

**BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA  
CORAM: DR. K. M. ABRAHAM, WHOLE TIME MEMBER**

**ORDER**

**DIRECTIONS UNDER SECTIONS 11 AND 11B OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH REGULATIONS 44 AND 45 OF THE SECURITIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 1997 IN RESPECT OF THE ALLEGED ACQUISITION OF SHARES OF PAL-PEUGOT LIMITED BY PREMIER LIMITED**

1. The Securities and Exchange Board of India (hereinafter referred to as SEBI) issued a notice dated February 5, 2010 to Premier Limited (hereinafter referred to as the entity) asking it to show cause as to why action under Regulations 44 and 45 (6) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the Takeover Regulations) should not be taken against it in respect of the alleged violations, as stated therein. A brief background of the matter, which led to the issuance of the show cause notice (hereinafter referred to as the notice) is as follows. It was observed that the company, PAL-Peugeot Limited (hereinafter referred to as the target company) was a joint venture between the entity and Automobile Peugeot, France (hereinafter referred to as the transferor). The entity and the transferor were the promoters of the target company holding 8,40,25,000 (31.96%) shares each of the paid up equity capital of the target company. In the year 1999, the transferor withdrew itself from the joint venture and gifted its entire shareholding

(8,40,25,000 shares) to the acquirer. It was alleged in the notice that, pursuant to an agreement, the entity by accepting the gift, had acquired 8,40,25,000 shares of the target company and consequently, its shareholding in the target company had increased from 30.12% to 62.08%. It was further alleged that as the aforesaid transfer was by way of gift and not as per the pricing as determined under Regulation 20 of the Takeover Regulations, the entity could exercise more control than what it was entitled prior to the ceding of control and that the cessation of joint control to a single control had to be treated as change in control. It was further alleged that the said acquisition was made without making a public announcement and thus, the entity violated Regulations 11(1), 12 and 14(1) of the Takeover Regulations. Hence the notice. M/s Desai & Diwanji, Advocates, filed the reply dated April 9, 2010 to the notice, on behalf of the entity. Thereafter, an opportunity of hearing was granted to the entity on June 2, 2010. However, on its request, the same was adjourned to June 15, 2010 and on the said date, Mr. Shyam Mehta, Advocate appeared before me on behalf of the entity and made elaborate submissions. Mr. R.M. Tavhare and Ms. Namita Tiwari were also present during the hearing. Thereafter, M/s Desai & Diwanji, Advocates, filed written submissions on behalf of the entity, vide letter dated June 22, 2010.

2. I have examined the notice issued to the entity, the oral submissions made by the learned counsel, the written submissions filed on behalf of the entity and the material available on record. The following facts remain undisputed before me:

a. The target company was a joint venture of the entity and the transferor, who were the promoters of the target company, holding 8,40,25,000 shares (31.96%) each of the paid up equity capital.

b. In the year 1999, the transferor withdrew itself from the joint venture and handed over the share certificates and transfer deeds in respect of 8,40,25,000 equity shares constituting 31.96% of the paid up equity capital of the target company to the entity.

3. In view of the above, the primary issue to be considered is whether the entity by accepting the share certificates and duly executed transfer deeds from the transferor had acquired 8,40,25,000 shares of the target company, in contravention of Regulations 11(1), 12 and 14 of the Takeover Regulations, as alleged in the notice. As per the notice, the gift of 8,40,25,000 shares of the target company to the entity triggered Regulation 11(1) of the Takeover Regulations, as its shareholding had increased from 30.12% to 62.04% of the paid up capital of the target company. Admittedly, the shareholding of the target company, after its Initial Public Offer (in the year 1995) are as follows:

<b>Shareholders</b>	<b>No. of Shares Held</b>	<b>Shareholding Percentage</b>
Premier Limited	8,40,25,000	31.96%
Automobile Peugeot	8,40,25,000	31.96%
Public, Banks & Institutions	9,48,82,066	36.08%
<b>Total</b>	<b>26,29,32,066</b>	<b>100%</b>

