WTM/MPB/EFD-DRA-4/NRO/11380/2021

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: MADHABI PURI BUCH, WHOLE TIME MEMBER

ORDER

Under Sections 11, 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992

In the matter of Edynamics Solutions Limited
In re : Deemed Public Issue Norms
In respect of:

Noticee No.	Name of the Noticees	DIN/ CIN	PAN
1	Edynamics Solutions Limited	U74900DL2000PLC106755	AAACE7849N
2	Ms. Anita Gupta	06501012	AOFPG8504E
3	Shri. Vikas Saini	06503769	BEZPS2003H
4	Shri Bharat Gupta	06507664	ALFPG6480L
5	Shri Manish Kumar Gupta	00001149	-

1. Edynamics Solutions Limited (hereinafter referred to as "**Noticee no. 1"/ "Edynamics"/ "ESL"/ The company**), was incorporated in New Delhi as "Edynamics Solutions Private Limited" on 12th July, 2000, under the Companies Act, 1956 which was subsequently converted in to a public limited company and consequently name changed to "Edynamics Solutions Limited" vide certificate of incorporation dated March 21, 2013, with CIN U74900DL2000PLC106755, issued by the Registrar of Companies, National Capital Territory of Delhi & Haryana. ESL is having its registered

office at, shop no 6, West Guru Angad Nagar, Opp. DDA Building, Laxmi Nagar, Delhi 110092, with other correspondence address as, A-406, Street No. 8, Road No. 4, Mahipalpur, Delhi 110075.

2. ESL came out with an Initial Public Offer (IPO) in the Small and Medium Enterprise (SME) Segment on BSE Limited (BSE), with the prospectus dated May 30, 2013, and got listed on June 26, 2013. Subsequently, vide notice dated January 04, 2016, BSE notified regarding migration of the shares of ESL from BSE-SME platform to dealing on the mainboard platform in the list of B Group securities.

3. Securities and Exchange Board of India (hereinafter referred to as "SEBI") conducted an inspection during August 21-28, 2014, of the Merchant Banker namely, Guiness Corporate Advisors Limited. During the inspection SEBI noticed violations of SEBI (ICDR) Regulations, 2009, relating to issue of securities by ESL handled by the said Merchant Banker. On examination, it was observed that, ESL had allotted equity shares at an issue price of Rs. 10/- on several occasions to 49 persons and on one instance to 22 persons between April 03, 2013 to April 22, 2013 (08 instance), with 1 or 2 day gap in majority of the allotments. In total, ESL had allotted equity shares to 365 allottees aggregating to Rs 6.92 Crores. The details of allotment are as follows:

Sr. no.	Date of allotment of shares	No. of allottees	No. of equity shares allotted
1.	03/04/2013	49	19,17,000
2.	12/04/2013	49	5,33,500
3.	13/04/2013	49	5,83,000
4.	15/04/2013	49	4,82,000
5.	16/04/2013	49	4,21,500
6.	18/04/2013	49	4,94,200
7.	19/04/2013	49	8,20,800
8.	22/04/2013	22	16,68,000
	TOTAL	**365**	**69,20,000**

4. From the details of allottees provided in the prospectus dated May 30 2013, it was observed that the investors were not pre-identified shareholders before the allotment of the shares, each tranche had different set of investors and the total allottees exceeded 200 (nos), for being considered as a private placement.

5. In view of the above, it was alleged that the above issue and allotment of shares was a deemed public issue under the first proviso to Section 67(3) of the Companies Act, 1956. Accordingly, there was an obligation on the Noticees, to file prospectus in connection with the issue of securities and comply with provisions of Section 56(1), 56(3), 60 (1), 73(1), 73(2) and 73(3) read with Section 67 of the Companies Act, 1956 and Regulations 4(2)(d), 4(2)(e), 5, 6, 7, 25, 26, 36, 37,46, 47, 57 and 59 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("ICDR Regulations, 2009").

6. Accordingly, Show Cause Notice ("SCN") dated September 21, 2018 and Supplementary Show Cause Notice ("SSCN") dated December 03, 2019, (clarifying para 17(a) of the SCN, on the direction of refund), was issued by SEBI to the 5 Noticees (ESL and the Directors during the said period of allotment of shares), calling upon them to show cause as to why suitable directions, as deemed appropriate, under sections 11(1), 11(4), 11A and 11B, of Securities and Exchange Board of India Act, 1992, (hereinafter referred to as "SEBI Act, 1992") read with Regulation 111 of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, should not be issued against them.

7. The directions against the noticees in the SCN and SSCN included but was not limited to the following:

   a) Directing the noticees no. 1 to 5, for refund of all subscription money and restraining them from accessing capital market for a period as deemed appropriate
   b) Restraining the noticee no. 1, from issuing any further securities for a period as deemed appropriate

8. The delivery status of the SCN, SSCN and replies of the noticees, if any, are as follows:

S.No.	Name of Noticee	Delivery of status of SCN	Delivery status of SSCN	Delivery through email	Correspondence/Reply from noticees
1	Edynamics Solutions Limited	Delivered	Affixture June 05, 2020	Yes	Email dated October 20, 2020 acknowledging receipt of SCN Reply letter dated December 01, 2020
2	Ms. Anita Gupta	Affixture November 22, 2018	Affixture June 05, 2020	No	No
3	Shri. Vikas Saini	Paper publication October 11, 2019	Paper publication August 23, 2020	Yes	Reply letter dated December 01, 2020
4	Shri Bharat Gupta	Delivered	Affixture June 05, 2020	Yes	Email dated October 21, 2020 intimating that the noticee has resigned from the company and have no knowledge about this matter
5	Shri Manish Kumar Gupta	Delivered	Affixture June 05, 2020	No	-

9. In the interests of natural justice, an opportunity of personal hearing was granted to all the noticees, two times on December 15, 2020 and February 03, 2021, however the noticees did not avail the same.

10. As requested by Noticees 1 and 3, inspection opportunities of the relevant documents relied while issuing SCN and SSCN were provided three times i.e. December 07, 2020, December 11, 2020 and January 11, 2021, which was not availed by the Noticees 1 and 3. However, it is noted that the relied upon documents in the matter was already provided to all the noticees alongwith the SCN and SSCN. Further, it was once again provided to Noticees 1 and 3 vide email dated January 21, 2021.

Submission by the Noticees

11. Noticee 2, 4 and 5 have not made any submissions to the SCN and SSCN on merits. However, Noticee 4 has merely replied vide email dated October 21, 2020, mentioning that the noticee has resigned from the company and has no knowledge about this matter

12. Noticee 1 and 3 have made following submissions vide letter dated December 01, 2020, pursuant to SCN and SSCN:

12.1. The SCN was issued after a gap of 5 years of the preferential allotment without explaining the delay. No issue or query was raised by SEBI/Stock Exchange or Registrar of Companies (RoC) during public issue. Subsequent to that many material developments have already taken place. The SSCN was issued more than a year after SCN.

