BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 153 of 2006

Date of decision : 15.5.2008

Goldman Sachs Investments (Mauritius) Limited …… Appellant

Versus

The Adjudicating Officer,
Securities and Exchange Board of India …… Respondent

Mr. Darius Khambatta Senior Counsel with Ms. Ipshita Dutta Advocate for Appellant. Mr. J.J. Bhatt Senior Advocate with Dr. Poornima Advani Advocate and Ms. Sejal Shah Advocate for Respondent.

Coram : Justice N.K. Sodhi, Presiding Officer
Arun Bhargava, Member
Utpal Bhattacharya, Member

Per : Justice N.K. Sodhi, Presiding Officer

The primary question that arises for our consideration in this Appeal is whether the Securities and Exchange Board of India (hereinafter called the Board) could ask the Foreign Institutional Investors (FIIs) to furnish an undertaking that they had not dealt in respect of off-shore derivative instruments with Indian residents, non-resident Indians (NRIs), persons of Indian origin (PIOs) or overseas corporate bodies (OCBs) in the absence of a bar on such deals.

2. With a view to regulate the activities of FIIs and their sub-accounts, the Board framed the Securities and Exchange Board of India (Foreign Institutional Investors) Regulations, 1995 (for short the Regulations). These provide that no person shall buy, sell or otherwise deal in securities as an FII unless he holds a certificate granted by the Board under the Regulations. An FII is also required to seek from the Board registration of each sub-account on whose behalf he proposes to make investments in India. Regulation 20 enjoins that every FII shall, as and when required by the Board or the Reserve Bank of India, submit to the Board or the Reserve Bank of

India, as the case may be, any information, record or documents in relation to its activities as an FII. The Board found that some FIIs were issuing derivatives/financial instruments against underlying Indian securities under different names such as participatory notes, equity linked notes etc. In order to monitor the investments by FIIs through these derivatives/financial instruments, the Board decided that FIIs should report the issuance/renewal/cancellation/redemption of these instruments to it and accordingly, issued a circular dated October 31, 2001 prescribing the format in which the report was to be submitted. The Board further advised that the report shall be submitted by only those FIIs which issue such instruments and that the reports were to be submitted only on issuance/renewal/cancellation/redemption of the aforesaid instruments and only for the month(s) during which the FIIs had issued/ renewed/ cancelled/redeemed those instruments. These reports were required to be submitted on a monthly basis within a week of the end of the month duly signed and approved by the compliance officer. By a subsequent circular dated August 8, 2003 the Board decided to revise the format for reporting the issuance/renewal/cancellation/redemption of derivatives/financial instruments. The report was to be submitted in two forms which were enclosed with this circular as Annexures A and B. For the first time the reporting format included an undertaking. Annexure A is a one time report to be submitted once only in which the FII is required to indicate the outstanding off-shore derivatives as on August 15, 2003. After furnishing the requisite information in the one time report, the FII or the sub-account, as the case may be, is required to furnish the following undertaking :

> **"We undertake that we/associates/clients have not issued/ subscribed/purchased any of the offshore derivative instruments directly or indirectly to/from Indian residents/NRIs/PIOs/OCBs."**

Information as required by Annexure B was to be submitted for every fortnight from the first day of the month to the 15th day of the same month and from 16th day of the month till the last day of the month. The reporting in Annexure B commenced with effect from the fortnight ending August 31, 2003 The information for each fortnight is required to be submitted within three working days from the closure of the fortnight. The

fortnightly report is also required to contain an undertaking by the FII or the sub-account, as the case may be, in the following words :

> **"We undertake that we/associates/clients have not issued/subscribed/purchased any of the off-shore derivative instruments directly or indirectly to/from Indian residents/NRIs/PIOs/OCBs during the Statement Period."**

This circular revising the format for reporting was also issued under Regulation 20 of the Regulations.