4. It was the contention of the entity that Regulation 11(1) of the Takeover Regulations would not be applicable to it, as it had not acquired any shares or voting rights in respect of the shares gifted to it and that the said shares are still in the name of the transferor till date. In this regard, the learned counsel appearing for the entity submitted that, the legal title in the shares of a company vests in the person whose name is recorded as the owner in the Register of Members of such company and only such member is entitled to exercise all rights and receive all benefits with regard to the said shares. The counsel also stated that in the case of a blank transfer, the transferor continues to remain the

legal owner of the shares, so long as his name remains in the Register of Members of the company. According to him, the mere execution of the share transfer deeds by the transferor cannot amount to an acquisition or an agreement to acquire those shares unless such transfer deeds are signed by the transferee and lodged with the company for registration of the transfer. The entity further stated that there was no agreement to transfer the impugned shares and that the transferor had only handed over the shares along with the signed transfer deeds to the entity on July 15, 1999. It was the submission that, till date, the entity has not even signed the said transfer deeds or lodged them for transfer with the target company. It was for this reason, the entity contended that, it had neither accepted the gift nor acquired the shares of the target company, as stated in the notice. According to the entity, even SEBI, while rejecting its application for the grant of exemption under Regulation 4 of the Takeover Regulations observed that the entity had acquired only the beneficial interest in the shares. It is further submitted that even in the latest balance sheet of the entity for the year ended March 31, 2009, under the heading 'Investments', it had only shown its original investments in the target company and that the shares of the transferor (so called gifted shares) were not shown as its investments. This, according to the entity would indicate that it had never treated the shares in question as belonging to it.

5. It is also submitted by the entity that, though, the share certificates and share transfer deeds were handed over by the transferor, the shares could not be transferred in its favour, as the meeting of the board of directors of the target company could not be held in the presence of the nominee directors of the transferor, since the transferor withdrew itself from the joint venture in the year 1999. In this regard, the entity also brought my attention to the relevant provisions of articles 3,22,101,102,175,196 and 201 of the Articles of the

Association (hereinafter referred to as AoA) of the target company. The said articles are reproduced hereinbelow for reference:

**3. “Agreement” “Joint Venture Agreement” or “JVA”**

*“Agreement” or “Joint Venture Agreement” or “JVA” means the Joint Venture Agreement dated as of October 19, 1994 as modified by the Supplementary Agreement dated 26<sup>th</sup> June, 1995 among AUTOMOBILES PEUGEOT (“AP”) as hereinafter defined and THE PREMIER AUTOMOBILES LIMITED (“PAL”) as hereinafter defined and the Company as hereinafter defined and any amendment or waiver thereof as is in writing and signed by the parties in the manner contemplated in the JVA.*

**“Fundamental Issues”**

*“Fundamental Issues” shall have the meaning set forth in Section 9.3 of the Agreement and in the Article 201 of these Articles.*

**22. Registered holder only the owner of share**

*Save as herein or by law otherwise expressly provided, Company shall be entitled to treat the registered holder of any share as the absolute owner thereof, and accordingly shall not, the except as ordered by the Court of Competent Jurisdiction, or as by statute required, be bound to recognise any trusts whatsoever or equitable, contingent, future, partial or other claim to or interest in such share on that part of any person whether or not it shall have express or implied or constructive notice thereof, and save as aforesaid, no notice of any trust express, implied or constructive shall be entered on the register, or receivable by the registrar; the Directors shall however, be at liberty, at their sole discretion, to register any share in the joint name of any two or more persons or the survivor or survivors of them.*

**58. Transfer of shares by Automobiles Peugeot and The Premier Automobiles Limited**

*(1) The transfer of shares of the Company registered in the name of Automobiles Peugeot (AP) AND THE Premier Automobiles Limited (PAL) by AP or PAL, as the case may be, shall be subject to the terms and conditions in the Joint Venture Agreement referred to in Article above, as set forth in this Article.*

*(7) Restriction on Transfer : Right of First Refusal*

*(i) Except as may be otherwise mutually agreed to by AP and PAL, neither AP or its subsidiary should AP transfer its shares as per Section 8.2 of the JVA nor PAL (the “Offering Shareholder”) shall sell or otherwise transfer any of its shares or interest therein or share of the said subsidiary in case of AP until it has delivered to the other Shareholder being hereinafter respectively referred to as the “Remaining Shareholder” an irrevocable written offer to sell all of the Offering Shareholder’s Shares to the Remaining Shareholder at a price determined by the Offering Shareholder (the “Offer Price”) and stated in the offer. If the*

*Remaining Shareholder does not consider the offer to be fair and not reflecting the actual value of the shares, then the Remaining shareholder shall so notify in writing to the Offering Shareholder within ninety (90) days after the Offering shareholder's delivery of the offer.*