12.2. For cases prior to April 01, 2014, SEBI circular no. CFD/DIL3/18/2015, dated December 31, 2015, provides procedure for offer/allotment of securities to more than 49 upto 200 investors in a financial year, to avoid penal action. The company has not allotted to more than 49 persons at any point of time. Further SEBI initiates penal action on receipt of complaints, but, no complaints are filed against the company for the allotment during financial year 2013-2014

12.3. Certified copies of documents, namely, office notes approving the directions and investigation report and all material/documents relied upon by SEBI and also inspection of the original documents.

12.4. The company has made eight preferential allotments from April 03, 2013 to April 22, 2013, after complying with the provision of section 81(1A) of the Companies Act 1956.

12.5. At the time of IPO, copy of the prospectus was filed with BSE and RoC Delhi and Haryana, containing the equity capital history of the company since incorporation and no violations of 67(3) or any other sections of Companies Act was received. Copy of prospectus was also filed with SEBI and no objection was received.

12.6. Additional Submissions: -

12.6.1. Many public companies do not raise capital through public issues as their funds requirement is not huge and secondly cost of raising funds through public issue is avoided. Such companies raise funds through private placements i.e. friends and relatives of the promoters, through special resolution under section 81 (IA) of the Companies Act.

12.6.2. The term 'offer' has not been defined under the Companies Act, 1956. The prospectus is an invitation for an offer to the public for the subscription ' or purchase of any securities. Since unlisted companies have not issued any prospectus, there was no invitation to the public to subscribe for the shares of the company.

12.6.3. ESL had allotted equity shares to 365 persons on a continuous basis from April 03, 2013 to April 22, 2013 on 8 instances through preferential allotment. As on date many allottees have already got exit from the company by selling their shares on a very good return.

12.6.4. The allotment of equity shares to 365 persons on 8 instances from April 03, 2013, to April 22, 2013, was made under the provisions of Companies Act, 1956.

12.7. Legal Submissions:

12.7.1. Section 67(3) carves out an exception to the principle mentioned in section 67 (1) and (2) that an offer or invitation to a section of the public or clients is a public issue. Section 67(3) provides that no offer or invitation shall be treated as made to the public, if the offer or invitation is not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations

12.7.2. The Companies (Amendment) Act, 2000 with effect from 13.12.2000 inserted first proviso to section 67(3) which reads as under:

> "*Provided that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to 50 persons or more*."

12.7.3. The Ministry of Corporate Affairs on December 04, 2003, promulgated Unlisted Public Companies (Preferential Allotment) Rules, 2003, providing for certain disclosures to be made in the explanatory statement issued pursuant to section 73(2) of the Companies Act. These Rules were amended on December 14, 2011 providing that in 'preferential allotment', offer shall not be made to 50 persons or more.

12.7.4. On account of the amendment by the insertion of the first proviso to section 67(3), there is a wrong notion that any allotment of shares by any unlisted public company to 50 or more persons in a financial year between 2000 to 2013, is in violation of section 67 (3) and section 73. The main thrust in section 67 for the

determination of the question as to whether there is a public offer or not, is offer or invitation. When there is an offer or invitation to subscribe for the shares, section 67 is triggered. There are three important ingredients in section 67 to treat a private placement as a public offer.

- There has to be an offer or invitation.
- Such offer/invitation has to be made by the company.
- It has to be made to 50 or more persons.

If any one of these three conditions is not satisfied, such 'private placement' cannot be regarded as 'public offer' by way of deeming fiction under the first proviso to section 67(3). When there is no offer or invitation, section 67 is not at all attracted and much less section 67(3) and 73.

12.7.5. Definitions in ICDR Regulations, such as, prospectus, advertisement, etc. indicate written communication in order to be treat as an 'offer'. In other words, if there is no written or visual communication, there cannot be any offer or invitation and the provisions of section 67 have no application. In the absence of any such written document, section 67 has no applicability.

12.7.6. ESL has brought out the salient features of Sahara Case and the order passed by Hon'ble Supreme Court of India and made a reference of its inapplicability in this case. The contention made are as follows:

a) Though Sahara's case was considered to be within the jurisdiction of SEBI and offer by Sahara to 50 or more persons was considered to be a public offer, the same ratio was arrived at on the basis of facts of the said case. It cannot apply invariably to each and every allotment of shares to 50 persons or more in a year by any unlisted public company

b) The Supreme Court in the said judgment relied on intention of Sahara to determine whether the issue of securities was a public issue or not. The

Supreme Court observed that the "acta exterior indicant interior secrata" (external action reveals inner secret) applies with all force in Sahara's case. The Court observed that the intention of Sahara was known by its action of offering shares to more than 50 persons and hence was liable to get its shares listed. In the case of such unlisted companies where there were no offers, there was no action of offering shares at all to the public and hence, the action of such companies does not justify an inference of intention being drawn as was done in Sahara case by the apex court.

12.7.7. The Noticee 1 and 3 have denied all the allegations and have prayed to drop all the charges without issuing any directions and to grant inspection of documents and personal hearing.

13. I have considered the allegations in the SCN, SSCN, submissions made by the Noticee 1 and 3 and the material available on record. Before, I proceed to consider the issues, I note the following details:

13.1. Details of Directors/ Promoters of ESL during the allotment of the shares, as per the prospectus filed with BSE in compliance with clause 52 of the Listing Agreement is as follows:

Sr.No.	Name of the Entity	DIN and PAN	Date of appointment	Date of Cessation
1	Ms. Anita Gupta (Promoter and Non-Executive Director)	06501012 AOFPG8504E	05/11/2011	Till date
2	Shri. Vikas Saini (Promoter and Executive Director)	06503769 BEZPS2003H	08/11/2011	Till date
3	Shri Bharat Gupta (Independent Director)	06507664 ALFPG6480L	22/06/2012	10/08/2020
4	Shri Manish Kumar Gupta (Independent Director)	00001149	22/06/2012	17/07/2013

13.2. Opportunity of personal hearing was also granted on two occasions i.e. December 15, 2020 and February 03, 2021. However, the noticees chose not to avail the same. Delivery modes and status of the hearing notices are as follows:

Sr.No.	Name of the Entity	Notice dated December 15, 2020	Notice dated February 03, 2021
1	Edynamics Solutions Limited	Through Email and Post	Through Email
2	Ms. Anita Gupta	Through Affixture	Through Affixture
3	Shri. Vikas Saini	Through Email and Paper Publication	Through Email
4	Shri Bharat Gupta	Through Email and Post	Through Email and Affixture
5	Shri Manish Kumar Gupta	Through email	Through Email and Affixture

13.3. I have considered the allegations and materials available on record including submission of the Noticee 1 and 3. On perusal of the same, the following preliminary issues arise for consideration.