3. Goldman Sachs Investments (Mauritius) Limited - the appellant herein is a registered sub-account with the Board and Goldman Sachs & Co. is the registered FII. On November 25, 2002, the appellant as a sub-account issued off-shore derivative instruments (ODIs), among others, to its affiliate namely, Goldman Sachs International Ltd. England with the shares of Himachal Futuristic Communications Ltd. as the underlying security. The affiliate in turn issued ODIs on the same underlying security on a back to back basis to Magnus Capital Corporation Limited (for short Magnus) which is an OCB. At the time when these ODIs had been issued, the revised format for reporting had not been prescribed. However, on the issuance of the circular dated August 8, 2003, the appellant was obliged to submit the one time report indicating the total outstanding off-shore derivatives as on August 15, 2003 in the prescribed form in Annexure A to the circular. This report was filed with a forwarding letter dated August 20, 2003. The report was incomplete and the difficulties experienced by the appellant in furnishing the complete information were mentioned in the accompanying letter. However, the complete information was furnished to the Board on August 29, 2003 through e-mail. It is pertinent to note that the one time report which was submitted to the Board in two parts did not contain the undertaking which Annexure A to the circular had prescribed. In addition to the information in Annexure A, the appellant was required to file fortnightly reports as envisaged in Annexure B to the circular as and when ODIs were/are issued/ renewed/cancelled/redeemed. The appellant was filing the fortnightly reports as and when required with the following undertaking :

> "Goldman Sachs Investment (Mauritius) International Ltd., undertake on behalf of itself and its affiliates (Goldman Sachs) that as far as it is aware, Goldman Sachs has not entered into any

> offshore derivatives on Indian Underlyers directly with Indian Residents, NRIs or OCB's (each as defined under relevant Indian laws and regulations) during the statement period. As agreed with SEBI, this undertaking does not extends to persons of Indian Origin, whether comprising part of the above categories of persons or otherwise."

The undertaking given by the appellant is substantially different from the one prescribed in Annexure B. It is the case of the appellant that the undertaking as prescribed could not be given and that its representatives had been meeting and corresponding with the officers of the Board on the basis of which they worked out an acceptable arrangement by which the aforementioned modified undertaking was being furnished. It is, thus, clear that in the one time report which was submitted in two parts, the appellant did not file any undertaking whereas in its fortnightly reports an undertaking in a modified form was being furnished.

4. In the light of the reports filed by the appellant, the Board was of the opinion that the former had violated the circular dated August 8, 2003 and Regulation 13(1) of the Regulations and, therefore, initiated adjudication proceedings under Chapter VIA of the Securities and Exchange Board of India Act, 1992 (hereinafter called the Act). The adjudicating officer served a notice dated June 6, 2006 calling upon the appellant to show cause why penalty be not imposed in terms of section 15HB of the Act. The appellant filed a detailed reply controverting the allegations made in the notice. It was pointed out that it had neither violated the reporting circular nor Regulation 13(1). The adjudicating officer framed the following three issues which, according to him, arose from the show cause notice and the reply:

> "6.1 Whether the undertaking given by GSIML is false/OR, GSIML violated the declaration regarding issuance of ODIs;
> 6.2 Whether GSIML violated the provisions of Regulation 20 of FII Regulations; and
> 6.3 Whether Regulation 13(1) of FII Regulation is attracted in the instant matter."

Issues no.1 & 2 were decided against the appellant in the following words:

> "……....
> From the bare perusal of the aforesaid undertaking given by the noticee it is made out that the undertaking was not at all in the format prescribed by the SEBI in its circular dated August 8, 2003. At many