#### **101. Quorum for the Meeting**

*Five members entitled to vote and present in person including atleast one representative appointed by AP and one representative appointed by PAL shall be quorum for a General Meeting and no business shall be transacted at any General Meeting unless requisite quorum is present at the commencement of the business. When more than one of the joint holders of a share is present not more than one of them shall be counted for ascertaining the quorum. Several executors or administrators of a deceased person in whose sole name shares stand shall for the purpose of this clause be deemed joint holders thereof.*

#### **102. If quorum not present when meeting to be dissolved & when to be adjourned.**

*If within half an hour from the time appointed for the holding of a meeting of the Company a quorum be not present the meeting if convened on the requisition of members, shall be dissolved and in every other case shall stand adjourned to the same day in the next week at the same time and place or to such other day, time and place as the Directors may be noticed to the members appoint. If at such adjourned meeting a quorum be not present within half an hour from the time appointed for holding meeting, the members present shall be quorum and may transact the business for which the meeting was called.*

#### **175. Number of Directors**

*(a) Until otherwise determined by a General Meeting the number of Directors shall not be less than three nor more than twelve excluding Alternate Directors (if any). The Board shall consist of at least eight members four of whom shall be nominated by Automobiles Peugeot (AP) and four by the Premier Automobiles Limited (PAL). Other independent Directors shall be appointed only by mutual consent.*

*The Management structure of the Company will be decided by the Board from time to time having regard to the provisions of the JVA in this regard.*

#### **196. Quorum**

*The quorum for a meeting of the Board of Directors shall be two (2) directors appointed by AP and two (2) directors appointed by PAL. If and when any seat on the Board becomes vacant for any reason, the shareholder that nominated the Director formerly filling the vacant seat shall be entitled to nominate and/or to have elected a director to fill the vacancy.*

### **XXVI. FUNDAMENTAL ISSUES**

*201 (a) Notwithstanding the foregoing and subject to such additional approvals of the shareholders (at a general or special meeting of Shareholders) as may be required by*

*applicable law, any action with respect to the following fundamental issues (“Fundamental Issues”) shall require the affirmative vote of at least one of the Directors designated by AP and the affirmative vote of at least one of the Directors designated by PAL:*

*(V) increase in the share capital of the Company, the allotment of any preference share or equity share capital in the Company to any person and any approval or any transfer, pledge, mortgage or other encumbrance of any Shares or Preference shares not otherwise expressly permitted by the Joint Venture Agreement.*

6. Further, it was also submitted before me that as, no Annual General Meetings (AGMs) of the target company had been held since June 27, 1997, the target company had applied to the Company Law Board (CLB) for convening the AGM. It was further submitted that the CLB, vide order dated December 4, 2001 read with the subsequent order dated March 5, 2002 *inter alia* directed the target company and its directors to call and hold the AGMs in respect of the years 1998 to 2000 by April 30, 2002. Thereafter, according to the entity, an AGM was held on April 19, 2002 and resolutions were passed *inter alia* for appointing three persons as directors and for substituting the existing articles of association with Table A set out in Schedule I to the Companies act, 1956. However, it was stated by the entity that, in a suit filed by ICICI Limited (the debenture trustee for the debenture holders of the target company), the Hon'ble High Court of Bombay, vide order dated June 24, 2002 had restrained the said three directors (nominees of the entity) from acting as directors of the target company with effect from the said date and that, pursuant to the said order, the said directors had tendered resignation on September 25, 2002. It was also submitted that the Hon'ble High Court of Bombay, had on September 26, 2005, passed an order in the winding up petitions, ordering the target company to be wound up. As per the entity, the Official Liquidator came to be appointed in respect of the target company and is presently in charge of the affairs and the assets of the target company. It was also submitted that as the board of the target company could not function, no policy decisions could be

taken and that there was no change in control as mentioned under Regulation 12 of the Takeover Regulations. It was the submission that even before the impugned gift, the Hon'ble High Court of Bombay, vide order dated June 30, 1999 appointed a receiver to take charge of the assets of the target company. According to the entity, the fact that it had made an application for the grant of exemption would indicate that it had not acquired the shares under the gift. According to the entity there was also no agreement, either verbal or written between it and the transferor, whereunder, the transferor had agreed to exercise voting rights or any other rights in respect of the gifted shares for and on behalf of the entity. In view of the above, it was contended that the entity did not agree to acquire the shares held by the transferor by way of gift. It was also contended that the entity was not entitled to exercise voting rights in respect of the impugned shares as the same were not transferred in its name. Without such acquisition of voting rights, according to it, there was no requirement to make a public announcement in accordance with Regulation 11(1) of the Takeover Regulations.

7. In order to ascertain whether the entity had acquired shares from the transferor, it would be necessary to refer to the definition of the term 'acquirer' under the Takeover Regulations. The term 'acquirer' has been defined under Regulation 2(1)(b) of the Takeover Regulations to mean "*any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or acquirers or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer*". Admittedly, the entity accepted the gift of share certificates and the transfer deeds. Thus, it agreed to acquire shares. This view would be further strengthened by the fact that the entity had made an application under Regulation 4 of the Takeover Regulations seeking exemption from the applicability of Regulation 11(1) thereof and other applicable provisions in respect of the impugned shares. Therefore, as per the

definition, in the context of the case, the entity is an acquirer as it had accepted the gift of shares. The impugned shares are equity shares carrying voting rights irrespective of its ownership. Therefore, the next question to be decided is whether the entity contravened Regulations 11(1) and 12 of the Takeover Regulations, in respect of such shares so gifted to it. It is necessary to mention the provisions of Regulation 11(1) of the Takeover Regulations, as on the date when the share certificates were handed over by the transferor to the entity). The same is reproduced hereinbelow

11(1): *No Acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 percent or more but less than 75 percent 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 percent of the voting rights, in any period of twelve months unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.*” [Emphasis supplied]

8. There is no case that the shares under gift were transferred and registered in the name of the entity. The entity is also not in receipt of benefits accruing out of such shares. According to the entity, as it cannot exercise the voting rights in respect of the shares so gifted, the above Regulation would not be applicable to it. This contention was based on the fact that it had not transferred the shares in its name and that the same are still in the name of the transferor. Section 87 (1) of the Companies Act, 1956 *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’ is defined in Section 41 thereof, as follows:

*"41 (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".*

The above provisions would make it clear that only members have the right to vote and a person can be construed as a member only if, he comes under any of the categories specified in Section 41 of the Companies Act, 1956. There is nothing on record to indicate that the entity is exercising the voting rights either directly or on behalf of the transferor in respect of the shares said to have been gifted. The counsel for the entity also brought my attention to the Order of the Hon'ble Securities Appellate Tribunal made in the matter of Shri Ch.Kiron Margadarsi Financiers Vs. Adjudicating Officer, Securities and Exchange Board of India. The relevant observations are reproduced below:

*“23. On a perusal of regulation 2(1)(b) it is clear that a person is an acquirer who acquires or agrees to acquire shares or voting rights/control in the target company. The mode of acquisition of shares or the purpose of acquisition is of not much significance to identify the acquirer. As has been held in the case of Joshi Jayantilal v. State of Gujarat (AIR 1962 Gujarat 297) and as per the Blacks Law Dictionary acquisition is the act of becoming the owner of certain property, the act by which one acquires or procures the property in any thing. In this context it is to be noted that the act of acquisition of shares or voting rights by itself will not attract the provisions of regulation 10, though the person who acquired the shares or voting rights may fall within the definition of the expression ‘acquirer’. 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 ten percent in regulation 10. Thus it is clear that a plain acquisition even if it exceeds 10% of the paid up capital of the company will not attract regulation 10, unless the acquisition entitle the acquirer to exercise ten percent or more of the voting rights in the company.”*

.....

26. .... *Mere receipt of share certificates along with blank transfer forms will not give to the pledgee any right, title or interest in the shares. The right, title and interest and ownership of the shares will continue in the pledger. The only right, which the pledgee will have, will be on non-payment to have the shares sold after notice. Such sale can only take place after a notice to the pledger. This is one instance where, even though blank transfer forms have been handed over along with share certificates, there is still no transfer of ownership.....*

27. ....*In view of the clear words in the regulation regarding entitlement to exercise voting rights, the shares standing in the name of pledgee, though acquired by way of security need be taken into account. However, it is not so in the case of the remaining shares which were only held by the Appellant, but not registered in its name. The voting rights in respect of the said shares remained with the pledgers. Even the loan agreement in the instant case does not authorise the Appellant to exercise the voting rights attached to the said shares, on their behalf. Shareholding, irrespective of the quantum, which does not entitle the person concerned to exercise voting rights in the company, is to be discarded for computing the 10% benchmark in regulation 10”*

.....

29..... *Change in possession of share certificates by itself, without transferring attendant rights, will not affect the ownership or management control of a company. The moment those shares are registered in the company’s register automatically the acquirer will become entitled to voting rights and depending on the quantum of shares involved and its attendant voting rights acquired regulation 10 also would attract.”* (Emphasis supplied)

9. I also note the following observation of the Hon’ble Securities Appellate Tribunal in the matter of Shri Sharad Doshi Vs Adjudicating Officer and others:

*“.....Voting rights is attached to equity share or say, it is built in the moment the share is issued. In the common parlance, share carrying rights means equity share or ordinary share as sometimes called. However, the right to exercise such voting right to the person holding equity share is not automatic. A person holding shares with voting rights will be entitled to exercise that voting right*

*only on entering his name in the company's register of members required to be maintained under section 150 of the Companies Act. In other words, in order to be eligible to exercise the voting rights attached to a share, physical possession of share certificate alone is not enough, but it is necessary to have the name of the holder entered in the company's members register. While the voting right is attached to equity share, registration of holding the share enables the holder to exercise the voting rights attached thereto.” (emphasis supplied)*

10. I further note that Article 22 of the AoA of the target company requires the target company to treat the registered holder of the shares as the absolute owner. Further, as per Article 201(a)(v), any transfer of shares requires the affirmative vote of at least one of the directors designated by the transferor and the same is subject to the additional approvals of the shareholders of the target company. The entity submitted that the said approvals could not be obtained as the transferor withdrew itself from the joint venture and no AGMs could be held in respect of the transfer. According to the entity, without the approval of the shareholders, the question of transferring the shares would not arise. I also note from the latest balance sheet for the year ended March 31, 2009 of the entity, that under the heading Investments, the entity has only shown its holding in the target company as its original investment and the shares of the transferor are not shown as its investments in the target company. On a plain reading of Regulation 11(1) of the Takeover Regulations would make it clear that same would be triggered only when the acquirer (the entity in this case) becomes entitled to exercise more than 5% of the voting rights in a company and does not get triggered when it cannot exercise such voting rights. In view of the observations of the Hon'ble SAT and the fact that the shares which had been gifted by the transferor still stands in its name, it would be reasonable to conclude that the entity is not entitled to exercise voting rights in respect of the impugned shares and thus had not triggered Regulation 11(1) of the Takeover Regulations.

11. With respect to the charge of non-compliance with the provisions of Regulation 12 of the Takeover Regulations, I note that the notice has alleged *“You could also exercise more control than what you were entitled to prior to the ceding of control by the transferor. It is further alleged that, since the transfer is by way of gift and not as per the price determined under Regulation 20 of the Takeover Regulation and you can exercise more control than what you were entitled to prior to the ceding of control, the cessation of joint control to a single control shall be construed as change in control.”* It is the allegation that, after the exit of the transferor from the target company, the entity has assumed sole control instead of a joint one when the transferor was also present. From the submission of the entity, I note that even before the impugned gift, the Hon’ble High Court of Bombay, vide order dated June 30, 1999 appointed a receiver to take charge of the assets of the target company. Further, as already stated above, the Hon’ble High Court had also restrained the nominee directors appointed by the entity from acting as the directors of the target company. I also note that the target company is under the winding up process and that the Hon’ble court appointed official liquidator is in charge of its affairs and assets. It is already established that the entity is not entitled to exercise voting rights in respect of the shares so gifted by the transferor. In the facts and circumstances of the case, I do not consider that the entity had acquired more control on receipt of gifted shares from the transferor and had failed to make the public announcement as required under Regulation 12 of the Takeover Regulations. For the reasons stated above, it would not be possible to hold the entity liable for not complying with Regulations 11(1) and 12 of the Takeover Regulations. Accordingly, the matter is disposed of as ordered hereinbelow.

12. In view of the foregoing, I, in exercise of the powers conferred upon me under Section 19 of the Securities and Exchange Board of India Act, 1992 read

with Sections 11 and 11B thereof and Regulations 44 and 45 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, hereby dispose of the show cause notice dated February 5, 2010 issued to Premier Limited, without any directions.

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

**PLACE: MUMBAI  
DATE: OCTOBER 12, 2010**