13.4. With respect to the request of inspection of documents by noticees 1 and 3, it is noted that inspection opportunities of the relied upon documents were provided three times i.e. December 07, 2020, December 11, 2020 and January 11, 2021, which were not availed by the respective noticees. However, it may be noted that all the relied upon documents were made available to all the noticees along with the SCN and SSCN. Further the same was once again provided to the noticees 1 and 3, vide email dated January 21, 2021.

13.5. I note that, Noticees no. 1 and 3 have contended that SEBI has inordinately delayed in issuance of the SCN and SSCN, the SCN was issued after a gap of almost 5 year from the date of allotment and no reason for belatedly initiating proceeding are mentioned. I note that the extant proceedings have emanated out of the inspection conducted by SEBI during August 21-28, 2014, of the respective Merchant Banker of ESL. During this examination vide letter dated June 06, 2016, and reminder letter dated June 22, 2016, information was sought from ESL in this respect, however, the letters were received undelivered with remarks 'refused' and 'no such entity'. Subsequently, information was sought from the directors, Ms. Anita Gupta (notice no. 2), Shri Vikas Saini (Noticee no. 3) and Shri Bharat Gupta (Noticee no. 4) vide letter dated August 09, 2016, however no information was received yet again. Further an attempt was also made to deliver the letters seeking information from ESL and the Directors through BSE, however, BSE vide letter dated May 09, 2017 informed that SEBI's letter could not be delivered to ESL and the Directors, except for Shri Bharat Gupta who stated that he has already resigned from the company. I note that every efforts was made for seeking information from ESL and the directors.

13.6. Here it would be appropriate to refer the judgement of the Hon'ble Supreme Court of India in the matter of Adjudicating Officer, SEBI vs. Bhavesh Pabari (2019) SCC Online SC 294, wherein, the Hon'ble Supreme Court held that: "*There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. What would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third-party rights had been created etc.*"

13.7. In this context, it is noteworthy that as a generally accepted principle regarding enforcement action by any enforcement authority, investigation/inquiry and inspections against any subject entity and the consequent action in pursuance of the same should be completed in a reasonable time frame, which would serve the objective of balancing the rights of the persons subjected to enforcement action and the investors whose rights are being protected though enforcement proceedings.

However, it is equally true that the time consumed in inspection/investigation or consequent enforcement actions can be caused due to multiplicity of factors, such as, the violation coming to the notice of the enforcement authority on a later date, the requisite data/material not being readily available, non-cooperation by the subject entities, pendency of connected matters before other courts / authorities, etc. In the present case, it is relevant to mention that delay was caused on account of the reason that the violation came to SEBI's notice at a later date and there was hindrance in receiving information from ESL and its Directors. Thus, in order to address the contention raised by the Noticees, it would be appropriate to consider the facts and circumstances of the case in light of the legal principles in this regard. Thus, I, find that the proceedings have been initiated within reasonable time and there has been no inordinate delay, as contended by the Noticees.

13.8. Further, with regard to issuing of the supplementary show cause notice, I note that in para 17(a) of the SCN, the Noticees were called upon to show cause as to why appropriate directions should not be issued against them including but not inter alia limited to "*directions against Noticee no. 1 to 5 to provide an option to exit to the investors in terms of Section 73 of the Companies Act, 1956, (modalities of refund may be as per SEBI Circular CIR/CFD/DIL3/18/2015 dated December 31, 2015)".* The circular is applicable to the issuance of securities to more than 49 persons but up to 200 persons in a financial year, since, the allegation in the SCN is in respect of issuance of shares to 365 allottees which is more than 200 and it was necessary to rectify the same and accordingly, the inadvertent error was appropriately corrected by the SSCN. The SSCN merely seeks to modify the directions proposed to give options to investors to exit, to directions to make refund to investors. It does not change the facts and allegations in the SCN and this does not prejudicially affect the Noticees and they have been given an opportunity to respond to the same.

13.9. Further, I note that Noticees apart from delay have also contested that no query was raised by SEBI or Stock Exchange and hence great prejudiced is caused to ESL, as large number of material developments have taken place post issuance of the

preferential share and on this ground SCN be dismissed. I find that the factum of delay in initiation of enforcement proceedings, in itself, cannot be a ground for withdrawal of proceedings. Only in cases where the noticees are adversely affected, can such a submission be considered. In this context, I find it relevant to refer to the order passed by Hon'ble SAT in the case of *Metex Marketing Pvt. Ltd. vs. SEBI (order dated June 4, 2019) wherein Hon'ble SAT held that: "This Tribunal has consistently held that in the absence of any specific provision in the SEBI Act or in the Takeover Regulations, the fact that there was a delay on the part of SEBI in initiating proceedings for violation of any provision of the Act cannot be a ground to quash the penalty imposed for such violation."* In the instant case, I find that the all the noticees were sought information and explanation through various SEBI letters dated June 06, 2016, June 22, 2016, August 09, 2016 and through BSE for which BSE replied vide letter May 9, 2017, that SEBI's letter could not be delivered to ESL and the Directors, except for Shri Bharat Gupta. Even after the above efforts being made no information or explanation was received from any of the noticees. Opportunities as well as time was very well granted to the noticees, however, the noticees chose not to reply or make any submissions. Therefore, I find that the delay in the initiation of enforcement proceedings has not, in any manner, adversely affected any of the Noticees.

13.10. The Noticee 1 and 3 have also contended that, while issuing SSCN, SEBI did not consider circular dated December 31, 2015, reference bearing no. CIR/CFD/DIL3/18/2015. I note that, the circular is applicable to the issuance of securities to more than 49 persons but upto 200 persons in a financial year. Since, the allegation in the SCN is in respect of issuance of shares to 365 allottees which is more than 200 in a financial year, the circular is not applicable and therefore the contention of the Noticee 1 and 3 cannot be accepted.

Issues for Consideration and Findings:

13.11. I have considered the allegations of the SCN and SSCN, submissions made by the Noticees 1 and 3, and the materials available on record. The following issues arise for consideration. Each issue is dealt with separately under different headings as follows:

13.11.1. ***Issue No. 1:*** *Whether allotment of equity shares was made by ESL during April 03, 2013, to April 22, 2013, as outlined in the SCN and SSCN*

13.11.2. ***Issue No. 2:*** *If finding on Issue No. 1 is affirmative, whether the said allotments are in violation of Section 56, 60, 67 read with section 2(36), Section 73 of Companies Act and various regulations of ICDR Regulations as outlined in the SCN and SSCN.*

13.11.3. ***Issue No. 3:*** *If the findings on Issue No. 2 are affirmative, then whether ESL along with the Directors of ESL bear the liability of refund to the shareholder under Section 73(2) of the Companies Act, 1956, in view of the facts and circumstances of the case*

13.11.4. ***Issue No. 4:*** *Whether appropriate directions, as mentioned in the SCN and SSCN, should be issued against the Noticees*

13.11.5. ***Issue No. 5:*** *If the findings on Issue Nos. 2 & 3 or 4 are affirmative, then who are liable for appropriate directions for the violations committed*

Issue No. 1: Whether allotment of equity shares was made by ESL during April 03, 2013 to April 22, 2013, as outlined in the SCN and SSCN ?

