

## M&A Hotline

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### SAT RULING: MERE BUSINESS RELATIONS NOT PAC

The Securities Appellate Tribunal (“SAT”) in its recent ruling<sup>1</sup> in the matter of *Triumph International Finance India Limited v. SEBI*<sup>2</sup> (“Triumph Case”) has set aside the order passed by the Adjudicating Officer of the SEBI (“Impugned Order”) and has held that close business relations between persons / parties cannot by themselves lead to a conclusion that such parties were acting in concert with each other for the purpose of acquisition of shares under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (“Takeover Code”).

#### FACTS

Triumph International Finance India Limited (“Appellant”) along with five other companies i.e. Classic Credit Limited, Classic Share & Stock Broking Services Limited, Panther Fincap & Management Services Limited, Panther Investrade Limited and Triumph Securities Limited (“TSL”) being associated with the Ketan Parekh group (hereinafter collectively referred to as the “Other Acquirers”) had acquired substantial quantity of shares of Adani Exports Limited (“Target”) during the period from November 1999 to January 2001. The total acquisition of the Appellant and the Other Acquirers (collectively referred to as the “Acquirers”) had exceeded the limit of 5% of the share capital of the Target on six dates between July 1, 2000 and October 16, 2000, thereby triggering the disclosure requirements prescribed by Regulation 7<sup>3</sup> of the Takeover Code, which the Acquirers failed to make. Accordingly, a show cause notice was issued to the Acquirers to which the Appellant filed a detailed reply. The Other Acquirers filed applications for a consent order and the proceedings qua them ended in a consent order. With respect to the Appellant, the Adjudicating Officer (“AO”) vide its order dated June 30, 2009<sup>4</sup> found that the Acquirers were acting in concert with each other when they acquired the shares and since they failed to disclose their holdings to the Target, they violated Regulation 7 of the Takeover Code. The Appellant filed an appeal with the SAT. The fact that the Appellant had acquired the shares of the Target, which together with the shares acquired by the Other Acquirers exceeded 5% of the paid up share capital of the Target was not disputed. Further, there was no dispute that the total number of shares acquired only by the Appellant did not exceed the 5% of the paid up share capital of the Target.

#### ISSUE FOR CONSIDERATION

Whether the Appellant was a ‘person acting in concert’ (“PAC”) with the Other Acquirers when it acquired shares of the Target?

#### FINDINGS

In determining the aforesaid SAT explored the definition of PAC, which has been defined under Regulation 2(1)(e) of the Takeover Code to comprise of persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company. Sub-section (2) of Regulation 2(1)(e) of the Takeover Code then gives a list of persons who shall be deemed to be acting in concert with each other unless the contrary is established.

#### NO COMMON OBJECTIVE

On a plain reading of the definition of a PAC it is clear that before two or more persons can be said to be acting in concert with each other they must have a common objective and that common objective should be substantial acquisition of shares or control over a company. The shares/control should then be acquired pursuant to an agreement or an understanding which could be formal or informal. These key elements were stressed upon by the SAT when it concluded that the same were missing in the show cause notice that was issued to the Appellant.

#### BASIS OF FINDINGS REVERSED IN AN APPEAL FILED BY THE APPELLANT IN ANOTHER MATTER

At the crux of the Impugned Order was the fact (arrived at by the AO) that the Appellant was a company controlled by Ketan Parekh (along with the Other Acquirers). SAT had in a prior matter namely, *Triumph International Finance Limited v. SEBI*<sup>5</sup> whilst considered similar factshad held that the Appellant though a close associate of Ketan Parekh’s investment / broking companies, was not under the control *per se* of Ketan Parekh. For a better understanding the following table summarizes the contentions of the SEBI in the Impugned Order and the reasoning of the SAT for reversing SEBI’s contentions, based on inter-alia, the earlier appeal:

Contention / Facts Relied Upon By SEBI	Finding of the SAT
Mrs. Mamta Parekh (wife of Ketan Parekh) and Mrs. Ami Parekh (wife of Kartik Parekh,	This by itself does not give Ketan Parekh a controlling stake in the Appellant company.

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who is cousin brother of Ketan parekh from the paternal side) held 7.92% each (i.e. 15.84% in total), of the share capital of the Appellant company.	
Ketan Parekh was a director in the Appellant company from December 16, 2000 up to March 31, 2001, though he did not attend any board meeting during this period.	This is not indicative of any control over the Appellant company. Merely being on the board of directors of a company does not lead to a conclusion that he is in control of that company.
The Appellant holds 49% shares in TSL which is admittedly a Ketan Parekh entity and the Appellant had entered into an agreement with TSL to acquire 51% shares of Ketan Parekh.	This fact also does not lead to the conclusion that Ketan Parekh was controlling the Appellant company. The reason for this agreement was that the Appellant was a member of the National Stock Exchange ("NSE") whereas TSL was operating on the Bombay Stock Exchange ("BSE") and it wanted to expand its business so as to operate on both the exchanges.
The Appellant acted as a broker for some of the investment companies owned and controlled by the Ketan Parekh that were his valued clients	Merely acting as a broker of some of the companies owned/controlled by Ketan Parekh does not make it a person acting in concert with such companies.

Ø **ASSOCIATION IS DIFFERENT FROM PAC**

The SAT differentiated between a business association among persons and their acting in concert with a common objective to acquire substantial number of shares in a company in pursuance to an understanding or an agreement and held that a mere business association does not tantamount to acting in concert as contemplated under the Takeover Code. The SAT further stated that merely acting as a broker of a close associate was a 'business association' and such association cannot be construed to be a PAC.

**ANALYSIS**

The meaning of PAC has often been a bone of contention not only because of the ambiguities surrounding it which makes it prone to several interpretations but also because of the wide implications it can have for e.g. disclosure requirements, clubbing of shareholding, announcements, pricing of public offers, to name a few. Courts and the SAT in a plethora of judgments have held that to fall within the purview of PAC what is important is that the parties should have a common objective and that objective should be to acquire a substantial stake or control in the target company.

Although the aforementioned principle is easier to apply when parties are totally unrelated, *vide* this Triumph Case, the SAT has clarified that even if the parties are very closely related to each other, they may still be outside the ambit of PAC. There is something more than just business relations between the parties which needs to be proved.

- **Deepak Jodhani, Simone Reis, Vaidhyadnan Iyer and Nishchal Joshipura**

1 <http://www.sebi.gov.in/satorders/triumphsat.pdf>

2 Appeal No. 183 of 2009 decided on February 9, 2010

3 Regulation 7(1) of the Takeover Code titled "Acquisition of 5 per cent and more shares or voting rights of a company" reads: Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent or ten per cent or fourteen per cent or fifty four per cent or seventy four per cent shares or voting rights in a company, in any manner whatsoever, shall disclose at every stage the aggregate of his shareholding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed.

4 <http://www.sebi.gov.in/adjorder/triumphintl.pdf>

5 Appeal no. 35 of 2002 decided on May 4, 2007.

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