> places in the reply of the noticee, I find a mention about noticee seeking clarification from SEBI and also their ignorance of law about prohibition on dealing with OCB's, because of which they did not include the undertaking in the first statement but later it was included in a statement filed in continuation of the first statement. I can understand that the noticee was consciously aware of the importance of the declaration and that is why firstly it avoided filing declaration. So according to me, this is an occasion when the noticee first violated the SEBI circular by not providing the declaration and later when after all of its so called discussions/clarifications from SEBI (the details of the outcome of which is not furnished by the noticee), the noticee claims to have complied with SEBI circular by filing a declaration entirely different from the prescribed format. In this connection, I would like to strongly object to the move of the noticee to amend/change the prescribed format of the undertaking as per the SEBI circular, to suit to its liking. At the outset, if this is the way a registered entity complies with the SEBI circular, I would say it is no compliance. Secondly, on the issue of MCCL being an OCB it is clearly observed from the communication from the Reserve Bank of India (RBI) dated December 26, 2003 addressed to SEBI (Annexure D of the SCN) that Magnus Capital Corporation, Mauritius is an Overseas Corporate Body (OCB). The noticee cannot be allowed to plead an ignorance of this fact. The noticee that is Goldman Sachs, having its presence in the financial/capital sectors world wide, is expected to have compliances of highest level, and which is found lacking in the instant matter. It seems that the noticee has failed to give any significance to the information to be given to the Regulator, on the ODI's issued to OCB's. It is a common knowledge and fact that OCB's had mis-utilised ODI route to park their illegal money and to manipulate Indian securities market without the fear of their identity getting detected. So the issues framed at paras 6.1 and 6.2 above are decided to the effect that the noticee has violated the declaration furnished in the fortnightly statement on issue of ODI's submitted to SEBI (As on August 15, 2003)……."

Issue no.3 pertaining to the violation of Regulation 13(1) was held to be only incidental to the main charge of furnishing a false declaration and was answered against the appellant as under:

> "…I am of the view that the purpose of this proviso, barring OCB's to invest as sub-account or as FII in Indian securities market, can only be met with, if OCB's are also denied making, investments as clients of sub-account or FII, otherwise the legislative intent and the object of the provision would get defeated. In the instant matter the noticee has defeated the purpose of the proviso to Regulation 13(1) (b) by issuing ODI's to OCB's…."

By his order dated September 8, 2006, the adjudicating officer imposed a penalty of Rs. one crore on the appellant under section 15 HB of the Act. It is against this order that the present appeal has been filed.

5. Let us first deal with the primary question posed in the beginning of our order which is whether the Board was at all justified in asking the FIIs and the sub-accounts

to file undertakings of the kind prescribed in the revised reporting format contained in the circular of August 8, 2003. Shri. D.J. Khambatta learned senior counsel for the appellant strenuously argued that till such time the circular was issued there was no bar on the FIIs and their sub-accounts to deal in ODIs with Indian residents/NRIs/PIOs/OCBs and that many of them had been dealing with them in the past and, therefore, the Board could not by this circular in question require such FIIs/sub-accounts to furnish an undertaking that they had not dealt with such persons. We find considerable force in this contention. In view of the economic reforms introduced in the country and with the opening up of the Indian securities market to the foreign participants, it became necessary for the Board to keep itself abreast of their activities and monitor the same. It is with this object in view that Regulation 20 enjoins upon the FIIs to submit to the Board any information, record or documents in relation to their activities as and when required. Regulation 20A was introduced on 28.8.2003 making it further clear that the FIIs shall fully disclose the information concerning the terms of and parties to the ODIs entered into by them or by their sub-accounts or affiliates relating to securities listed or proposed to be listed in any stock exchange in India. It was in pursuance to the powers conferred by Regulation 20 that the circular dated October 31, 2001 was issued requiring FIIs to report the issuance/ renewal/ cancellation/ redemption of the derivatives/financial instruments against underlying Indian securities issued by them. Since there was no bar on the FIIs and their sub-accounts to issue/subscribe/purchase any derivative instrument to/from Indian residents/ NRIs/PIOs/OCBs, it would be reasonable to presume that many of them must have dealt with such persons in the course of their business activities. When this was the position, the Board suddenly amended the reporting requirements by the FIIs and their sub-accounts on August 8, 2003 by prescribing the revised reporting format to which a detailed reference has already been made requiring them to furnish an undertaking with effect from the date of the circular that they had not dealt in ODIs with Indian residents/ NRIs/PIOs/OCBs in the past. We wonder how they could be asked to furnish such an undertaking in the absence of any bar to deal with such persons. This requirement of an undertaking appears to us to be opposed to all norms of reason and is totally devoid of