14.1. I note that ESL and the Director noticees have not disputed the allotment of the shares during April 03, 2013, to April 22, 2013.

14.2. I have also pursued the MCA filing documents, the prospectus filed by ESL with BSE post allotment of these shares and the submission made by Noticee 1 and 3, dated December 01, 2019. In these filings/disclosures, ESL had

disclosed/admitted that, ESL allotted 69.20 lakhs equity shares at an issue price of Rs. 10/- to 49/22 persons on eight instances between April 03, 2013 to April 22, 2013, with 1-2 days' gap in majority of the allotments. In total, ESL had allotted equity shares to 365 (nos) allottees aggregating to Rs 6.92 Crores.

I therefore, conclude that ESL had allotted equity shares as above.

Issue No. 2: If finding on Issue No. 1 is affirmative, whether the said allotments are in violation of Section 56, 60, 67 read with section 2(36), Section 73 of Companies Act, and various regulations of ICDR Regulations as outlined in the SCN and SSCN.

15.1. Noticee 1 and 3 have contended that, when there is an offer or invitation to subscribe by a company, for the shares to 50 or more persons, section 67 is triggered. If these conditions are not satisfied, such 'private placement' cannot be regarded as 'public offer' by way of deeming fiction under the first proviso to section 67(3). When there is no offer or invitation, section 67 is not at all attracted and much less section 67(3) and 73.

15.2. To determine whether offer of equity shares is a public issue or not, reference has to be made to Section 67 of the Companies Act, 1956,

"67. (1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(2) any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as members or debenture holders of the

company concerned or as clients of the person issuing the prospectus or in any other manner.

(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub- section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-

(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation …

***Provided** that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:*

***Provided further** that nothing contained in the first proviso shall apply to nonbanking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956).”*

15.3. I note here that, Hon'ble Supreme Court of India in Sahara India Real Estate Corporation Limited & Ors. vs. SEBI (Civil Appeal no. 9813 and 9833 of 2011) (hereinafter referred to as the “Sahara Case”), while examining the scope of Section 67 of the Companies Act, 1956, observed as follows:

The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing contained in Subsection (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. … Resultantly, after 13.12.2000, any offer of securities by a public company to fifty persons or more will be treated as a public issue under the Companies Act, even if it is of

domestic concern or it is proved that the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation."

15.4. Further, reference may drawn to the order dated April 28, 2017, of the Hon'ble Securities Appellate Tribunal in *Neesa Technologies Limited vs. SEBI (Appeal No. 311 of 2016)* which lays down that, *"In terms of Section 67(3) of the Companies Act any issue to '50 persons or more' is a public issue and all public issues have to comply with the provisions of Section 56 of Companies Act and ILDS Regulations. Accordingly, in the instant matter the appellant have violated these provisions and their argument that they have issued the NCDs in multiple tranches and no tranche has exceeded 49 people has no meaning".*

15.5. Therefore, I note that Section 67(3) of Companies Act, 1956, provides for situations *when* an offer is not to be considered as an offer to public. As per the said sub section, if the offer is one which is not calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or, if the offer is the domestic concern of the persons making and receiving the offer, the same are not considered as public offer. Under such circumstances, they are considered as private placement of shares and debentures. It is noted that, as per the *first proviso* to Section 67(3) Companies Act, 1956, the public offer and listing requirements contained in that Act, would become automatically applicable to a company making the offer to fifty or more persons. However, the *second proviso* to Section 67(3) of Companies Act, 1956, exempts Non-Banking Financial Company (NBFC) and Public Financial Institutions (PFIs) from the applicability of the *first proviso*.

15.6. In the instant case, I note that ESL has made allotment of equity shares to 365 allottees and has raised Rs. 6.92 crores as a result and the Noticees have not denied this fact. I find that the Noticees have also not claimed that the ESL was a

NBFC or PFIs within the meaning of Section 4A of the Companies Act, 1956. In view of the aforesaid, I, therefore, find that there is no case that ESL was covered under the second proviso to Section 67(3) of the Companies Act, 1956.

15.7. Further, it is inconceivable on how the issuance and allotment of shares would have been made to 365 persons on eight continuous instances/days (between April 03-22, 2013), without making an offer, where each instance constituted 49/22 different persons. Therefore, the allotment made by ESL pursuant to the offer made by the Company is not a private placement but public offer.

15.8. Regarding the contention of Noticee 1 and 3, based on the applicability of Section 67 of the Companies Act, 1956, to preferential issue made under Section 81(1A) of Companies Act, 1956, it would be appropriate to refer to the judgement of the Hon'ble Supreme Court of India in Sahara India Real Estate Corporation Limited & Ors. vs. SEBI (2013) 1 SCC 1 (hereinafter referred to as the "Sahara Case"), where the Hon'ble Supreme Court dealt with similar contention and held as under, "*101. ..... Section 81(1A), it may be noted, is only an exception to the said rule, that the further shares may be offered to any persons subject to passing a special resolution by the company in their general meeting. Section 81(1A) cannot, in any view, have an overriding effect on the provisions relating to public issue. Even if armed with a special resolution for any further issue of capital to person other than shareholders, it can only be subjected to the provisions of Section 67 of the Company Act, that is if the offer is made to fifty persons or more, then it will have to be treated as public issue and not a private placement. A public issue of securities will not become a preferential allotment on description of label. Proviso to Section 67(3) does not make any distinction between listed and unlisted public companies or between preferential or ordinary allotment."*

15.9. Hence, the Hon'ble Supreme Court in the Sahara case has made it clear that a special resolution for any further issue of capital to person other than shareholders, as provided under Section 81(1A), is subject to the provisions of Section 67 of the

Companies Act 1956, and if the offer is made to fifty persons or more, then it will have to be treated as public issue and not a private placement. Hence, I find the contention of the Noticees no. 1 and 3 that, they have made a preferential placement after complying with the provisions of Section 81(1A) of the Companies Act, and have not made any offer or invitation to the public, as untenable.

15.10. Even in cases where the allotments are considered separately, reference may be made to Sahara Case, wherein it was held that under Section 67(3) of the Companies Act, 1956, the *"Burden of proof is entirely on Sahara to show that the investors are/were their employees/workers or associated with them in any other capacity* which *they have not discharged."* In the instant case, the noticees, have not placed any material on record that the allotment made by ESL was in satisfaction of Section 67(3)(a) or 67(3)(b) of Companies Act, 1956, i.e. it was made to the known associated persons or domestic concern. Therefore, I find that the said issuance cannot be considered as private placement.

15.11. Therefore, in view of the material available on record, I find that the allotment of equity shares by the ESL falls within the first proviso of Section 67(3) of the Companies Act, 1956. Hence, the same is deemed to be a public issue and ESL was mandated to comply with the 'public issue' norms, as prescribed under the Companies Act, 1956.

