



**COMPETITION COMMISSION OF INDIA**  
(Combination Registration No. C-2014/02/153)

21.05.2014

**Order under Section 43A of the Competition Act, 2002 ('Act')**

1. On 14<sup>th</sup> February 2014, the Competition Commission of India ('**Commission**') received a notice from Thomas Cook (India) Limited ('**TCIL**'), Thomas Cook Insurance Services (India) Limited ('**TCISIL**') and Sterling Holiday Resorts (India) Limited ('**SHRIL**') (hereinafter TCIL, TCISIL and SHRIL shall be collectively referred to as the '**Parties**'). The notice was given in respect of the composite scheme of arrangement and amalgamation ('**Scheme**') whereby:
  - (a) the resorts and time share business of SHRIL were proposed to be transferred by way of a demerger from SHRIL to TCISIL (a subsidiary of TCIL), in lieu whereof, certain equity shares of TCIL would be issued to the shareholders of SHRIL, as per the ratio set out; and
  - (b) SHRIL, with its residual business, was proposed to be amalgamated into TCIL, in lieu whereof, certain equity shares of TCIL would be issued to the shareholders of SHRIL, as per the ratio set out.
2. In addition, the details of the following acquisitions were also disclosed in the notice filed on 14<sup>th</sup> February 2014 and were claimed to be exempted pursuant to the Government of India Notification No. S. O. 482 (E) dated 4<sup>th</sup> March 2011 (target exemption notification):
  - (i) *Subscription to equity shares of SHRIL by TCISIL:* The Parties entered into a Subscription Agreement ('**SA**') on 7<sup>th</sup> February 2014 for the purpose of TCISIL subscribing 20, 650, 000 equity shares of SHRIL, representing 22.86 percent of the equity share capital of SHRIL, on a fully diluted basis, pursuant to a preferential allotment;



- (ii) *Purchase of equity shares of SHRIL by TCISIL:* The Parties, India Discovery Fund Limited, Bay Capital Investments Limited & Bay Capital Investment Managers Private Limited entered into a Share Purchase Agreement ('SPA') on 7<sup>th</sup> February 2014 for the purpose of TCISIL acquiring 19.94 percent of the equity share capital of SHRIL on a fully diluted basis (post the aforesaid preferential allotment/subscription);
- (iii) *Open offer for shares of SHRIL:* It was stated in the notice that pursuant to the aforesaid SA and SPA, the obligation to make an open offer under the relevant provision of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 was triggered. Accordingly, TCISIL, along with TCIL, as a person acting in concert, made a public announcement of an open offer to purchase up to 26 percent of the equity share capital of SHRIL from the public shareholders ('Open Offer'). The board of directors of TCISIL and TCIL have passed their respective resolution in this regard on 7<sup>th</sup> February 2014; and
- (iv) *Market Purchases:* Between 10<sup>th</sup> and 12<sup>th</sup> February 2014, TCISIL acquired 9,026,794 equity shares, representing 9.93 percent of the equity share capital of SHRIL, on a fully diluted basis, through market purchases on the BSE Limited.
3. While the aforesaid subscription, shares purchase and the acquisitions pursuant to the Open Offer were proposed at the time of giving notice to the Commission, it was noticed that the Market Purchases had already been consummated. Therefore, on 10<sup>th</sup> March 2014, the Commission issued a show cause notice to the Parties under Regulation 48 of the Competition Commission of India (General) Regulations, 2009 read with Section 43A of the Act. The show cause notice was issued as the Commission considered the Scheme and the aforesaid acquisitions as parts of one composite combination; and the Market Purchases, being a part of the composite combination, were consummated before giving notice to the Commission. Accordingly, the show cause notice was issued to the Parties to show cause, in writing, within fifteen days of the receipt of the notice, as to why penalty in terms of Section 43A of the Act be not imposed upon them.
4. The Parties filed their reply to the show cause notice on 25<sup>th</sup> March 2014. On the request of the Parties, the Commission also heard them on 21<sup>st</sup> May 2014.



