position stated above, it is to be examined whether the acquirers fulfilled the conditions specified in Regulation 3(1) (c) (as on the date of allotment) of the Takeover Regulations, so as to be eligible for exemption from the applicability of the provisions of Regulation 11(1) thereof, in respect of their acquisition. If so, the acquirers did not need to make a public announcement, in respect of their aforesaid acquisition. In the present case, the requirements under Regulation 3(1)(c) of the Takeover Regulations, are the following:

i) Board resolution in respect of the proposed preferential allotment shall be sent to all the stock exchanges on which the shares of the company are listed,

ii) The notice of the general meeting called for the purpose of consideration of the preferential allotment shall disclose:

   a) full disclosure of the identity of the class of the proposed allottee(s),
   b) the price at which the allotment is proposed,
   c) the identity of such person(s),
   d) the purpose of and reason for such allotment, consequential changes, if any, in the board of directors of the company and in voting rights, shareholding pattern of the target company, and whether such allotment would result in change in control over the target company.

12. With reference to (i) above, the acquirers claimed that, the target company had sent the Board Resolution to all the stock exchanges. Further, SEBI in its show cause notice dated July 20, 2007 also observed that the Board Resolution in respect of the aforesaid preferential allotment of the equity shares of target company to the acquirers was sent to BSE, CSE and BhSE on September 1, 2001. In the facts and circumstances, it is fairly established that the target company had forwarded the Board Resolution to the stock exchanges in respect of the aforesaid preferential allotment of the shares of the target company. In respect of disclosure specified at ii (b), the acquirers stated that, it was mentioned in the Board Resolution as "at par". Further, I note that, in the explanatory statement pursuant to section 173(2) of Companies Act, 1956, it is stated 'In order to finance the diversification into manufacturing of sponge iron. The company has secured term loan of Rs.208 lakhs from SIDBI. The term of sanction interalia includes increase in paid up capital of the Company by Rs.150 lakhs by fresh issue of Capital. It is proposed to allot 15,00,000 equity shares of Rs.10/- each at par to

promoters on private placement/ preferential basis". The said fact was also informed to the stock exchange, by the target company. Therefore, it is fairly established that the obligations as specified at (ii) (b) above was complied in respect of the above mentioned acquisition.

13. In respect of non mentioning of the identity of the allottees in the notice of General Meeting, the acquirers submitted that the same was disclosed by mentioning that "shares were to be issued to promoters" in the said notice. I note that, in the notice to Annual General Meeting dated September 29, 2001, it was mentioned ".....is hereby accorded to the Board to offer, issue and allot in one or more branches, on preferential/private placement basis to promoters upto 15,00,000/- (Fifteen lakh) equity shares of Rs.10/- at par aggregating Rs.1,50,00,000/- (Rupees One Crores Fifty Lakh only)". According to the acquirers, the name of the actual allottees to whom the shares of the target company were to be allotted was inadvertently not made in the notice of General Meeting. It is not in dispute that the acquirers are the only promoters of the target company. It was disclosed in the notice that the shares were to be allotted to the promoters of the target company. The identity of allottees was not disclosed in the notice. I, further note that the acquisition of the acquirers resulted in the increase of their shareholding in the target company by more than 5%. In such case, Regulation 3(1) (c) further obligates the disclosure of consequential changes, if any, in the board of directors of the company and in voting rights, shareholding pattern of the target company, and whether such allotment would result in change in control over the target company in the notice of the general meeting called for the purpose of consideration of the preferential allotment. Admittedly, the acquirers failed to do so. This can be further made out from the reply of Mr. Y K Dalmia dated August 7, 2207, in which it was stated that "the non – compliance with regard to full disclosures as required under regulation 3(1)(c)(ii), is concerned the same was complied with on being brought to the notice of the company by a resolution passed at