15.12. As held above, the allotment of equity shares by ESL was a public issue of securities. I note here that Section 2(36) of the Companies Act, 1956, read with Section 60(1), thereof, mandates a company to register its 'prospectus' with the RoC, before making a public offer / issuing the 'prospectus'. As per the aforesaid Section 2(36), 'prospectus' means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate. Section 60(1) of the Companies Act, 1956, states as below:

"60. REGISTRATION OF PROSPECTUS

(1) No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless, on or before the date of its publication, there has been delivered to the Registrar for registration a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his agent authorised in writing, and having endorsed thereon or attached thereto"

15.13. As the offer of equity shares by ESL is a deemed public issue of securities, ESL was required to register a prospectus with the RoC under Section 60 of the Companies Act, 1956. I find that the Noticees have not submitted any record to indicate that ESL has registered a prospectus with the RoC, in respect of the offer of its equity shares during April 03, 2013 to April 22, 2013. I, therefore, find that ESL has not complied with the provisions of Section 60(1) of the Companies Act, 1956.

15.14. In terms of Section 56(1) of the Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II of the Act. Further, as per Section 56(3) of the Companies Act, 1956, no one shall issue any form of application for shares in a company, unless the form is accompanied by abridged prospectus, containing disclosures as specified. These Sections are reproduced as below:

56. Matters to be stated and reports to be set out in Prospectus

1) *Every prospectus issued - (a) by or on behalf of a company, or (b) by or on behalf of any person who is or has been engaged or interested in the formation of a company, shall state the matters specified in Part I of Schedule II and set out the reports specified in Part II of that Schedule ; and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule.*
2) *….*

3) No one shall issue any form of application for shares in or debentures of a company, unless the form is accompanied [by a memorandum containing such salient features of a prospectus as may be prescribed] which complies with the requirements of this section :

15.15. I, note here that, ESL has not produced any records to show that ESL had issued a Prospectus containing the disclosures mentioned in Section 56(1) of the Companies Act, 1956, or issued application forms as per section 56(3) accompanying the abridged prospectus. Therefore, I find that, ESL has not complied with Sections 56(1) and 56(3) of the Companies Act, 1956.

15.16. As mandated under Section 73 of the Companies Act, 1956, every company intending to offer shares to the public for subscription shall also ensure that such securities are listed on a recognized stock exchange. The provisions of Section 73 are reproduced below for the sake of convenience:

"73. Allotment of shares and debentures to be dealt in on stock exchange.

(1) Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognised stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.

(2) Where the permission has not been applied under sub- section (1) or, such permission, having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent,

as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.

(3) All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank until the permission has been granted, or where an appeal has been preferred against the refusal to grant such. permission, until the disposal of the appeal, and the money standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in sub- section (2)]; and if default is made in complying with this sub- section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees."

15.17. Further, section 73(1) states that, every company which intends to offer shares/debentures to the public for subscription by the issue of a prospectus shall, before such issue, apply to one or more recognized stock exchange for permission for the listing of these shares/debentures. I note here that, the obligation to comply with Section 73(1) is with ESL. The Noticees have not furnished any documents to show that the ESL had made an application to a recognized stock exchange for listing of the allotted shares. Further, prior to subscription of these shares, a detailed prospectus has to be issued to the public and the application for listing has to be made prior to the offer document, i.e., much before the allotment of the shares and the fact that such an application has been made has to be stated in the prospectus and the shares allotted to public have to be listed on a stock exchange. It has already been held above that the ESL has not issued any such prospectus to the public or made any listing application before issuing the shares.

15.18. The intent of Section 73 is to ensure that public who have been allotted the shares by the company are provided with an opportunity to trade in the shares of the company in which they have invested and, if permission to list such securities is denied then the funds so raised have to be returned to the public with interest. In

a nutshell, the purpose and intent of Section 73 is to protect the interests of investors who are subscribing to an issue of shares by a body corporate. The prospectus so issued in this regard should contain details, such as, capital structure of the company, terms and particulars of the present issue, terms of payment, rights of the instrument holders, tax benefits, if any, objectives of the issue, details of the project, etc., and it is meant to ensure that the public, which intends to subscribe to the shares / debentures, are able to take an informed decision regarding their investment.

15.19. In view of the above, I hold that ESL has not complied with Section 73(1) of the Companies Act, 1956. Since no application seeking permission for listing of the securities has been made to any stock exchange, the question of grant/denial or appeal against the denial of permission does not arise. As such in terms of Section 73(2) and 73(3), ESL and its every director, who is an officer in default, have incurred a liability to repay jointly and severally the money raised through the share subscription with applicable interest rate and the funds so raised is also required to be kept in a separate bank account maintained with a Scheduled Bank. I note that no such repayment has been made in discharge of their liability so far and no record has been provided to show that the money raised through the issuance of securities was kept in a separate bank account.

15.20. I note here that the offering of equity shares by ESL has already been held to be a deemed public issue and as such ESL was also required to comply with the following Regulations of the ICDR Regulations, 2009, namely:

i. 4(2)(d): Making an application to one or more recognised stock exchanges for listing of specified securities
ii. 4(2)(e): Entering into an agreement with a depository for dematerialization of specified securities.
iii. Regulation 5: Appointment of Merchant Banker and other intermediaries
iv. Regulation 6(1): Filing of draft offer documents with SEBI, designated stock Exchange and RoC

v. Regulation 7: Obtaining in-principle approval from recognised stock exchange in which the specified securities are to be listed
vi. Regulation 25 &26: Satisfy conditions of initial public offer
vii. Regulation 36: In a public issue, the specified securities held by promoters shall be locked-in for a certain period.
viii. Regulation 37: In case of an initial public offer, the entire pre-issue capital held by persons other than promoters shall be locked-in for a period of one year.
ix. Regulation 46: Keeping the public issue open for specified period.
x. Regulation 47: Pre issue advertisement for public issue.
xi. Regulation 57: Manner of disclosures in the offer document
xii. Regulation 59: Refrain from offering any incentive to any person making application for allotment of specified securities.

15.21. SEBI has framed the ICDR Regulations and all public issues are required to comply with these regulations. The ICDR Regulations operate as safeguards for the investors who subscribe or intend to subscribe in the public issues of securities. I also note that the allotment of equity shares was made in 2013, during which the ICDR Regulations, 2009, were in force. I note that the Noticees have not provided any record/document to show that ESL has complied with the above-mentioned provisions of the ICDR Regulations, 2009.

15.22. In view of the above findings, I am of the view that the ESL was engaged in fund mobilizing activity from the public, through the offer of equity shares, and has contravened the provisions of Sections 56(1), 56(3), 60, 73 read with Section 67, of the Companies Act, 1956 and provisions of Regulations 4(2)(d), 4(2)(e), 5, 6, 7, 25, 26, 36, 37,46, 47, 57, and 59 of the SEBI (ICDR) Regulations, 2009.