5. The Parties have submitted that the Market Purchases and the notified transaction (i.e. Scheme) are not inter-connected or inter-dependent and the Market Purchases were not required to be notified to the Commission. It has also been submitted that Market Purchases were undertaken even though there was no certainty as to the consummation or completion of the Scheme. In these regard, the Commission observes as under:
- 5.1. It has been admitted by the Parties that both the Scheme and the Market Purchases were authorised in the same board meeting of TCISIL held on 7<sup>th</sup> February 2014 but through separate resolutions. Further, on the same day, TCIL and SHRIL issued a joint press release wherein it is stated that they announce a merger and the transaction is expected to close by fourth quarter of 2014. In such a case, it becomes difficult to agree that the Parties were not certain about the Scheme and other acquisitions on the day when the Market Purchases were undertaken. Given that the Scheme and all the acquisitions (i.e. shares purchase from the promoters, subscription pursuant to the preferential allotment, open offer and the Market Purchases) were authorised in the same board meeting of TCISIL held on 7<sup>th</sup> February 2014 and that all these transactions are related to the business and shares of SHRIL, there is no reason to believe why all these transactions shall not be regarded as one composite business combination. Further, the Parties have not clarified the need for TCISIL to go for the Market Purchase of the shares of SHRIL when SHRIL itself is proposed to be de-merged and amalgamated into TCISIL and TCIL respectively.
- 5.2. The joint press release dated 7<sup>th</sup> February 2014 states that the Parties announce a merger between them and the part equity, part merger deal is structured as a multi stage process comprising the acquisitions and the Scheme. Further: (a) both the SA and SPA define and refer to the Scheme; (b) the SA provides that between its execution date and the completion date, SHRIL shall not participate in any discussion or negotiation that may reasonably be expected to lead to an alternative transaction other than a transaction with TCIL as set out in the SA, the SPA or the Scheme; and (c) the SA also provides that SHRIL cannot undertake any merger, amalgamation or any other corporate restructuring without the written consent of TCISIL. It is also noticed that the warranties given by TCIL and TCISIL under the SPA and SA include their ability to consummate the



transaction under the respective agreements and the Merger Cooperation Agreement ('MCA'), which provides for the manner of implementation of the Scheme. These coupled with the fact that the Market Purchases, Scheme, SA, SPA and the Open Offer were authorised by the boards of the respective Parties on the same day suggest that all the said transactions are inherently connected and interdependent with each other and form parts of one wider business transaction.

- 5.3. Though the Market Purchases have no reference in the MCA, SA, SPA and the Scheme, the facts and circumstances of the case, particularly: (a) TCISIL having authorised the Scheme and all other acquisitions on the same day; and (b) the Market Purchases having been consummated between 10<sup>th</sup> and 12<sup>th</sup> February 2014, which is almost simultaneous and immediately after finalizing the composite combination, suggest that the Market Purchases are inherently related to the other transactions and TCISIL would not have had any reason to pursue the Market Purchases absent the Scheme and other acquisitions. Moreover, if the Parties had considered the Market Purchases as different from the Scheme and the other acquisitions, they would not have made any reference of the same in the notice filed by them with the Commission on 14<sup>th</sup> February 2014. For reasons discussed above, it is noted that the Market Purchases are not independent and are inherently related to the Scheme and other acquisitions.
6. The Parties submit that the Market Purchases do not qualify as a combination within the meaning of Section 5 of the Act read with target exemption notification and consequently do not require notification to the Commission. Since the turnover of SHRIL during the financial year ended 31<sup>st</sup> March 2013 was INR 116.67 crores, the Parties claim that the Market Purchases do not qualify as a combination in view of the target exemption notification which exempts an enterprise, whose control, shares, voting rights or assets are being acquired, has assets of the value of not more than INR 250 crores in India or turnover of not more than INR 750 crores in India, from the provisions of Section 5 of the said Act, for a period of 5 years. In this regard, it is observed as follows:



- 6.1. When a series of transactions is envisaged to accomplish a combination, it is appropriate to consider all the transactions to assess the effect of the combination on competition. Any isolated analysis of a/few part(s) of a combination may not facilitate correct analysis of the effect of the combination on competition. While it is open for the Parties to structure their transaction(s) in a particular way, for the purpose of regulatory statute such as the Act, the substance of the transaction would be more relevant to assess the effect on competition irrespective of whether such transaction is pursued through one or more steps/transactions. If a combination is structured in a series of steps/transactions, it may be possible that few of the steps may not constitute a combination on a standalone basis. It may also be the case that a particular step, in the series of steps, is eligible to avail exemption on a standalone basis. However, taking advantage of the structure of transaction(s) with a view to avoid compliance with the requirements of the Act cannot be accepted. If as this could facilitate structuring of transactions in such a manner so as to evade compliance with the requirements of the Act as well as the jurisdiction of the Commission over a particular step or whole of a combination.
- 6.2. In the instant case, the Parties could have claimed exemption had the Market Purchases been undertaken without the other transactions i.e. without the Scheme, SPA, SA and the Open Offer. It is evident from the facts and circumstances of the case that TCISIL would not have made the Market Purchases in the absence of the other transactions; in such a case, the Market Purchases could not be viewed in isolation for the purposes of exemption.
7. The Parties contend that the Act and the Combination Regulations do not refer to the term 'composite combination' that has been used in the Show Cause Notice. Sub-regulation (4) of Regulation 9 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ('**Combination Regulations**') does not impose an obligation to file a composite notice but is merely an enabling provision, to allow the Parties to file a single notice where they were required to file multiple notices. It has been further argued that sub-regulation (4) of Regulation 9 of the Combination Regulations implies that there is neither any requirement to file notice in relation to any exempt transaction, nor any need to wait for



any approval from the Commission before consummating a non-notifiable transaction. In this regard, it is observed as follows:

- 7.1. The Parties' submit that neither the Act nor the Combination Regulations use the prefix 'composite' before the term combination. It has been further submitted that by having three sub-sections viz. (a), (b) and (c), Section 5 of the Act maintains distinction between each type of the transaction mentioned in the said provisions and therefore, different transactions cannot be fused or intermingled, merely because they take place contemporaneously. Though it is correct that Section 5 of the Act has three sub-sections each describing different transaction as a combination but the fact remains that said provisions do not restrict any one to enter into a composite combination that comprises different steps/ transactions each of which may be separately covered in any one of the three sub-sections. While it may not be appropriate to consider two distinct and unrelated transactions as one combination, there is no explicit bar under the Act to consider different steps of a composite transaction as one combination particularly when all those steps are envisaged and authorised by the Parties on the same day.
- 7.2. It is relevant to note that Sub-regulation (4) of Regulation 9 of the Combination Regulations states that *'Where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected or inter-dependent on each other, one or more of which may amount to a combination, a single notice, covering all these transactions, may be filed by the parties to the combination'*. This provision clearly acknowledges the possibility a business transaction being achieved by way of inter-connected or inter-dependent steps/transactions. It is further observed that it is not uncommon for unrelated enterprises to envisage acquisition of shares followed by scheme of arrangement under the relevant provisions of the Companies Act. Any technical interpretation of Section 5 to isolate two different steps/transactions of a composite combination is against the spirit and provisions of the Act. Accordingly, the contentions of the Parties in this regard cannot be accepted.



- 7.3. The Parties' submit that sub-regulation (4) of Regulations 9 of the Combination Regulations does not impose an obligation to file a composite notice but is merely an enabling provision to allow the Parties to file a single notice where they were required to file multiple notices. It has also been argued by the Parties that sub-regulation (4) of Regulations 9 of the Combination Regulations neither imply any requirement to file a notification in relation to any exempted transaction, nor any need to wait for any approval from the Commission before consummating a non-notifiable transaction. As earlier discussed, the Market Purchases are not independent and cannot be viewed in isolation for the purpose of any exemption. It is observed that sub-regulation (4) of Regulation 9 of the Combination Regulations is an enabling provision for filing one notice in respect of a composite combination and the same cannot be interpreted to facilitate consummation of a particular step in a composite combination without compliance of the relevant provisions of the Act. To read sub-regulation (4) of Regulation 9 of the Combination Regulations to facilitate consummation of a particular step of a composite combination even before giving notice to the Commission is erroneous, misplaced and contrary to the intent and purpose of the Act including Sections 5 and 6.
8. The Parties have also contended that even assuming for the sake of argument that the concept of 'composite combination' is regulated and controlled under the Act, based on the previous decisions of the Commission, the Market Purchases do not meet the requirements of a composite combination. Citing reference to the earlier decisions of the Commission (*Case bearing Reg. Nos. C-2012/03/45, C-2012/03/48 and C-2013/05/122*), it has been argued that mutual interdependence is the relevant test to see whether two transactions are part of one composite combination. However, the Commission has never held that mutual interdependence is the only test to determine a composite combination. It is relevant to note sub-regulation (4) of Regulation 9 which states that a business transaction could be achieved by way of a series of steps or smaller individual transactions which are inter-connected or inter-dependent on each other. Even in the case bearing Reg. No. C-2013/05/122, the Commission regarded different steps/transactions as one combination as they were related to each other and there was no conclusion that mutual interdependence is the only test to determine a composite combination. It is observed that considering two different transactions as one combination depends on the



facts and circumstances of each case with due regard to the subject matter of the transactions; the business and entities involved; simultaneity in negotiation, execution and consummation of the transactions; and also, whether it is practical and reasonable to isolate and view the transactions separately. In the instant case, though different, the Market Purchases are inherently related to the other transactions (Scheme and other acquisitions) and would not have been pursued in the absence of Parties envisaging the Scheme and other acquisitions.

9. In terms of sub-section (2) of Section 6 of the Act, any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission disclosing the details of the *proposed* combination within the time prescribed therein. Whereas, at the time of giving notice to the Commission, TCISIL had already consummated the Market Purchases. Therefore, the Parties have failed to give notice under sub-section (2) of Section 6 of the Act.
10. In terms of Section 43A of the Act, if any person or enterprise fails to give notice under sub-section (2) of Section 6 of the Act, the Commission shall impose on such person or enterprise, a penalty which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination.
11. Though the penalty under section 43A of the Act may extent up to one percent of the total turnover or the assets of such a combination whichever is higher, the Commission has sufficient discretion to consider the conduct of the Parties and the circumstances of the case to arrive at an appropriate amount of penalty. In the instant case, the Parties consummated the Market Purchases between 10<sup>th</sup> and 12<sup>th</sup> February 2014 and same was disclosed in the notice filed on 14<sup>th</sup> February 2014. Though the parties have made full disclosure of all the transactions and there was no effort on their part to conceal information, the Commission discovered the violation of the provisions of the Act only from the notice given by the Parties. These facts go to suggest that the conduct of the Parties was not such that attracts severe penalty. Considering the facts and circumstances of the case, the Commission considers it appropriate to impose a relatively nominal penalty on the Parties. Therefore, in exercise of the powers under Section 43A of the Act, a penalty of INR 1,00,00,000 (Rupees one crore) is imposed on the Parties. The parties to the combination shall pay the penalty within 60 days from the date of receipt of this order.



12. The Secretary is directed to communicate to the Parties accordingly.

(Ashok Chawla)  
Chairperson

(Anurag Goel)  
Member

(M. L. Tayal)  
Member

(S. L. Bunker)  
Member

(Sudhir Mital)  
Member

(Augustine Peter)  
Member