logic. In fact, it borders on absurdity and is arbitrary. When the FIIs and their sub-accounts have not been debarred from dealing in ODIs with Indian residents/ NRIs/ PIOs/OCBs and many of them would have dealt with the latter, they could not be asked to furnish the undertaking. We could have appreciated the requirement of the undertaking being given by FIIs and their sub-accounts only if they had first been debarred from dealing with the aforesaid persons. In other words, the bar must necessarily precede the undertaking demanded from the FIIs and their sub-accounts. The learned senior counsel for the appellant further contended that even as on today there is no provision either in the Act or in the Regulations which debars FIIs or their sub-accounts from dealing in ODIs with Indian residents/NRIs/PIOs/OCBs. The learned senior counsel, however, brought to our notice Regulation 15A of the Regulations which was inserted on 3.2.2004 and the same reads as under :

> "15A.(1) A Foreign Institutional Investor or sub-account may issue, deal in or hold, off-shore derivative instruments such as Participatory Notes, Equity Linked Notes or any other similar instruments against underlying securities, listed or proposed to be listed on any stock exchange in India, only in favour of those entities which are regulated by any relevant regulatory authority in the countries of their incorporation or establishment, subject to compliance of "know your client" requirement: **Provided** that if any such instrument has already been issued, prior to the 3rd February, 2004, to a person other than a regulated entity, contract for such transaction shall expire on maturity of the instrument or within a period of five years from the 3rd February, 2004, whichever is earlier.
>
> (2) A Foreign Institutional Investor or sub-account shall ensure that no further down stream issue or transfer of any instrument referred to in sub-regulation (1) is made to any person other than a regulated entity."

We have perused this Regulation and find that there is no prohibition on the FIIs or their sub-accounts from dealing in ODIs with the aforesaid class of persons. Regulation 15A is only restricting their dealings with such entities which are regulated by any relevant regulatory authority in the countries of their incorporation or establishment, subject to compliance of "know your client" requirement. The learned senior counsel for the appellant is, therefore, right that even today there is no bar on the FIIs or their sub-accounts and this makes the requirement of furnishing the undertaking even more incomprehensible. In this view of the matter, the Board was not justified in asking for the undertaking prescribed by the revised reporting format.

6. Before we conclude on this issue, we hasten to add a caveat here. Not even for a moment are we suggesting that the Board could not have called upon the FIIs to report about their activities or furnish to it the information required of them under the Regulations. We are only disapproving the action of the Board in so far as it requires them to furnish the undertaking as prescribed for the first time in the revised reporting format in the absence of a bar prohibiting them from dealing in ODIs with Indian residents/NRIs/PIOs/OCBs.

7. In view of our finding on the aforesaid question, it is not necessary for us to deal with the other issues raised by the learned senior counsel for the appellant. However, detailed arguments were addressed by both sides on the merits of the case as well and we deem it appropriate to record our findings thereon.

8. The next argument of Shri. D. J. Khambatta learned senior counsel for the appellant is that the show cause notice is confusing and does not spell out clearly the allegations against the appellant. We are in agreement with the learned senior counsel. The allegations made against the appellant are contained in paragraphs 3, 4 and 5 of the show cause notice which read as under :

> "3. It prima-facie appeared that Goldman Sachs Investment (Mauritius) Ltd. (hereinafter referred to as 'GSIML') a sub-account registered with SEBI issued off-shore derivative instruments to an Overseas Corporate Body namely Magnus Capital Corporation Ltd. (MCCL), and thereby violated the declaration furnished in the fortnightly statement on issue of off-shore derivative instruments submitted to SEBI (as on August 15, 2003-copy enclosed). The aforesaid declaration was furnished by GSIML pursuant to SEBI Circular dated August 8, 2003 and Regulation 13(1) of the FII Regulations. The aforesaid circular was issued by SEBI in exercise of the powers conferred by Regulation 20 of FII Regulations. Therefore, it is alleged that you have dealt with an OCB and gave an incorrect declaration that "Goldman Sachs Investments (Mauritius) I Limited undertakes on behalf of itself and its affiliates ("Goldman Sachs") that, as far it is aware, Goldman Sachs has not entered into any OTC derivatives on Indian underlyers directly with Indian residents, NRIs or OCBs (each as defined under relevant Indian laws and regulations) during the Statement Period. As agreed with SEBI, this undertaking does not extend to Persons of Indian Origin, whether comprising part of the above categories of persons or otherwise.
>
> 4. It is noted that MCCL is an OCB and in this regard, copy of the letter from Reserve Bank of India dated December 26, 2003 is enclosed.
>
> 5. The conduct of yours have been in violations of SEBI circular dated August 8, 2003 read with Regulation 13(1) of FII Regulations and which adjudication penalty in terms of Section 15HB of Securities and Exchange Board of India Act, 1992. The Section 15HB of SEBI Act,