Issue No. 3**: **If the findings on Issue No. 1 and 2 are affirmative, then whether ESL along with the Directors of ESL bear the liability of refund to the shareholders under Section 73(2) of the Companies Act, 1956, in view of the facts and circumstances of the case?

16.1. With respect to the liability for non-compliance of Section 73 of Companies Act, 1956, is concerned, as stipulated in Section 73(2) of the said Act, the company and every director of the company who is an *officer in default* shall, from the eighth day when the company becomes liable to repay, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, if the money is not repaid forthwith. With regard to liability to pay interest, I note that as per Section 73(2) of the Companies Act, 1956, the company and every director of the company who is an *officer in default* is jointly and severally liable, to repay all the money with interest at prescribed rate.

16.2. With regard to the interest rate to be charged, I note that Rule 4D of the Companies (Central Governments) General Rules and Forms, 1956, states *"The* rates *of* interest*, for the purposes of Sub-sections (2) and (2A) of Section 73, shall be 15 per cent per annum."* Hence, the money so collected is liable to be refunded with interest to be charged at 15 percent p.a.

16.3. As per Section 5 of the Companies Act, 1956, *"officer who is in default"* means all the following officers of the company, namely: (a) the managing director/s; (b) the whole-time director/s; (c) the manager; (d) the secretary; (e) any person in accordance with whose directions or instructions, the Board of Directors of the company is accustomed to act; (f) any person charged by the Board with the responsibility of complying with that provision; (g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors.

16.4. It is noted that the liability to repay is a statutory liability under Section 73(2) of the Companies Act, 1956, which mandates the repayment to be made forthwith. The present order only enforces the pre-existing liability of the company and 'officer in default' to repay along with interest.

16.5. Considering the facts that ESL had raised Rs. 6.92 crore from 365 persons during FY 2013-14 and there are no records available or presented by the noticees, that repayment as envisaged under Section 73 of the Companies Act, has been made by the company, ESL has not complied with its obligation to repay the amounts collected within eight days after the Company became liable to repay it, and the said liability is still continuing. Therefore, ESL and every director of the Company who is an officer in default shall be jointly and severally liable to repay the money and interest at such rate as may be prescribed.

16.6. I note here that, as per the filings with the MCA and prospectus filed with BSE, it is observed that, Shri Vikas Saini, was appointed as 'Whole Time Director' since March 25, 2013, through Board Resolution and General Meeting of Members for five years from April 01, 2013. He was also Promoter and Executive Director of ESL as per the form 32 filed with MCA and the prospectus filed with BSE. I note that there is nothing on record to suggest that the other directors were whole time directors or a person in accordance with whose directions or instructions the Board of Directors of the Company are accustomed to act or a person charged by the Board of responsibility of compliance with the provisions of the Companies Act, as given in Section 5 of the Companies Act, 1956, and therefore, the Whole Time Director i.e. Shri Vikas Saini, is held responsible as the Officer in Default of ESL.

16.7. I may note here the judgment of Hon'ble SAT in Pritha Bag v. SEBI *(Appeal no. 291 of 2017) that*, *where the company intends to offer shares to the public for subscription, has not been done by issue of a prospectus or where permission has not been sought from the stock exchange, in that event, the company and other directors of the company who is an officer in default shall be jointly and severally liable to repay that money alongwith interest at such rate as may be prescribed. From the aforesaid, it is apparently clear that the liability to repay the amount is upon that director of the company who is an officer in default. "Officer in default" has been defined under Section 5 of the Companies Act.*

16.8. In view of facts above, I conclude that, Shri Vikas Saini, Whole Time Director of ESL, is the 'officer in default' under Clause (b) of Section 5 of the Companies Act, 1956. Therefore, Shri Vikas Saini has incurred the liability to make refund along with interest at the rate of 15% per annum, under Section 73(2) of the Companies Act, 1956.

Issue No. 4: Whether appropriate directions, as mentioned in the SCN and SSCN, should be issued against the Noticees?

17.1. I note that Noticees no. 1 and 3 have submitted that, ESL came out with an IPO for which the prospectus containing the equity capital history of the company since incorporation, was filed with BSE, and got approval from BSE on May 29, 2013. Copy of the prospectus was also filed with RoC, NCT of Delhi and Haryana on May 30, 2013. Noticees no.1 and 3 have also submitted that they got approval from BSE and the RoC, without mention of any violation of Section 67(3) of the Companies Act, 1956 or any other Sections of the Companies Act, 1956. They have also submitted that a copy of the prospectus was filed with SEBI at the time of the IPO and they did not receive any objection from SEBI at the time of the IPO.

17.2. In the present case, I, note that in terms of Chapter XB {Issue of Specified Securities by Small and Medium Enterprises (SME)}, Regulations 106-O of the ICDR Regulations, offer document is to be filed with SEBI for dissemination on the website for public information and no observations shall be issued by SEBI. Further it is also noted from the records that the Noticees have not submitted any material/documents based on which a legal inference could be drawn that the Noticees were given any impression by SEBI on issue of observation on the prospectus filed for issuance of the equity shares by ESL on the SME platform of BSE. It is worthwhile to note that when a draft offer document is filed with SEBI, SEBI does not guarantee the accuracy or adequacy of the contents of the Prospectus. Further, with regard to the purported approval given by BSE, I note from the BSE letter dated May 29, 2013, submitted by the Noticees 1 and 3 with their reply letter dated December 01, 2020,

that, BSE had made it clear in its letter that, BSE inter alia does not in any manner warrant, certify or endorse the correctness or completeness of any of the contents of the offer document, take any responsibility for the financial or other soundness of the company, its promoters, its management or any scheme or project of the company and that it should not for any reasons be deemed or construed that the offer document has been cleared or approved by BSE. In this regard, I find that the said BSE letter is self-explanatory. By virtue of such letter of BSE, the same does not stand as an expression by BSE that all regulatory compliances have been met with by the Company. Therefore, no objection on the non-compliances of the deemed pubic issues was made by BSE does not come to the aid of Noticees no. 1 and 3.

17.3. I find that even if these submissions were to be considered, the same cannot form the basis for not taking action by SEBI in respect of an issue of equity shares by ESL, which is otherwise in violation of public issue norms. In this regard, it would be appropriate to refer and rely on the judgment from *B.L. Sreedhar and Ors.* Vs. *K.M. Munireddy (Dead) and Ors.,* that acquiescence, is no more than an instance of the law of estoppel by words or conduct. It has been held in a catena of cases by Hon'ble Supreme Court of India viz., *Municipal Corpn. of Greater Bombay v. Hakimwadi Tenants' Assn., decided on 24 November, 1987, Tata Chemicals Ltd.* Vs. *Commissioner of Customs (Preventive)* decided on 14/05/2015, *Air India* Vs. *Nergesh Meerza*, AIR 1981 SC 1829, that, there can be no estoppel against law. There can be no estoppel against a statute. Therefore, the plea of acquiescence/estoppel would not hold good against the statutory provisions as may be applicable in this present matter.