the Extra- ordinary general meeting of the company held on 22nd August 2005". The subsequent ratification in the Extra Ordinary General Meeting held on August 22, 2005 as mentioned above, would also establish the fact that some of the obligations/disclosures, as required under Regulation 3(1)(c)(ii) of the Takeover Regulations, were absent in the notice of the 10th Annual General Meeting held on September 29, 2001. The obligations at Regulation 3(1)(c)(ii) are pre conditions to avail exemption from the applicability of Regulations 10, 11 or 12, as the case may be, and that it cannot be said to have fulfilled by a subsequent ratification. Thus, all the requirements at Regulation 3(1)(c)(ii) were not strictly adhered to in respect of the acquisition of 15,00,000 equity shares of the target company by the acquirers on January 8, 2002 on preferential basis. Disclosure of the specified information in the notice is vital from the point of view of the public shareholders, as the details so furnished would help them to take an informed decision about the their investments in the company**.** Failure to disclose complete details on the specific aspects as provided in the Takeover Regulations cannot be considered trivial or inconsequential to be ignored. As the acquirers had failed to comply with the complete requirements of clause (ii) of regulation 3 (1) (c) of the Takeover Regulations (as existed prior to September 9, 2002), they were not eligible for the grant of exemption in respect of their acquisition.

14. In the facts and circumstances of the present case, it is established that the necessary disclosures as specified in Regulation 3(1)(c)(ii) (as existed as on the date of acquisition) of the Takeover Regulations were not strictly adhered in respect of the acquisition of 15,00,000 equity shares of the target company on preferential basis by the acquirers, on January 8, 2002 and therefore, the said acquisition was not exempted from the applicability of Regulation 11(1) (as it stood as on the date of acquisition) of the Takeover Regulations. As the acquirers failed to make a public announcement in respect of their aforesaid

acquisition, it is clear that they (acquirers) had not complied with the said Regulation 11(1) of the Takeover Regulations.

15. However, I note that Mr.Y.K. Dalmia vide letter dated April 10, 2006 (to SEBI), forwarded the copy of separate letters of the target company dated September 1, 2001 addressed to CSE & BhSE. In the said letters, the target company had enclosed the copy of extracts of the meeting of its Board of Directors, held on September 1, 2001. It is stated in the said extracts that, "The Board confirmed & decided to approve subject to approval of shareholders in the Annual General Meeting (AGM) allotment of 15 lac shares of Rs.10/- each aggregating to Rs.150 lac to promoters & their relatives & associates to part finance the sponge iron project." The said letters were acknowledged by BhSE and CSE on September 2, 2001 and September 3, 2001, respectively. Further, according to the acquirers, the target company vide letter dated August 28, 2001 informed BSE *interalia* about its plan to consider the issuance of 15,00,000 equity shares of Rs.10/- each aggregating to Rs.150 lakhs at par on preferential basis, to promoters and their associates. In this context, the acquirers have also produced a copy of the receipt (No.27682 dated September 1, 2001) obtained from its Courier, "Goodluck Commercial Service" in respect of an assignment addressed to The Secretary, BSE. Further, in its notice of the Tenth Annual General Meeting (held on September 29, 2001), the target company stated "Notice is hereby given that the 10th Annual General Meeting of the members of SURAJ PRODUCTS LIMITED will be held at the Registered Office of the Company at VilI : Barpali, P.O. Kesaramal (Rajgangpur) Dist: Sundargarh – 770 017, Orissa on 29th day of September, 2001 at 11.30 A.M. to transact the following business:

SPECIAL BUSSINESS:

……

……

"5. To Consider & if thought fit, to pass with or without modifications, the following resolution as a SPECIAL RESOLUTION: RESOLVED THAT pursuant

to sub-section (1A) of Section 81 and other applicable provisions if any, of the Companies Act, 1956 (the Act) and subject (whenever applicable) to such guidelines and/or approvals, permissions and/or sanctions of Securities and Exchange Board of India ("SEBI") or any other authorities or institutions as may be relevant ("the appropriate authorities") and subject to such terms and conditions or modifications as may be considered necessary, proper or expedient by the Board of Directors of the Company ("the Board") or prescribed by appropriate authorities, permissions, consents and/or sanctions which the Board or any Committee thereof is authorized to agree at its sole discretion if it thinks fit in the interest of the Company, the consent, authority and approval of the Company be and is hereby accorded to the Board to offer, issue and allot in one or more branches, on preferential/private placement basis to promoters upto 15,00,000/-(Fifteen lakh) equity shares of Rs.10/- at par aggregating Rs.1,50,00,000/- (Rupees One Crores Fifty Lakh only)."

16. I also note that, in item No.5 to the explanatory statement (made pursuant to Section 173(2) of the Companies Act, 1956) it was stated, "In order to finance the diversification into manufacturing of sponge iron. The company has secured term loan of Rs.208 lacs from SIDBI. The term of sanction inter alia includes increase in paid up capital of the Company by Rs.150 lacs by fresh issue of Capital. It is proposed to allot 15 lac equity shares of Rs.10 each at par to promoters on private placement / preferential basis." On a perusal of the documents submitted by the acquirers, I note that the target company vide its separate letters dated December 31, 2001 addressed to CSE, BhSE and BSE, informed that the meeting of its Board of Directors was to be scheduled on January 8, 2002 to allot 15,00,000 equity shares of Rs.10/- each at par to promoters on preferential basis as approved by its shareholders in the Annual General Meeting held on September 29, 2001. I also note that the preferential allotment of the target company on January 8, 2002 to the acquirers was intended to finance the expansion plan as per the stipulations of SIDBI.

17. Considering the facts and circumstances of the present case, I do not consider the present case, a fit case to pass a direction to the acquirers to make a public offer to the shareholders of the target company in respect of their acquisition of 15,00,000 equity shares of target company on January 8, 2002 on preferential basis, as required under Regulation 11(1) (as it stood as on the date of acquisition) of the Takeover Regulations. However, as the acquirers had prima facie violated the provisions of Regulation 11(1) (as it stood as on the date of acquisition) of the Takeover Regulations in respect of the aforesaid acquisition, I conclude that that adjudication proceedings shall be initiated against the acquirers, in respect of the said prima facie violations.

18. Taking into consideration the totality of the facts and circumstances of the case, as discussed above, I, in exercise of the powers conferred on me, by virtue of section 19 of Securities and Exchange Board of India Act, 1992 read with sections 11 and 11B of Securities and Exchange Board of India Act, 1992 and Regulations 44 and 45 of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, hereby, direct that adjudication proceedings under the provisions of Securities and Exchange Board of India Act, 1992 read with Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 be initiated against Mr Y.K. Dalmia and persons acting in concert with him namely, Mrs. Gayatri Dalmia, Mr.Ghanshyam Dalmia, Mr. K.P. Dalmia, Mrs. Kumudini Dalmia, Miss Nandita Dalmia, Miss Nivedita Dalmia, Mr.R.K. Dalmia, Mrs. Sunita Dalmia and M/s. Narbada Innovative Products Pvt. Ltd., for prima facie violating the provisions of Regulation 11(1) (as it stood as on the date of acquisition) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 in respect of their acquisition of 15,00,000 equity shares (on preferential basis) of the target company, namely, Suraj Products Limited, on January 8, 2002. The

acquirers may make submissions before the Adjudicating Officer, who shall consider the same on merits and pass appropriate order in accordance with the provisions of law, without being prejudiced by the observations made in this order. A separate order would be issued appointing the Adjudicating Officer.

19. Accordingly, the show cause notice of Securities and Exchange Board of India dated July 20, 2007 issued to Mr. Y.K. Dalmia and persons acting in concert with him namely, Mrs. Gayatri Dalmia, Mr.Ghanshyam Dalmia, Mr. K.P. Dalmia, Mrs. Kumudini Dalmia, Miss Nandita Dalmia, Miss Nivedita Dalmia, Mr.R.K. Dalmia, Mrs. Sunita Dalmia and M/s. Narbada Innovative Products Pvt. Ltd., is disposed of.

K. M. ABRAHAM
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA

Place: Mumbai
Date: October 10, 2008.