1992 reads as under :-

> "Penalty for contravention where no separate penalty has been provided.
> 15HB. Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which may extend to one crore rupees."
> ……."

We have repeatedly gone through the allegations made in para 3 of the show cause notice and those have not made us wiser. We are unable to ascertain as to what is the precise charge which the adjudicating officer was wanting to make out. Para 3 of the notice when carefully read apparently means this: The appellant as a sub- account had issued ODIs to Magnus which is an OCB and "thereby violated the declaration furnished in the fortnightly statement on issue of off-shore derivative instruments submitted to SEBI (as on August 15, 2003 – copy enclosed)….Therefore, it is alleged that you have dealt with an OCB and gave an incorrect declaration that…." As already noticed, the revised reporting format prescribed by the circular dated August 8, 2003 required two reports to be furnished in Annexures A and B. In para 3 of the show cause notice what is alleged is the violation of the fortnightly report as on August 15, 2003. There is no fortnightly report as on 15.8.2003. The report as on 15.8.2003 is the one time report and not the fortnightly report. One cannot, therefore, make out as to which of the two reports the adjudicating officer is referring to and which is the declaration that is said to have been violated. This is why we say the show cause notice is confusing. Be that as it may, a copy of the report, the declaration in which was allegedly violated had been enclosed with the show cause notice. That report was the one time report submitted by the appellant in Annexure A. One could then presume that the adjudicating officer was alleging the violation of the declaration made in the one time report. The one time report was submitted by the appellant in two parts – on August 20 and 29, 2003. Interestingly, none of those reports contain any declaration/undertaking at all and this fact is not only admitted but the adjudicating officer himself has recorded a finding to that effect in the impugned order. How could it then be said that the appellant violated the declaration made in the one time report when

there is none. We could have appreciated if it had been alleged that the appellant failed to furnish the prescribed declaration/undertaking in the one time report but that is not the charge. Faced with this situation, Shri. J.J. Bhatt learned senior counsel for the Board submitted that the show cause notice when properly read levells the charge that the appellant failed to furnish the undertaking in Annexure A. If we accept this contention, we would be modifying the charge at the appellate stage which is impermissible. Moreover, the adjudicating officer has levied the penalty for furnishing a false declaration and not for failure to furnish one. Even if one were to assume that reference in para 3 of the show cause notice is to the fortnightly report and not to the one time report (though there is no warrant for the same because copy of the one time report had been sent alongwith the notice), the charge of violating the declaration cannot stand. One is left guessing as to which fortnightly report the adjudicating officer is referring to. Since he has mentioned 15.8.2003 as the date in the show cause notice and even if we presume that he is referring to a fortnightly statement of August 2003, it could only be the second fortnightly statement. This statement contained the modified undertaking already referred to in the earlier part of the order to the effect that as far as the appellant was aware, it did not enter into any ODI with any Indian resident, NRI or OCB during the statement period. This declaration is not incorrect because during this fortnight the appellant did not issue, renew, cancel or redeem any ODI. From whatever angle we may look at, the charge of filing an incorrect declaration cannot stand. Moreover, there are too many assumptions that one has to make before the charge can be spelt out. At this stage it would be appropriate to refer to the observations of the Supreme Court in Canara Bank and others vs. Debasis Das and others (2003) 4 SCC 557. This is what the learned judges have laid down :

> "The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. **The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party**

> **determinatively of the case he has to meet.** Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time." (emphasis supplied)

These observations apply with full force to the facts of our case. In view of what we have said above, we have no hesitation in holding that the show cause notice is not only vague and confusing but also self contradictory and the impugned order deserves to be set aside on this ground as well.

9. The adjudicating officer has taken exception to the modified declaration/undertaking given by the appellant in all its fortnightly statements. It was strenuously urged by the learned senior counsel for the appellant that the modified form of the declaration was/is being furnished after obtaining the consent of the officers of the Board and, therefore, initiating adjudication proceedings was not justified. There is merit in this contention as well. There is no gainsaying the fact that the undertakings given by the appellant in its fortnightly statements are not in conformity with the prescribed format. What happened was that soon after the circular dated August 8, 2003 was issued prescribing the revised reporting format and after the appellant had filed its incomplete one time report, the Board addressed a communication dated 27.8.2003 requiring the appellant to explain why it had omitted to give the undertaking and sought some additional information. In response thereto, the representative of the appellant contacted Mr. Santosh Sharma the then Divisional chief of FII department of the Board on August 28, 2003 and explained to him the difficulties which the appellant and other industry participants were facing with the prescribed form of undertaking. It appears that Mr. Sharma agreed with the appellant that the undertaking in the prescribed format could not be given and that the appellant could exclude PIOs from its undertaking. As agreed to between them, the appellant filed its fortnightly reports giving the modified undertaking (as quoted in the second part of para 3 of the show cause notice and reproduced in the earlier part of our order) and the same is being filed

till date. The representatives of the appellant again met Mr. Santosh Sharma on October 9, 2003 and the latter confirmed that he had no issue with the modified undertaking which the appellant had been filing. While the discussions between the representatives of the appellant and the Board were continuing, the latter issued a show cause notice to the former under section 11B of the Act alleging that it had violated the circular dated August 8, 2003 in as much as it did not file the undertaking as per the prescribed format. Proceedings in regard to this show cause notice are still pending. It appears that by this time, Mr. Santosh Sharma was no longer the Divisional chief of FII department and the appellant raised its concerns in early November 2003 in a meeting with two officers of the Board namely Mr. Batra and Mr. Natrajan who also, according to the appellant, were sympathetic to the problems pointed out by the latter. The appellant filed its reply on November 13, 2003 to the notice received under section 11B of the Act and has relied upon the aforesaid discussions. On November 19, 2003 the representative of the appellant met Mr.Chanda- the new Divisional chief of FII department of the Board to clarify, among other issues, the modification of the prescribed undertaking. The appellant then recorded all the discussions it had with Mr. Chanda and earlier with Mr. Santosh Sharma and sent an e-mail on November 20, 2003 to Mr. Chanda in confirmation thereof. A copy of this detailed e-mail is on the record which has not been disputed. Thereafter, the appellant had some telephonic conversation with Mr. Chanda who agreed that the appellant could file the modified undertaking. This telephonic conversation was also confirmed by Mr. Chanda as per his e-mail dated December 2, 2003 sent to the appellant. In view of this documentary material on the record which was not disputed by the learned senior counsel appearing for the Board, we have no hesitation in holding that the officers of the Board of the rank of Divisional chief of FII department had permitted the appellant to file the undertaking in the modified format in which it was actually submitted. In this view of the matter, it cannot be said that the appellant violated the prescribed format of the undertaking. If at all it did, it did so with the clear permission of the Board and the latter is not justified in levelling the charge now in issue. The adjudicating officer was not justified in

observing that there was no material on the record to substantiate the discussions referred to herein above. Obviously, he has not looked at the record.