17.4. To deal with the doctrine of acquiescence, one more judgement of the Hon'ble Supreme Court of India in the matter of *B.L. Sreedhar and Ors.* Vs. *K.M. Munireddy (Dead) and Ors.,* decided on 05/12/2002, may be referred to describe the doctrine of acquiescence as follows:

"… The doctrine of Acquiescence may be stated thus: "If a person having right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act." (Duke of Leeds v. Earl of Amherst 2 Ph. 117 (123) (1846). This is the proper sense of the term acquiescence, "and in that sense may be defined as acquiescence, under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct." (De Bussche v. Alt. L.R. 8 Ch. D. 286 (314). Acquiescence is not a question of fact but of legal inference from facts found (Lata Beni Ram v. Kundan Lall. L.R. 261 IndAp 58 (1899)…."

17.5. It is also pertinent to mention the decisions of Hon'ble Supreme Court in the matter of Maharshi Dayanand University vs. Surjeet Kaur (2010) 11 SCC PG.159, wherein the Hon'ble Supreme Court reiterated the established legal position, that, *"there can be no estoppel/promissory estoppel against the legislature in exercise of the legislative function nor can the Government or a Public authority be debarred from changing its stand in a given situation. Thus, the question of estoppel has to be determined on the basis of facts in each case."*

17.6. Based on the facts, circumstances and considerations above, I note that, sections 56(1) and 56(3) read with Section 56(4) of the Companies Act, 1956, imposes the liability on the company, every director, and other persons responsible for the prospectus for the compliance with the said provisions. The liability for non-compliance of Section 60(1) of the Companies Act, 1956, is on the company and every person who is a party to the non-compliance of issuing the prospectus as per the said provision. Therefore, ESL and the respective directors in default at the time of allotment of equity shares, are liable for the violations of Sections 56(1), 56(3) and 60(1) of the Companies Act, 1956 and consequently, they are in violation of the provisions of ICDR Regulations.

17.7. With respect to the provisions of Section 73(2) of the Companies Act, 1956, it is to ensure that the subscribers to the deemed public issue are repaid the subscription money with applicable interest rate, in case the issuer company is not giving exit opportunity to the shareholders by way of listing of shares on the stock exchange. As per ESL submission dated December 01, 2020, ESL has got listed on the SME platform of BSE on June 26, 2013, pursuant to the prospectus dated May 30, 2013. ESL has also submitted that many allottees out of the 365 are no longer shareholders of the company because they have already got exit from the company by selling their shares on a very good return.

17.8. In view of the above an analysis of the trading price post listing was made. As per the information available, ESL shares were listed on BSE at Rs 25 on June 26, 2013. Further from the details of the trading price of the shares on BSE since June 26, 2013, till September 03, 2019, the following is noted:

Year	Average of High Price	Maximum price	Minimum price	Sum of No. of Shares	Total Trades	Sum of Total Turnover (Rs.)
<26-06-13						
2013	56.05	84.85	26.65	747,000.00	175	38,565,300.00
2014	82.52	221.55	16.3	2,348,000.00	1618	128,400,350.00
2015	8.69	17.90	3.46	5,613,000.00	2032	54,299,470.00
2016	6.64	11.54	3.65	747,038.00	965	4,576,409.00
2017	8.34	15.45	3.60	9,834,424.00	11122	103,463,749.00
2018	2.23	5.74	0.76	1,757,435.00	2546	5,781,118.00
2019	0.43	0.76	0.33	650,811.00	335	246,886.00

Source BSE Website

Details of allotment in the public issue - June 22, 2013				
Category of Shareholder	**No. of Shareholders**	**Total No. of Shares**	**Total No. of Shares held in**	**Total No. of Shares**

			Dematerialized Form	
Total Public shareholding	1,290	1,71,91,000	62,58,000	79.25

Source BSE Website

It is also noted from the BSE website that, ESL is suspended by BSE vide Notice No.20190903-37, dated September 03, 2019, for non-payment of outstanding Annual Listing Fee and is in violation of SEBI & Exchange Regulations.

17.9. From the above details it is observed that, ESL share traded at higher price than the allotted share price during April 03-22, 2013, at 10/- each to the 365 persons. These shares were immediately listed on the stock exchange from June 26, 2013, at Rs 25, and as per the share trading price the allottees had the considerable time and opportunity to exit at profit vis-à-vis, the price at which they had acquired these shares. In other words, the investors have got considerable degree of exit opportunity. Therefore, I am of the view that, the investors in the deemed public issue of ESL have not been substantially prejudiced due to the non-compliance with the provisions of Section 73 of the Companies Act, 1956. Hence, the directions to refund all the subscription money to the shareholders may not be appropriate at this stage. However, it may be appropriate that SEBI may consider initiation of adjudication proceedings against the ESL and the officer in default, in this respect, if deemed fit.

17.10. However, without prejudice to the above facts, I note from the facts and circumstances of present case, such as time consumed in initiation and completion of proceedings and existence of substantial degree of exit option at the relevant time, can be considered as a mitigating factor for suitably modifying the directions to be issued against the Noticees, which in effect will cater to the objective of balancing the rights of the Noticee subjected to enforcement action vis-à-vis in the interest of the investors.

Issue No. 5: If the findings on Issue Nos. 2, 3 and 4 are affirmative, then who are liable for appropriate directions for the violations committed?

17.11. As concluded above, Shri Vikas Saini being the officer in default has incurred the liability to make refund along with interest at the rate of 15% per annum, under Section 73(2) of the Companies Act, 1956. However, based on the facts and circumstances of the matter, the directions to refund all the subscription money to the shareholders may not be appropriate at this stage. Therefore, it may be appropriate that SEBI may consider initiation of adjudication action against the ESL and officer in default, if deemed fit.

17.12. It is noted here that, as per Companies Act 1956, there was no requirement of having Independent Director for unlisted companies and therefore all the directors were designated as 'director' prior to March 27, 2013, by ESL. Since ESL intended to get listed on BSE and go for public issue, in order to fulfil the requirement of clause 52 i.e. corporate governance of the SME Listing Agreement, the directors' role was reclassified. As per the form 32 filed with MCA on April 01, 2013, Shri Vikas Saini was appointed as Executive-Whole Time Director, Ms. Anita Gupta as Non-Executive Director, Shri Bharat Gupta as Non-Executive Independent Director and Shri Manish Kumar Gupta as Non-Executive Independent Director. Therefore, I note here that, there was no material role change amongst the directors but was only reclassification of the designation for compliance with SEBI provisions.

