BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No.37/2002

In the matter of:

1. Sundaram Finance Ltd.,
2. Wheels India Ltd.,
3. **Spicer Heavy Axle Holdings Inc.** **Appellants**

Vs.

Securities and Exchange Board of India **Respondent**

Appearance:
Shri P. N. Kapadia,
Advocate,
Ms. R. R. Mulla Pheroze
Advocate
I/b. M/s. Gagrat & Co., **For Appellants**

Ms. Poonam Bamba,
Jt. Legal Adviser,
SEBI
Shri Vinay Chauhan,
Legal Officer,
SEBI **For Respondent**

ORDER

Appellant No.1 and Appellant No.2 are companies incorporated under the Indian companies Act, 1913. Appellant No.3 is a company incorporated under the laws of the State of Michigan, USA with its registered office in Ohio, USA. The Appellants are the major shareholders in an Indian company viz. Axles India Ltd. (the target company). They are also the promoters of the target company. The target company decided to issue 61,20,000 equity shares of Rs.10/- each at par for cash on Rights basis to its equity shareholders as on 18.1.2001. The aforesaid issue opened on 29.1.2001 and closed on 27.2.2001. Pursuant to the

said Rights offer the Appellants applied for and were allotted shares of their full entitlement. The remaining shareholders did not apply for their full entitlement and the Appellants acquired the unsubscribed portion of the Rights issue, as per the disclosure made in the Letter of Offer. As a result of acquisition of shares in the Rights issue, the promoters holding in the target company increased from 83.63% to 90.96% and the public shareholding came down to 9.04% from 16.37%. The acquisition is stated to be exempted in terms of regulation 3(1) (b) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the 1997 Regulations) from the compliance of the requirements under Chapter III of the said Regulations. However, they failed to file the report under regulation 3 (4) with the Respondent within the 21 days' time limit prescribed in the regulation. The report was filed only on 22.11.2001. The Respondent, on coming to know of the said failure on the part of the Appellants decided to adjudicate the matter and for the purpose an adjudicating officer was appointed. The adjudicating officer, after enquiry confirmed the failure and imposed one lakh rupees as monetary penalty on the Appellants. The order passed by the adjudicating officer on 21.5.2002 imposing the monetary penalty is under challenge in the present appeal.

Shri P. N. Kapadia, learned Counsel appearing for the Appellants explained the factual background of the case. He referred to the dates and events culminating in the issuance of the impugned order and the circumstances in which the shares were acquired by the Appellants in the Rights issue resulting in the increase of their total share holding from 83.63% to 90.96%. He submitted that it is an admitted fact that the acquisition of shares by the Appellants enjoyed exemption in terms of regulation 3(1)(b) and as such the requirement of making public announcement was not attracted. Learned Counsel submitted that the report required under regulation 3(4) was not filed with the Respondent as the Appellants were advised by the Lead Manager/legal adviser that filing of report under regulation 3 (4) was not required in view of the fact that at the time of acquisition of the Rights shares by them they were already holding more than 15% equity shares in the target company. In this context he referred to the

requirement of the said regulation and stated that reporting was necessary only if the acquisition would entitle the acquirer to exercise 15% or more of the voting rights in the target company. He submitted that it was in the context of the process of public announcement that was to be made by the Appellants to acquire the remaining 9.04% shares from the public in terms of the requirement of the listing agreement, the requirement of reporting under regulation 3(4) brought to the notice of the Appellants by the Respondent, and thereupon immediately filed the report. Learned Counsel submitted that the acquisition of the shares was not done in any surreptitious manner. He submitted that the Appellants being the existing share holders were entitled to participate in the right issue, that the intention of the promoters to subscribe to the shares left unsubscribed by the public shareholders was disclosed in the Letter of Offer. He further submitted that since the response to the Rights issue was poor, as per the terms of the letter of offer, 747947 shares left unsubscribed by the public were also subscribed by the promoters, in addition to their rights entitlement of 51,17,887 shares.

Learned Counsel submitted that on 7.11.2000 the Board of Directors of the target company passed a resolution to issue 6120000 shares on Rights basis that on 31.10.2000, i.e. prior to the said Board meeting the target company had intimated the Madras and Banglore Stock Exchanges about the said meeting and the proposed rights offer, that again immediately after the said Board meeting, the target company by its letter dated 7.11.2000 intimated the said two stock exchanges about the decision to issue 6120000 equity shares of Rs.10/- each at par on Rights basis to the existing shareholders of the company in the ratio of three new equity shares for every two equity shares held on the record date to be determined in consultation with the Stock Exchange. Learned Counsel submitted that before dispatching the letter of offer to its share holders in respect of the said Rights issue, the target company submitted a draft letter of offer in respect of the Rights issue to the Respondent in compliance with the SEBI (Disclosure and Investor Protection) Guidelines, that in the said letter of offer it was disclosed that "The promoters intend to subscribe to their rights entitlement in full. In the event of undersubscription such unsubscribed portion will be subscribed by Spicer, SFL, WIL in the

ratio of 2:1:1. Subscription beyond their entitlement is exempt under Regulation 3 (1)(b) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997."

Learned Counsel submitted that the draft letter of offer submitted to the Respondent and the Madras and Banglore Stock Exchanges and the final letter of offer dated 30.12.2000 contained substantially the disclosures required to be made in the report under regulation 3(4). He submitted that from the factual position relatable to the matter it is clear that the Appellants had no intention to suppress any material information from the Respondent that the detailed information relating to the acquisition of the shares by the Appellants in the Rights issue made by the target company was well within the knowledge of the Respondent, the stock exchanges and the share holders of the target company, that the unintentional delay involved in filing the report in terms of regulation 3(4) has not affected anybody's interest.

Learned Counsel submitted that the adjudicating officer has adjudicated the matter without authority and jurisdiction, that the authority and jurisdiction of the adjudicating officer flows from the order passed by the Respondent for the purpose under section 15I of the Act, that in the instant case, the Respondent vide its order dated 20.3.2002 the adjudicating officer was appointed "to enquire into and adjudge under sub section (b) of section 15A of the alleged contravention of sub regulation 4 of regulation 3…." Learned Counsel referred to rule 4(4) of the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 requiring the adjudicating officer to explain the person concerned or his representative, the offence alleged to have been committed by such person indicating the provisions of the Act, rules and regulations in respect of which contravention is alleged to have taken place, that the adjudicating officer accordingly brought to the notice of the Appellants that the charge against them was of the failure covered under section 15A(b). . He submitted that the jurisdiction of the adjudicating officer was limited to adjudge the failure covered in clause (b) of Section 15A, that in the show cause notice dated 10.4.2002 issued to the Appellants by the Adjudicating Officer also Section 15A (b) was relied on for the purpose of

imposition of penalty, that it is thus clear that the Respondent and the adjudicating officer had decided to proceed against the Appellants intentionally under Section 15A(b). He submitted that reliance on the said section was not a wrong citation of the section is evidenced from the fact that the text of the said section has been extracted and explained in the impugned order. He further submitted that that sub section (b) of section 15A is not attracted in respect of documents or reports which were required to be filed with the Respondent. In this context he cited this Tribunal's decision in Housing Development Finance Corporation Ltd., V. Securities and Exchange Board of India (2000) 28 SCL 289 and submitted that the facts of the said case is almost identical to the Appellants' case, that in both the cases the exemption from making public offer was available and the question was belated filing of report under regulation 3(4), that in fact the delay involved in filing the report by the Housing Development Finance Corporation was 286 days and in that case the adjudicating officer, had held that the failure was in terms of section 15A(b) of the Act and imposed Rs.150000 as monetary penalty in terms of the show cause notice issued for the violation of the said sub section (b) of section 15A. He submitted that the said order was set aside by the Tribunal, holding that the Respondent had deliberately chosen the penal provisions under clause (b) of section 15A instead of invoking the provisions under clause (a) and that it was not a case of wrong labeling of the relevant provisions in the Act as the facts did not support that proposition. Learned Counsel submitted that clause (a) and clause (b) of section 15A are intended to meet different situations that an adjudication for violation falling under clause (b) can not be considered as an adjudication for violation of clause (a) of section 15A. He submitted that the maximum penalty payable for the offences under these clauses is different, that the penalty for failure to comply with the requirements under clause (b) is very rigorous and is imposable on a day to day basis so long as the failure continues whereas under clause (a) only a lumpsum penalty not exceeding Rs.150000 is imposable.

Learned Counsel submitted that the order of the adjudicating officer imposing monetary penalty on the Appellants is contrary to the decision of this Tribunal in the Housing

Development Finance Corporation (HDFC) case cited. He further submitted that even clause (a) of section 15A was not attracted to the Appellants' case as there was no failure to file the report under regulation 3(4), that it is not permissible to read the word "delay in filing" in clause (a) of section 15A. Shri Kapadia stated that where the Parliament intended to penalise "delay in filing", it has been expressly provided for in clause (b) of section 15A, that "the delay in filing" is cognizable only in respect of those documents which are covered under clause (b) of section 15A. In support that it is not permissible to read any word in any section, particularly in the case of a penal section, which is not provided by the legislature, learned Counsel cited the Hon'ble supreme Court in The Member, Board of Revenue V Arthur Paul (AIR 1956 Sc 35) that "when two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense." He also referred to the State of Gujrat V Dilipbhai Nathjibhai Patel (JT 1998 (2) SC 253 that "in interpreting a statute the Court can not aid the legislature's defective phrasing of an Act nor can add or amend and, by construction make up deficiencies which are left there." Then the Hon'ble Court cited the following observation in Union of India V Deoki Nandan Aggarwal (JT 1991 (3) Sc 608)

> "It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court can not re write, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court can not add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the Court could not go to its aid to correct or make up the deficiency. Court shall decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught legislative judgement is subversive of the constitutional harmony and comity of instrumentalities"

Shri Kapadia submitted that the adjudicating officer had no authority to adjudicate the matter under clause (a) of section 15A of the Act as no such power was delegated to him by the Respondent vide its order dated 20.3.2000 made in terms of section 15I.

Learned Counsel with reference to the penalty imposed by the adjudicating officer submitted that the adjudicating officer has not considered the dictum of the Hon'ble Supreme Court in the Case of Hindustan Steel Ltd V State of Orissa (83 ITR 26) that:

> "…..But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi criminal proceeding and penalty ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty, will be justified in refusing to impose penalty, when there is technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the company in failing to register the company as a dealer acted in the honest and genuine belief that the company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

Learned Counsel submitted that the adjudicating officer failed to understand that the delay in filing the report with the Respondent was a genuine lapse as is evident from the conduct of the Appellants. He also referred to this Tribunal's observation in Samrat Holdings Ltd, V Securities and Exchange Board of India (2001) 29 SCL 417 (Sat) and stated that in the said case also the issue involved was filing of report with the Respondent under regulation 3 (4)

involving a delay of 243 days, that in the light of the facts of the said case the Tribunal held that non compliance remained in effect only a technical formality and following the ratio in Cabbot International Corpn. V Adjudicating Officer SEBI (2001) 29 SC (Sat) 399, the penalty imposed by the adjudicating officer was set aside. Learned Counsel submitted that the facts of the said case are comparable to the facts of the present case and ratio in those cases is therefore, applicable to the instant case. In this context learned Counsel submitted that the adjudicating officer has ignored the views taken by the Tribunal though binding on him, and passed the order, that in the impugned order it has been stated that "the acquirers have contended the delay in filing was unintentional and they also contended that the violation is purely technical in nature and of no consequences to anybody. It is immaterial whether the delay in intentional or not. Such contention is not sustainable in view of the specific requirement prescribed under sub regulation 4 of regulation 3 of the said Regulations and the said violation can not be termed as purely technical." He submitted that the adjudicating officer did not even bother to consider the Appellants' submission that the delayed reporting was unintentional and passed the order ignoring the decisions of the Hon'ble Supreme Court and this Tribunal.

Ms. Poonam Bamba, learned Representative of the Respondent submitted that the acquisition of shares by the Appellants in the Rights issue made by the target company is not in dispute. The fact that the report required to be filed with the Respondent within 21 days of the acquisition as required in terms of regulation 3 (4) was filed involving a delay of 226 days, and the violation of regulation 3(4) has not been disputed. She submitted that the reporting requirement under regulation 3(4) serves as a source of crucial information which enables the Respondent to see whether the acquisition is exempt under the Regulation and if not, to take appropriate action in the interest of investors, that reporting is not a mere technical formality, but it has a purpose. She submitted that having admitted the violation of the regulation on their part the Appellants are questioning the validity of the order imposing the penalty.

Learned Representative submitted that the Appellants are justifying their failure stating

that before dispatching the letter of offer to the share holders in respect of the Rights issue, the target company through its lead manager had submitted a draft letter of offer with the Respondent's Regional office at Chennai. Ms. Bamba submitted that filing a copy of the draft/final letter of offer with the Respondent is not a substitute for complying with the requirements of regulation 3(4), as the information required to be furnished in the report under the regulation is much more exhaustive. In this context she referred to the letter of offer and submitted that what was described therein was a possibility, and referred to the note under the heading "Notes to the Capital Structure" and stated that what is disclosed therein is that "In the event of exercise of Rights entitlement by all the aforesaid categories of share holders, the post issue share holding pattern would be the same as the aforesaid pre-issue share holding pattern. In the event of nil subscription, of the public entitlement and the promoters subscribing to the entire unsubscribed portion, the promoters holding will increase to 95,31,924 shares representing 93.45% of the post issue paid up capital" that in note (j) it was stated that "the Promoters intend to subscribe to their rights entitlement in full. In the event of undersubscription such unsubscribed portion will be subscribed by Spicer, SFL, WIL in the ratio of 2:1:1. Subscription beyond their entitlement is exempt under regulation 3(1)(b)……"

Learned Representative submitted that reporting under regulation 3(4) is a post acquisition requirement, that it can not be said that the Appellants were unaware of the requirements of the said regulations as is evident from the fact that they have quoted the provisions of the regulations in the letter of offer. She submitted that the Appellants' submission that they filed report on their own is not a matter that would absolve the Appellants of the requirement of compliance of regulation 3(4) that in fact they filed the report as there was no escape in the context of the requirement of acquiring the shares from the public as the public holding had come down to less than 10% by making a public offer, that but for the compulsion they would not have filed the report even at that point of time Ms. Bamba submitted that in any case mens rea is not an ingredient for the purpose of imposing monetary penalty under section 15A. In this context she referred to the view expressed by Shri G. P.

Singh in his authoritative treatise on Administrative Law (6th Edn. P. 553) that "Existence of a guilty intent is an essential ingredient of a crime at common law and the principle is expressed in the maxim – Actus non facit reum nisi means sit rea. The legislature may, however, create an offence of strict liability where means rea is wholly or partly not necessary. Such a measure is resorted to in public interest and moral justification of laws of strict liability is well expressed by Dean Roscoe Pound. "Such statutes are not meant to punish the vicious will but to put pressure on the thoughtless and inefficient to do their whole duty in the interest of public health, safety or morals. The offences falling under this class are known as public welfare offences"……." When a statute creates an offence, the question whether the offence involves the existence of meansrea as an essential element of it or whether the statute dispenses with it and creates strict liability are questions which have to be answered on a true construction of the statute." Ms. Bamba also cited this Tribunal in SRG Infotech (India) Ltd. V SEBI (1999) 22 SCL 422 to support her contention that meansrea is not required to be established for imposing monetary penalty under the penal provision in Chapter VI A of the Act..

With reference to the Appellants' challenge that the Respondent's order to adjudicate the matter under section 15 A (b) and that the alleged failure is not one attracting the provisions of the said section, learned Representative referred to this Tribunal's observation in VLS Finance Ltd V P. Sri Sai Ram (2000) 28 SCL 205 (Sat) that "It is well settled that mere mention of wrong provision of law, when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power". In this context she also relied on the decision of the Hon'ble Supreme Court in Municipal Corporation of the City of Ahmedabad V. Ben Hariben Manilal (1983) 2 SCC 422 holding "It is well settled that the exercise of power, if there is indeed a power, will be referable to a jurisdiction, when the validity of the exercise of that power is in issue, which confers validity upon it and not to a jurisdiction under which it would be nugatory, though the section was not referred, and a different or a wrong section of different provision was mentioned….that a wrong reference to

the power under which action was taken by the Government would not per se vitiate the action if it could be justified under some other power under which government could lawfully do that act." She also referred to the State of Karnataka V Muniyalla (1985) 1 SCC 196 therein the Hon'ble Supreme Court had reiterated the view held in Ahmedabad Municipal Corporation that … merely because an order is purported to be made under a wrong provision of law, it does not become invalid so long as there is some other provision of law under which the order could be validly made. Mere recital of a wrong provision of law does not have the effect of invalidating an order which is otherwise within the power of the authority making it." She cited two more decision of the Hon'ble Supreme Court in support of her submission that the Adjudicating officer enjoyed the power to impose the penalty for belated filing of the report with the Respondent. These decisions are (i) Collector of Central Excise, Calcutta V Pradymna Steel (196 (82) ELT 441 (SC) and (ii)State of Sikkim V Dorjee Tshering Bhuta and ors (1991) 4 Scc 243. In both these decision it was held that if source of power is traceable, exercise of such power can not be set aside merely because it was done under a different provision. She countered the Appellants' submission that section 15A(a) does not take cognizance of the delay in filing the report, and it is only the failure to report, by stating that the failure referred to in the said section is with reference to the reporting requirement under regulation 3(4) that the said regulation requires reporting within 21 days of the acquisition and as such filing if done beyond the said 21 days would be considered as belated filing.. In this context she referred to the observation of this Tribunal in HDFC's case (supra) that 'the argument that clause (a) does not prescribe any time limit for compliance is incorrect. The opening words in the section that "if any person who is required under the Act or any rules or regulation made thereunder" should be read in conjunction with clause (a) and in that context it would be seen that every requirement referred in clause (a) is relatable to time limit. If the Appellants' argument that clause (a) does not prescribe any time limit is accepted it would lead us to an absurd situation as there would be no referral point of time to decide the occurrence of the default. If the requirement of reporting etc. under clause (a) is not relatable to a time factor for compliance, no offence can be made out and consequently no penalty also will be leviable and thereby clause (a) would

become redundant".

Ms. Bamba submitted that the ratio in Samrat Holdings (supra) has no application to the case as the facts are not common that in Samrat, the adjudicating officer had not disputed the bonafides of the Appellant and further that in that case there was also compliance of regulation 3(3), that in the instant case it is not so. She also submitted that ratio in Cabbot International (supra) is also not applicable as the decision therein was mainly based on the fact that the adjudication order was not in harmony with the findings recorded by the adjudicating officer.

I have carefully considered the submissions made on behalf of the parties and the material placed before me. The fact that the report under regulation 3(4) was filed with the Respondent involving a delay of 245 days is not in dispute. It is also not in dispute that the acquisition of shares by the Appellants in the Rights issue made by the target company enjoyed exemption in terms of regulation 3(1)(b) and as such in terms of chapter III of the Regulations, the Appellants were not required to make any public announcement offering to purchase shares from the public share holders and that the share holders' interest has not been adversely affected as a result of the belated filing of the report with the Respondent. It is also on record that the concerned stock exchanges and the Respondent were aware of the Rights issue and the fact that in the event of the failure on the part of the public share holders, the Appellants would be acquiring those shares. The Appellants have submitted that they were under the bonafide belief, based on the advice given to them by their Lead Managers/ legal adviser that there was no need to file a report under regulation 3(4) as their existing holding in the target company's capital far exceeded the percentage of 15 (%) stipulated in the said regulation, that it was they on their own decided to make public offer to acquire shares from the minority share holders in the target company in terms of clause 40 of the listing agreement in the context of their holding having exceeded 90%.

On a perusal of the material placed before me, I find nothing therein to come to a

conclusion that the Appellants had wilfully delayed the filing of the report with the Respondent. On the contrary, there is no reason to believe that having disclosed all the material facts relating to the proposed and actual acquisition of shares in the Rights issue to the concerned stock exchanges and the Respondent, the Appellants would intentionally avoid filing the requisite report with the Respondent, especially, in view of the fact that filing of the report would not have caused any adverse effect on them. It is also not that the Respondent was unaware of the Rights issue and also of the would be increase in the Appellants' holding in the capital of the target company in case the other share holders did not subscribe in the Rights issue, and the fact that the Appellants had voluntarily come forward with an offer to purchase the shares from the minority shareholders in terms of clause 40 of the listing agreement. On their own, if they had not come forward to acquire the minority interest, not filing of the report with the Respondent could be viewed as a deliberate action so as to suppress material facts from the Respondent and thereby disabling the Respondent from proceeding against the Appellants for the said failure. In the facts and circumstances of the case it is difficult to hold that the Appellants either acted "deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation." The failure for which the Appellant has been charged, in the light of the facts and circumstances specific to the case, appears to be a mere technical breach of the provisions of the regulations and that the said breach was on a bonafide belief that the Appellants were not required to file the report as their holding in the target company's paid up capital was above 90% of the total capital. The Appellants' version that they had acted on the basis of the advice given by the Lead Managers/legal adviser, remains unrebutted. Lead Manager is supposed to be an expert in the matters requiring compliance under the 1997 Regulations, and if the Appellants had gone by the advice given by the expert Lead Manager, they can not be blamed entirely. It is also noted that as a result of the acquisition of that portion of the shares which the other share holders did not opt to subscribe, there was no change in control or management of the target company.

Regulation 3(4) which the Appellants failed to comply with in the prescribed time limit is as follows:

3 (4) In respect of acquisition under clauses (a), (b), (c) (e) and (i) of sub section (1) the acquirer shall, within 21 days of the date of acquisition, submit a report along with supporting documents to the Board giving all details, in respect of acquisitions which (taken together with shares or voting rights if any, held by him or persons acting in concert with him) would entitle such person to exercise 15% or more of the voting rights in a company."

The acquisition of shares by the Appellants in the Rights issue made by the target company is stated to be exempted in terms of regulation 3(1)(b) referred to in regulation 3(4). The purpose of the reporting envisaged under regulation 3(4) is to provide requisite input to the Respondent, so as to ensure that the exemption claimed by the acquirer is genuine and that it is not meant to avoid the requirement of making public offer to benefit the other share holders.

Both the parties had hotly contested as to the provisions applicable for the purpose of invoking penal action in this case. The Appellants' contention is that the order for adjudication, which provides authority to the adjudicating officer, is only to adjudge the alleged failure to comply with the requirement of regulation 15A(b), that the failure to file report with the Respondent under regulation 3(4) is not covered under clause (b) but is under clause (a), that even the said clause (a) is not attracted in the light of the facts and circumstances of the case, and that the said clause takes cognizance of the "failure" and not "the delay involved" in filing the report. The Respondent has refuted this contention.

The Respondent's argument citing authorities, that the mere mention of a wrong provision of law when the power exercised is available even though under a different provision is by itself not sufficient to invalidate the exercise of the power, is of no support to the Respondent in the facts specific to the present case. It has been clearly established that it is not a case of wrong citation or labeling of a wrong provision in the Act. It is clear from the conduct of the Respondent that the reference to clause (b) by the Respondent in the show cause notice and in the impugned order was deliberate and intentional. In this context it is felt that it

would be advantageous to have a look at the provisions of section 15A as extract below:

> "15A. If any person, who is required under this Act, or any rules or regulations made thereunder,--
>
> (a) to furnish any documents, return or report to the Board, fails to furnish the same, he shall be liable to a penalty not exceeding one lakh and fifty thousand rupees for each such failure
>
> (b) to file any return or furnish any information, books or other documents, within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty not exceeding five thousand rupees for every day during which such failure continues."
>
> (c) to maintain books of accounts or records, fails to maintain the same, he shall be liable to a penalty not exceeding ten thousand rupees for every day during which the failure continues.

On a perusal of the section it is clear that the legislature has identified distinct offences in the three sub clauses and different quantum of penalty for each such offence has also been prescribed.

As Shri Kapadia pointed out, the power to adjudicate flows in terms of the order passed by the Respondent for the purpose under section 15I. The adjudicating officer is not empowered to go beyond what he has been asked to adjudicate. In the instant case, it is noted from the order dated 20.3.2002 of the Respondent that "the adjudicating officer was appointed to inquire into and adjudge under clause (b) of section 15A of the Act the alleged contravention of sub-regulation 4 of regulation 3 of the 1997 Regulations." It is noted that the Board has the power to appoint adjudicating officer to adjudge the failure specified in clause (a) of section 15A of the Act, and that the failure to file the report with SEBI under regulation 3(4) attracts the penal provisions provided in the said clause (a). In that context in the normal course it could be easily inferred that reference to section 15A (b) by the Respondent was nothing but a

wrong mention of the section. But it is noticed that the adjudicating officer did not consider that the reference to section 15A(b) was only a wrong mentioning of the section and the proper section was Section 15A(a) He did not refer back the matter for rectifying the mistake. But he literally followed the order and issued the show cause notice to the Appellants specifically citing the penal provision under section 15A(b) of the Act. They were asked to show cause for not imposing the penalty as provided in clause(b). As already stated clause (a) and clause (b) of section 15A are meant to deal with different offences. The fact that it is not a mere reference to the wrong section by the Respondent is clear from the impugned order itself. In the adjudication order the adjudicating officer has clearly discussed the law which according to him applied, in the following words:

> "clause (b) of section 15A of the SEBI Act provides for the penalty for failure to furnish information, return etc. under the provisions of the Act or any rules or regulations made thereunder".

Having stated so he has extracted the text of clause (b) of section 15A. In the same order, a little over, he has observed "from the facts as stated above, it is established that there has been a delay on their part in submission of the report within specified time period as required under sub regulation (4) of regulation 3 of the said Regulations. In respect of the said violation, clause (b) of section 15A of the said Act prescribes a penalty of Rs.5000/- for every day during which such failure continues." In this context it is to be noted that under clause (a) of section 15A, the penalty is not leviable on a continuing basis , that the maximum penalty leviable thereunder is limited to one lakh and fifty thousand rupees as against the sum of Rs.5000 leviable for each day as provided in clause (b). In the light of the conduct of the adjudicating officer it is difficult to come to a conclusion that the intention was to adjudicate the failure under section 15A (a) but wrongly section 15A(b) was mentioned in the order. In my view it is not a case of wrong citation of the section, but a case of wrong reliance on an inapplicable provision. In fact this Tribunal in its order dated 10.11.2000 in HDFC's case had held that non compliance of regulation 3(4) attracts section 15A(a) and not section 15A(b) that for the

reasons best known to the Respondent, it has opted to go contrary to the view held by the Tribunal in the said order, despite that the Tribunal's order is binding on the Respondent till such time the order is stayed or reversed by an Appellate Court. The facts in HDFC case have been stated in the said order. HDFC acquired 47,50,000 equity shares of Rs.10 each at a price of Rs.25/- per share, of one of its associate companies namely Hindustan Oil Exploration Company Limited (the company). Since 47,50,000 shares constituted 10.92% of the paid capital of the company, in terms of regulation 3(4) of the 1997 Regulations. the said company was required to submit a report alongwith supporting documents to the Respondent within 21 days of the date of acquisition of shares. The report was inadvertently not submitted within the stipulated time. It was submitted on its own, on 30.4.1998, when the lapse was noticed while preparing the annual disclosure report required to be filed with the Respondent under the Regulations. The Respondent on knowing about the belated submission of the report, decided to take penal action against the company. Accordingly the Respondent vide its order dated 12.11.1999 appointed an adjudicating officer to conduct an inquiry in the matter and impose penalty as provided under section 15A of the Act. The adjudicating officer after inquiry concluded that the company was in default in not submitting the report , etc. to the Respondent as required under sub regulation 4 of regulation 3 of the Regulations and in that context in terms of section 15A (b) of the Act, the adjudicating officer vide his order dated 24.7.2000 imposed a sum of Rs.1,50,000 as penalty against the company. The company challenged the said order in an appeal before the Tribunal.

This Tribunal after considering all the aspects observed :

"It is seen from the impugned order that the Respondent through its Chairman, vide order dated 12th November, 1999, had appointed an Adjudicating Officer "to conduct an inquiry into the alleged contravention of sub regulation (4) of Regulation 3 of the Securities and Exchange Board of India (Substantial Acquisition of shares and Takeovers) Regulations, 1997 read with clause (b) of section 15A of Securities and Exchange Board of India Act, 1992, by HDFC, the acquirer in the matter of acquisition of shares of Hindustan Oil Exploration Company Ltd (HOECL).

It is understood that in the show cause notice issued, the Appellant was asked to explain as to why penal provision available under section 15A(b) should not be taken against it for default under regulation 3(4).

In para 6.4.1 of the impugned order it has been stated that " the question now arises as to what penalty should be imposed on HDFC in the light of the provisions of clause (b) of section 15A of the said Act, which prescribes a penalty of Rs.5000 for every day during which such failure continues".

In para 6.5 of the order the Adjudicating Officer has again stated that " In the light of what is stated above, it may be seen that section 15A(b), ibid without any pre-condition prescribed a penalty for the delay @ Rs.5000 for every day during which failure to submit report continues".

In para 7.1 also the Adjudicating Officer has referred to section 15A(b) and stated that " As mentioned above, taking into consideration the above said factors and circumstances, the provisions of sections 15A(b) and 15I of the Securities and Exchange Board of India Act, 1992 I levy a total penalty of Rs.1,50,000 on M/s. Housing Development Finance Corporation Ltd.,".

It is seen from the Respondent's reply to the appeal that it had re-iterated section 15A (b) as the penal provision applicable to the default under section 3(4) of the Regulations. In para 2 under "preliminary submissions" and paras 2,4 and 5 under the heading "Facts of the Case and Grounds of Appeal" of the reply, the Respondent had attempted to justify imposition of penalty provided under section 15A(b) of the Act.

Since the charge against the Appellant is its failure to comply with the requirements of regulation 3(4) and the penalty is imposed under section 15A(b) it is felt necessary to consider

the legal provisions of the said regulation and the section. Regulation (3) enumerates certain acquisitions enjoying exemptions from the scope of regulations 10,11 and 12. One of such exempted acquisitions in terms of regulation3(1) (c) is acquisition of shares in a preferential allotment, made by a company in pursuance of a resolution passed under section 81(1A) of the Companies Act 1956, subject to fulfillment of the conditions stated thereunder. However, in terms of sub regulation (4) of regulation 3 in respect of acquisition under 3(1)(c) –" the acquirer shall, within 21 days of the date of acquisition, submit a report alongwith supporting documents to the Board giving all details in respect of acquisitions which (taken together with shares or voting rights held by him or by persons acting in concert with him) would entitle such person to exercise 15% or more of the voting rights in a company".

It is important to have a look at section 15A of the Act as a whole, as it contains the applicable penal provisions. Section 15A reads as under:

" Penalty for failure to furnish information, return, etc.

15A . If any person, who is required under this Act or any rules or regulations made thereunder:-

(a) to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty not exceeding one lakh and fifty thousand rupees for each such failure;

(b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty not exceeding five thousand rupees for every day during which such failure continues;

(c) to maintain books of account or records, fails to maintain the same; he shall be liable to a penalty not exceeding ten thousand rupees for every day during

which the failure continues".

While the Appellant acquired the shares in question in July, 1997 the bench mark was only 10% which was raised to 15% with effect from 20.10.1998.
In terms of the then existing limit of 10% the Appellant's holding was higher by 0.92%. It appears that "15% or more of voting rights" referred to in para 2 on page 3 of the Respondent's reply is not applicable to the present case as the hike in percentage is post 1997. However, it is a fact that the Appellant's holding stood higher by 0.92% over the then prevailing bench mark.

It is seen from the order mandating adjudication, the show cause notice issued to the Appellant in the adjudication, the observations/finding of the Adjudicating Officer and also from the reply filed by the Respondent that they had consciously and deliberately resorted to the provisions of clause(b) of section 15A. It was not a wrong labeling or mentioning of the wrong section. During the course of the arguments, I had asked the learned Representative of the Respondent to explain the reason for resorting to the provisions of clause(b) of section 15A, inspite of the clear provision under clause(a) providing penalty specifically for failure to submit report to the Board, in the context of the charge that the Appellant had failed to comply with the requirement of submitting the requisite report to the Board within the stipulated time as provided under sub regulation(4) of regulation3. Learned Representative submitted that the default is covered under clause(b) and not under clause(a). Mr. Barua, explained that the expression " information" contained in clause(b) need be interpreted to include report as well because the report is also information. He further submitted that the absence of any specific reference to the Board in clause(b) is of no consequence as it is implied. He submitted that the difference between clause(a) and clause(b) was clear from the wording of the section itself. According to him clause(a) does not prescribe any time limit to furnish any document, return or report, whereas clause(b) specifically provides time limit for compliance and also provides penalty for failure to file return or furnish information, etc. within the time specified for the

purpose in the regulations. Since sub regulation (4) of regulation 3 specifically provides 21 days time limit to submit the report to the Board and since the Appellant submitted the report only belatedly, provisions of sub section(b)attracted in the case. According to him only those matters for which regulations do not prescribe any particular time limit for compliance are covered under clause (a).

I am not impressed by the argument put forth by the learned Representative justifying the reason for invoking the penal provisions available under clause(b) over the provisions of clause(a) in the instant case. On a careful reading, it is seen that section 15A has been drafted to meet different situations, enumerated under clauses (a)(b) and (c). It is also pertinent to note that the legislature, taking into consideration the gravity of the matter, i.e. the resultant consequences of the default has decided to provide monetary penalties of different quantum. It appears that failure under clause (a) i.e. failure to furnish returns, reports, etc. to the Board, has been viewed rather leniently as the maximum monetary penalty leviable is limited to one lakh and fifty thousand rupees for each such failure. But, under clause(b) the penalty in the event of failure to file returns furnish any information, books or other documents within the time prescribed by regulation meets with a penalty upto five thousand rupees for every day during which such failure continues. It appears from clause (c), that failure to maintain the requisite books of account or records is viewed more seriously as could be seen from the penal consequences, as the failure attracts a maximum penalty of ten thousand rupees for every day during which the failure continues.

It is also to be noted that the expressions "document" and "return" have been repeated in clause (b) also. If expression "information" referred to in clause(b) can be in a report form, as suggested by the Respondent, all the requirements of (a) are covered under (b) also. If the legislative intention had been to include reporting to the Board also in clause(b) specific provision under clause (a) for the same purpose with a different quantum of penalty would not have been provided in the Act. These two sub

clauses are meant to meet different requirements. It is clear that clause(a) takes care of the matters to be exclusively dealt with the Board and clause(b) is to the exclusion of the Board.

The argument that clause (a) does not prescribe any time limit for compliance is incorrect. The opening words in the section that " if any person who is required under the Act or any rules or regulations made thereunder" should be read in conjunction with clause (a) and in that context it could be seen that every requirement referred in clause (a) is relatable to time limit. If the Respondent's argument that clause (a) does not prescribe any time limit is accepted, it would lead us to an absurd situation as there would be no referral point of time to decide the occurrence of the default. If the requirement of reporting etc., under clause (a) is not relatable to a time factor for compliance, no offence can be made out and consequently no penalty also will be leviable and thereby clause(a) would become redundant!

The learned Representative's submission that since information includes report as well, failure to file the same can be brought under clause (b) is not tenable. Even if it is admitted that in a generic sense information includes report as well, it is of no help to the Respondent in view of the clear provisions of the law. Sub regulation (4) of regulation3 specifically requires the acquirer to "submit a report alongwith supporting documents to the Board giving all details in respect of the acquisition……". So it is very clear that what is basically required to be submitted is a report and that report is required to be submitted to the Board.

Clause (a) of section 15A is specific on the said requirement as it inter-alia refers clearly to the requirement of furnishing report to the Board. Since there is a specific provision in clause (a) of section 15A of the Act providing penalty for failure to furnish any report to the Board, as required under the Act, rules or regulations made thereunder, the Respondent's action in terms of clause (b) of the said section 15A in the instant case cannot be considered legally in order.

It is to be noted that clause (a) is with reference to submission of reports, etc. with the Board and in that sense its scope is narrow. Scope of clause(b) is wide to include agencies such as stock exchanges, companies in certain circumstances, inspection/investigation officers appointed by the Respondent, etc. The Board (the Respondent) is not an entity covered under clause (b) as the requirement of reporting to the Board is specifically covered in clause(a).

I am well aware of the views expressed by the Supreme Court in several cases that if source of power exists non-mentioning of it or wrong labeling of it would not invalidate exercise of such powers. But the said principle is not applicable to the present case for the reason that it is not a case of mere mentioning of a wrong provision of law. It is seen from the order of adjudication, show cause notice, impugned order, the reply of the Respondent and the argument put forth by the learned Representative, that it was a deliberate and conscious decision based on the Respondent's interpretation of the scope of the legal provision, clause (b) of section 15A of the Act was invoked instead of clause (a).

In the light of the legal position stated above, imposition of penalty on the Appellant under section 15A(b) is not legally tenable."

Since the Appellants' case is in no way materially different from the HDFC's case the view taken therein by this Tribunal is in equal force applicable to the present case. Imposition of penalty on the Appellants under section 15A(b) is not legally tenable in the instant case also.

On the question of imposition of penalty also this Tribunal had considered the legal position in several cases. Samrat Holdings' (supra) case is one among them. The facts of the said Samrat Holdings' case are as under:

"Samrat Holdings Pvt. Ltd. a wholly owned subsidiary of another private limited company namely RDI Print & Publishing Pvt.Ltd.(RDI). RDI is a group company of Titan Industries Ltd (TIL). TIL and its associate companies held 1,15,00,000 equity shares accounting for 28.75% of the paid up capital of TWL. Out of the said holding 2,50,000 shares

were transferred to the said Samrat Holdings on 19.3.1997 and 45,00,000 shares on 31.3.1997. As a result of the said transfer, the said company's share holding accounted for 11.87% of the equity share capital of TWL. As per regulation 3(1)(e)(i) of the 1997 Regulations, interse transfer of shares amongst group companies are exempt from the provisions of regulations 10,11 and 12 of the Regulations. Since the instant acquisition was entirely from group companies, said regulations 10,11 and 12 did not attract. However, in terms of regulation 3(4) the company was required to report to the SEBI the details of the acquisition as specified therein within 21 days of the acquisition. Since this requirement was complied with belatedly, involving a delay of about 240 days, the Chairman of SEBI ordered adjudication and appointed an adjudicating officer. After concluding necessary inquiry, the adjudicating officer penalised the company by imposing a monetary penalty of Rs.1,21,500 vide his order dated 31.8.2000. The company filed an appeal. In the said appeal after considering all the relevant aspects this Tribunal had viewed that :

"In this appeal there is no dispute about the facts. The Appellant has admitted that the report under regulation 3(4) was filed involving a delay of 243 days, that the delay was unintentional and the moment it came to know about the lapse the report was filed on its own, seeking condonation of the delay. The Respondent's order imposing penalty has been challenged on the ground that it was not in accordance with the provisions of section 15I read with section 15J of the Act and against the principles laid down by the Supreme Court in Hindustan Steel's case (supra).

SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the Regulations) regulates acquisition of shares and takeovers, through certain measures provided therein. As very often acquisition of shares or voting rights may become necessary in commercial and business interests and all such cases of transfer of shares among two set of persons may not result in a takeover and jeopardise the interest of the share holders, Regulations have exempted certain categories of acquisition from the scope of its substantive requirements. Exempted types of acquisitions have been specified under regulation 3 of the

Regulations. One such exempted type of acquisitions is interse transfer of shares amongst group companies. Even though the acquisitions exempted under regulation 3 are exempted from the purview of the substantive provisions like making public offer, etc. in the Regulations, the acquirer is required to inform the concerned stock exchange details of the proposed acquisition at least 4 working days in advance of the proposed acquisition in terms of regulation 3(3). In terms of regulation 3(4) the acquirer is also required within 21 days of the date of acquisition, submit a report alongwith supporting documents to the Board giving all details in respect of acquisition which would entitle him to exercise 10% or more of the voting rights in the target company. Object of these two sub-regulations are different. While reporting to the concerned stock exchanges under regulation 3(3) is meant to enlighten the investing public in their investment decision in the shares of the company, requirement under regulation 3(4) is meant to serve as an input to enable SEBI to ensure whether the acquisition is one enjoying exemption and if not, to follow up further course of action in the interest of investors-such as directing public offer, etc. Regulation 3(4) is more relevant from the enforcement point of view. In the present case it is on record that the TWL had complied with the requirements of regulation 3(3) and failure is confined to compliance of regulation 3(4) by the Appellant. Since, the Respondent has admitted that the acquisition is covered under regulation 3, there is no question of any public offer, etc. required as a result of the acquisition. So the consequence of delayed filing has not in any way affected any follow up requirement on the part of the Respondents. Therefore it could be said that the non-compliance remained in effect only a technical formality. It may not be so in all cases as the report would be crucial in certain cases depending on the facts and circumstances of each case. It is made clear that the report is not to be discounted or treated irrelevant as such, in all the cases.

For failure to comply with the requirement of reporting to SEBI penalty has been provided in section 15A of the Act. In terms of the said section if any person who is required under the Act or any rules or regulation made thereunder fails to comply with the requirements stated therein, he shall be liable to a penalty not exceeding the specific sum provided therein, for each such failure.

Section 15I which empowers SEBI to adjudicate reads as under:

"15I (1) For the purpose of adjudging under sections 15A,15B,15C,15D,15E, 15F,15G and 15H, the Board shall appoint any officer not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.

(2) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject-matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections".

Section 15J which is on factors to be taken into account by the Adjudicating Officer reads as under:

" 15J .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".

In the case of Cabot International Capital Corporation Vs. Adjudicating Officer, SEBI (Appeal No.24/2000 decided on 25.1.2001) this Tribunal considered the scope of section 15I and 15J in the context of unintentional failure on the part of the Appellant to comply with the requirement of regulation 3(4) and held:

> "On a perusal of section 15I it could be seen that imposition of penalty is linked to the subjective satisfaction of the Adjudicating Officer. The words in the section that "he may impose such penalty" is of considerable significance, especially in view of the guidelines provided by the legislature in section 15J. "The Adjudicating Officer shall have due regard to the factors" stated in the section is a direction and not an option. It is not incumbent on the part of the Adjudicating Officer, even if it is established that the person has failed to comply with the provisions of any of the sections specified in sub section (1) of section 15I, to impose penalty. It is left to the discretion of the Adjudicating Officer, depending on the facts and circumstances of each case.
>
> In this context, it is relevant to have a look at the clear cut guidelines provided by the Supreme Court in Hindustan Steel's case (supra). Para 7 from the judgement considered relevant in this context is extracted below:
>
> " Under the Act penalty may be imposed for failure to register as a dealer: Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An Order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be

exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute".

The back ground of the said case leading to the above observation by the Court is as follows:

"In proceedings for assessment of tax under the Orissa Sales Tax Act, 1947, the Sales Tax Officer held that the Company was a dealer in building material, and had sold the material to contractors and was on that account liable to pay tax at the appropriate rates under the Orissa Sales Tax Act. The Sales Tax Officer directed the Company to pay tax due for ten quarters ending December 31, 1958, and penalty in addition to the tax for failure to register itself as a dealer. The Appellate Assistant Commissioner confirmed the order of the Sales Tax officer. In second appeal the Tribunal agreed with the tax authorities and held that the Company was liable to pay tax on its turnover from bricks and cement and steel supplied to the contractors. The Tribunal however substantially reduced the penalty imposed upon the company".

The observation of the Court cited above was in answer to the question "whether the Tribunal is right in holding that the penalties under section 12(5) of the Act (Orissa Sales Tax Act, 1947) had been rightly levied?"

The facts of the present case are reasonably comparable with the case cited above. In the light of the clear observation of the Court as to when penalty for failure to carry out a statutory obligation could be imposed, it is to be seen as to whether the facts of the present case warranted penalty. The facts to be considered are whether there is anything to show that

the Appellant acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. It is also to be seen that whether the breach flows from a bonafide belief of the Appellant that it was not liable to act in the manner prescribed by the statute.

In this context it is also relevant to know the significance of the expression "shall be liable to a penalty" appearing in the section 15A. The Supreme Court in Superintendent & Remembrancer of Legal Affairs to Govt. of West Bengal (supra) held that "the expression "shall be liable to a penalty" occurring in many statutes has been held as not conveying the sense of an absolute obligation or penalty but merely importing a possibility of such obligation or penalty".

As already stated above, in terms of section 15I whether penalty should be imposed for failure to perform the statutory obligation is a matter of discretion left to the Adjudicating Officer and that discretion has to be exercised judicially and on a consideration of all the relevant facts and circumstances. Further in case it is felt that penalty is warranted the quantum has to be decided taking into consideration the factors stated in section 15J. It is not that the penalty is attracted perse the violation. The Adjudicating Officer has to satisfy that the violation deserved punishment.

Supreme Court decision in Additional Commissioner of Income tax (supra), which is a reiteration of the ratio in the Gujarat Travancore Agency case(supra) relied on by the Respondent to show that it is not necessary to prove mens rea for imposing penalty is not relevant to the present case in view of the distinguishable nature of the relevant provisions under the Income Tax and the SEBI Act. These two decisions are with specific reference to provisions of section 271(I)(a) of the Income Tax Act. The said section 271 (1)(a) provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has <u>without reasonable cause</u> failed to furnish the return of income. Thus the burden is ultimately on the

assessee to plead and prove the reasonable cause. Consequently no mens rea could arise at all. On the contrary there is no such requirement in section 15A.The section does not require pre-existence of a guilty mind to impose penalty. But the Act itself circumscribes the powers of the Adjudicating Officer in the field of imposition of penalty. The case law relied on by the Respondent is of no help to the Respondent to justify imposition of penalty against the Appellant in view of the facts and circumstances peculiar to this case, discussed in detail above.

It is not the case of the Respondent, that the Appellant had "acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation".

On the contrary, as the acquisition was reported to the stock exchanges and thereby the transparency requirement was fully met with, it is difficult to reasonably conclude that the Appellant had deliberately held back reporting under regulation 3(4). There is no reason to disbelieve , in the absence of clinching evidence to show otherwise, the Appellant's version that failure was a genuine lapse, as is evident from its conduct of submitting the report suo moto. Belated reporting has neither resulted in any gain to the Appellant nor caused any loss to anybody. The Adjudicating Officer has also endorsed the same view as is evident from his own words.

He has stated in para 6.4.5.3 as under:

> 6.4.5.3: "…….. The fact of non submission of a report/return within the specified time period, irrespective of Mens rea or any other condition therefore, attracts penalty under the said provision. No doubt the Adjudicating Officer has to take into account the circumstances and the mitigating factors, if any".(emphasis eupplied)

His following positive statement in para 6.4.5.5 and 6.4.5.6 is also very relevant:

> 6.4.5.5: " The question now arises as to what penalty should be imposed on the

Acquirer in the light of the provisions of Clause (b) of Section 15A of the said Act, which prescribes a penalty of Rs.5000/- for every day during which such failure continues. Further, Section 15J of the said Act and sub Rule (2) of Rule 9 of the SEBI Rules require the adjudicating officer to pay due regard to the factors as laid down therein while adjudging the quantum of penalty". (emphasis supplied)

6.4.5.6: " In this case, from the submissions made, I am satisfied about the genuineness of the submissions and the bonafides of the Acquirer. I accept their submissions viz. that the delay was unintentional and this case being a case of internal transfer between the Group Companies did not result in any loss to Investor or gain to the Acquirer". (emphasis supplied)

However having said so, the Adjudicating Officer observed:

" Taking the circumstances of the case and the plea of the Acquirer into account, I propose to levy a minimum penalty of Rs.500/- for each day of delay. The number of days delay in this case works out to 243 days. Hence, the total penalty leviable would be Rs.1,21,500/-."

Thus the Adjudicating Officer's findings and the order imposing penalty cannot stand together. The findings should serve as the basis for penalty. But in this case his findings serve only to absolve the Appellant from the reach of penalty. There is nothing in the order supporting the Adjudicating Officer's decision imposing the penalty.

In the light of the totality of the facts and circumstances of the case and the findings of the Adjudicating Officer thereon, and also in view of the Supreme Court's guidelines in the

Hindustan Steel's case, imposition of monetary penalty on the Appellant, in my view is unwarranted.

For the reasons stated above, the impugned order cannot be sustained. Therefore the appeal is allowed and the impugned order is set aside."

There is nothing in the impugned order to show that the Appellant acted deliberately, in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. On the contrary the evidence on record shows that the appellant had acted bonafide. Therefore, imposition of penalty was unwarranted.

In the light of the facts and circumstances of the case discussed above , I am of the view that the view taken by this Tribunal in HDFC and Samrat Holding is applicable to the present case also.

For the reasons stated above the impugned order can not be sustained.

The appeal allowed.

Sd/-
(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date:January 29,2003.