10. We may now deal with yet another aspect of the charge that could be discerned from the show cause notice. If we have understood correctly, the charge is that the appellant dealt with Magnus which is an OCB and thereby violated the proviso to Regulation 13(1) of the Regulations which reads as under :

> **"Procedure and grant of registration of sub-accounts.**
>
> 13(1). For the purpose of grant of registration the Board shall take into account all matters which are relevant to the grant of such registration to the sub-account and in particular the following, namely :-
> (a)…..
> (b)…..
> **Provided** that a non-resident Indian or an overseas corporate body registered with Reserve Bank of India shall not be eligible to invest as sub-account or as foreign institutional investor;"

The fact that Magnus is an OCB and that the appellant dealt with it through its affiliate is not in dispute. However, this charge must fail on two counts. Firstly, the proviso reproduced above debars a non-resident Indian or an OCB from investing in India only **"as sub-account or as foreign institutional investor."** It is nobody's case that Magnus has invested in India either as a sub-account or as FII and, therefore, the bar envisaged in the proviso to Regulation 13(1) is not attracted. The observations made by the adjudicating officer in para 11 of the impugned order the relevant part of which have been reproduced in para 4 of our order can only be described as absurd and betray his inability to understand the plain language of the proviso to Regulation 13(1). In his eagerness to decide this issue against the appellant, he has attempted to rewrite the Regulation. Secondly, it is the case of the appellant that when it issued the ODIs in November 2002, it did not know that Magnus was an OCB. OCBs wanting to carry on activities in India are registered with the Reserve Bank of India and it is that Bank which maintains their list. The appellant contends, and we are in agreement with its learned senior counsel that the list of OCBs is not in the public domain nor is it on the website of the Reserve Bank of India and, therefore, not easily accessible to anyone or everyone. It is clear from the record that even the Board came to know that Magnus was an OCB only when it received the letter dated December 26, 2003 from the Reserve

Bank of India. This letter is a part of the show cause notice issued to the appellant and we have perused the same. It appears to us that even the Reserve Bank of India before confirming that Magnus was an OCB took up the matter with the designated Bank of OCB i.e. Hongkong & Shanghai Banking Corporation Ltd. When the Board itself was not aware and the Reserve Bank of India was not clear about the status of Magnus till December 2003, we do not think that it was fair and reasonable to charge the appellant for having dealt with Magnus as OCB.

11. When the circular dated August 8, 2003 was issued the appellant and, may be, some others as well, found that it may not be possible for them to comply with its requirements in view of the incongruities referred to hereinabove and sought some clarification from the Board. This is what the appellant said in its letter dated August 20, 2003 which is relevant for our purpose :

> "With reference to the undertaking that SEBI has requested at the bottom of the report we would like to understand from SEBI the reason for providing this undertaking. It is our understanding that there are no restrictions under regulations applicable to FIIs with respect to whom offshore affiliates of FIIs/sub-accounts may enter into any transactions. We would be grateful if SEBI could provide some clarification in this regard."

The adjudicating officer seems to have taken offence to the clarification sought by the appellant and observed in para 9 of the impugned order as under :

> ".. On the face of it, questioning the requirement of a provision, from the regulator who is exercising its lawful powers under the Takeover Regulations is something inconceivable…"

The clarification sought by the appellant was obviously reasonable as it is really not understandable as to why the Board asked the FIIs to file the undertaking in the prescribed format. Instead of furnishing some plausible response to the clarification sought, the adjudicating officer has shown how overbearing he is when he made the aforesaid observations in the impugned order. He conveniently forgot that two Divisional chiefs of FII department of the Board had appreciated the difficulties which the appellant was pointing out and had even permitted it to file a modified undertaking. The aforesaid observations of the adjudicating officer also lead us to believe that there was total lack of application of mind on his part. He has referred to the "Takeover

Regulations" which have no concern whatsoever with the case in hand. The aforesaid response of the adjudicating officer to the clarification sought by the appellant appears to be sheer arrogance. In this back ground, we cannot appreciate the response of the adjudicating officer and cannot but deprecate his conduct.

In the result, the appeal is allowed and the impugned order set aside. The Board is directed not to insist on the undertaking prescribed by the revised reporting format. The appellant will have its costs which are assessed at Rs.1 lac.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Arun Bhargava
Member

Sd/-
Utpal Bhattacharya
Member

15.5.2008
bk/-