17.13. Even though it is observed that the role classification was only for compliance of the provisions, even assuming responsibilities of independent directors contained in the companies and SEBI Act. With respect to the responsibilities and accountability of the independent directors reference may be drawn to the master circular of MCA No. 1/2011, dated, July 29, 2011, (though the same is applicable for prosecution for the violations of companies Act), where, it lays down in principle that, no independent directors shall be held liable for any act of omission or commission by the company or by any officers of the company which constitute a breach of violation of any

provision of the Company's Act 1956 and which occurred without the knowledge attributable through the board process and without his consent or connivance or where he has acted diligently in the board process.

17.14. In view of the above, it is necessary to evaluated if all the directors have exercise their power on behalf of the company and shareholders of the company, with utmost care, skill and diligence and not acted negligently. It is noted from the Annual Report of FY 2013-14, filed with BSE by ESL, that the Board of Directors met nineteen (19) times of which eight (8) Board Meeting were during April 03-22, 2013, i.e. the deemed public issue period. The dates of the Board meetings as per the Annual Report are:

01/04/2013,03/04/2013,12/04/2013,13/04/2013,15/04/2013,16/04/2013,18/04/2013,19/04/2013,22/04/2013,26/04/2013,29/04/2013,22/06/2013,17/07/2013,26/08/2013,09/09/2013,30/09/2013,14/11/2013,10/02/2014 and 24/03/2014.

Of the above dates 03/04/2013, 12/04/2013, 13/04/2013, 15/04/2013, 16/04/2013, 18/04/2013, 19/04/2013, and 22/04/2013, were the allotment dates for the eight (8) instances of allotment deemed as public issue during April 03-22, 2013.

17.15. It is also observed from the Annual Report for FY 2013-14, that, Ms. Anita Gupta, Shri Vikas Gupta and Shri Bharat Gupta attended eighteen (18), seventeen (17) and fifteen (15), Board Meetings, respectively, whereas, Shri Manish Kumar Gupta has not attended any of the Board Meetings.

17.16. Since there were 19 (nineteen) Board Meetings, Ms. Anita Gupta and Shri. Vikas Gupta, would have mostly attended all the Board Meetings including the ones held during April 03-22, 2013. Further, out of nineteen (19) meetings, eight (8) meetings were during the April 03-22, 2013, Shri Bharat Gupta would have necessarily attended at least four (4) board meetings held during April 03-22, 2013 (provided he attended all the rest board meetings of the financial year). Given this fact, Ms. Anita Gupta, Shri Vikas Gupta and Shri Bharat Gupta, attended the respective Board Meetings where the decision and approval with respect to the allotment of the equity

share to 49/22 allottees to the tune of 365 allottees, majorly on consequent days during April 03-22, 2013, through eight instances/tranches have taken place. The mere fact that seven out of eight instance of allotment was forty nine (49) allottees with a gap of only 1-2 days, constitute as information base that such allotments in tranches are made only to circumvent the deemed public issue norms. Therefore, it is observed that, Ms. Anita Gupta, Shri Vikas Gupta and Shri Bharat Gupta had all the information and knowledge of the nature of allotments deemed as public issue, through the Board process and meeting.

17.17. With respect to Shri Manish Kumar Gupta from the records available before me, I note that Shri Manish Kumar Gupta has not participated in any of the Board Meetings during FY 2013-14, and has also resigned from ESL on July 17, 2013. Hence, from the documents/records available before me, I find that there is no evidence to show that Shri Manish Kumar Gupta, as an Independent Director, has information through the board process that such allotments in tranches during the during April 03-22, 2013, are made, to circumvent the deemed public issue norms.

17.18. Based on the facts above, Ms. Anita Gupta, Shri Vikas Gupta and Shri Bharat Gupta, were very well aware of the issuance/allotment of the equity shares i.e. deemed public issue, during April 03-22, 2013, and also duly approved the same, in the instant case. The public interest requires that the persons who had knowledge /consent/connivance in the act/omission, which constitutes violation of the provisions of the deemed public issue be made accountable to the investors and liable for appropriate action/directions.

17.19. In view of the violations committed by ESL, Ms. Anita Gupta, Shri Vikas Gupta and Shri Bharat Gupta, in the interest of the prospective investors of ESL, to safeguard the investors investments, for ensuring regulatory compliances by ESL and to further ensure orderly development of securities market, it becomes necessary for SEBI to issue appropriate directions against ESL, Ms. Anita Gupta, Shri Vikas Saini and Shri Bharat Gupta, for violation of provisions of Sections 56(1), 56(3), 60, read with

Section 67, of the Companies Act, 1956 and provisions of Regulations 4(2)(d), 4(2)(e), 5, 6, 7, 25, 26, 36, 37,46, 47, 57, and 59 of the SEBI (ICDR) Regulations, 2009

ORDER

18. In view of the aforesaid observations and findings, I, in exercise of the powers conferred under Section 19 of the Securities and Exchange Board of India Act, 1992, read with Sections 11, 11(4), 11A and 11B of the SEBI Act, hereby issue the following directions:

18.1. Edynamics Solutions Limited, Ms. Anita Gupta, Shri. Vikas Saini and Shri Bharat Gupta, are directed not to, directly or indirectly, access the securities market, by issuing prospectus, offer document or advertisement soliciting money from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, from the date of this order, till the expiry of One (01) year from the date of this Order.

18.2. Ms. Anita Gupta, Shri. Vikas Saini and Shri Bharat Gupta are also restrained from associating themselves with any other listed public company or any public company which intends to raise money from the public, or any intermediary registered with SEBI till the expiry of One (01) year from the date of this Order.

18.3. Needless to say, in view of prohibition on sale of securities, it is clarified that during the period of restraint, the existing holding, including units of mutual funds, of the Noticees, Ms. Anita Gupta, Shri. Vikas Saini and Shri Bharat Gupta, shall remain frozen.

19. The Show Cause Notice and Supplementary Show Cause Notice against Shri Manish Kumar Gupta is disposed of without any directions.

20. It is made clear that if Edynamics Solutions Limited, Ms. Anita Gupta, Shri. Vikas Saini and Shri Bharat Gupta, have any open positions in any exchange traded derivative

contracts, they can close out/square off such open positions within 3 months from the date of order or at the expiry of such contracts, whichever is earlier. It is also clarified that Edynamics Solutions Limited, Ms. Anita Gupta, Shri. Vikas Saini and Shri Bharat Gupta, can settle the pay-in and pay-out obligations in respect of transactions, if any, which have taken place before the close of trading date on the date of this order.

21. The above directions shall come into force with immediate effect.

22. Copy of this Order shall be sent to all the Noticees.

23. Copy of this Order shall be forwarded to the recognised Stock Exchanges, Depositories and Registrar and Share Transfer Agents for information and necessary action.

24. A copy of this Order shall also be forwarded to the Ministry of Corporate Affairs/ concerned Registrar of Companies, for their information and necessary action.

-sd-

DATE: April 22, 2021 **MADHABI PURI BUCH**

PLACE: MUMBAI **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA