



BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 38 of 2005

Alfalah Securities (Pvt.) Ltd
12th Floor, Tower A,
Saima Trade Tower,
I.I. Chundrigar Road,
Karachi

Appellant

Versus

Commissioner (Securities Market Division) SEC.....Respondent

Date of Impugned Order

9 August 2005

Date of Hearing

14 February 2006

Present:

Mr. Ijaz Ahmed Advocate and Mr. Mohammad Shoaib for the Appellant

Mr. Imran Inayat Butt, Mr. Babar Sattar and Mr. Mohammad Hasan Zaidi for the Respondent



ORDER

1. This order will dispose of appeal No. 38 of 2005 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 by Alfalah Securities (Pvt) Limited, against the order dated 09-08-2005 ('Impugned Order') passed by Commissioner (Securities Market Division).

2. The brief facts of the case are that Alfalah Securities (Pvt) Limited, ("Appellant") in its Morning Note dated 11-01-2005 ("Morning Note") published the following statement under the heading 'News Highlights':

"PTCL revenues to get inflated by potential reversal in APC revenues provisioning in 1QFY05 (Our Sources)

(Positive)

According to our sources in the company, PTCL's revenues are likely to be inflated by about PKR 2 bn (PKR 0.39 per share) in its 2QFY05 accounts. This is due to (I) an addition of about PKR 800 mn of the revenues related to Interconnect, which were not incorporated in 1QFY05 due to non-finalization of Interconnect draft rules. The Ministry of Telecom and IT has recently released rules for Access Promotion Contribution Fund (APC), which are acceptable from January 01, 2005. Therefore, any provisions, which were made by PTCL in this regard during 1QFY05, would be reversed. (II) PTCL is likely to book about PKR 1.2bn revenues under APC account during 2QFY05. Provisions for APC revenue and cost will be applicable from 2HFY05 while the Ministry still has to release the Service Fund rules for which it is still in search of an adviser. Therefore, we do



not expect these rules to be applicable on PTCL during FY05. PTCL booked a net profit of PKR 6.282 billion (EPS: 1.23) in 1QFY05. However, we are still in the process of revising our earning estimates. We believe that PTCL is likely to book profit after tax (PAT) within the range of PKR 8.16 – 8.6 bn....”

3. On the day of publication of the Morning Note i.e. 11-01-2005, the price of shares of PTCL closed at the upper circuit breaker price of Rs.53.30 per share as compared to its price of Rs.49.60 per share on the preceding day. The Commission sought the details of the trading activity of the Appellant in the month of January from Karachi Stock Exchange which suggested that the Appellant had bought and sold substantial number of PTCL shares between 10-01-2005 and 14-01-2005. The information contained in the Morning Note and the subsequent trading activity of the Appellant suggested that it had obtained the information from a source placed inside PTCL.

4. The Securities Market Division of the Commission issued a Show Cause Notice to the Appellant on 07-07-2005 detailing the aforesaid facts and asking as to why action should not be initiated against it under sub-section (3) and (4) of section 15B, section 7(1)(d) and section 22(1)(c) of the Securities and Exchange Ordinance 1969 (“Ordinance”) as well as Rule 8(ii) and (iv) read with Rule 8(a) of the Brokers and Agents Registration Rules of 2001 (“Rules”). After providing an opportunity of personal hearing to the Appellant, the Commissioner (Securities Market Division) held in the Impugned Order that the Appellant had access to insider and privileged information from within PTCL, and acting thereupon, dealt in shares of PTCL for and on behalf of its parent company, i.e. Bank Alfalah Ltd. The Commissioner therefore imposed a fine of Rs.72,150/- under section 15B of the Ordinance being equivalent to the gain which accrued to Bank Alfalah Ltd. The Commissioner further imposed a fine of Rs.100,000/- under Rule 8(b) of the Rules for violation of the Brokers Code of Conduct read with Rule 8(iv) of the Rules.



5. Not being satisfied with the findings in the Impugned Order, the Appellant filed the present appeal before us. Mr. Ijaz Ahmed Advocate appeared before us on the date of hearing fixed on 14-02-2006 along with Mr. Muhammad Shoib, the chief executive officer of the Appellant. Reiterating the facts, he stated that PTCL in its accounts for the first quarter, for the financial year 2005 ended on 30-09-2004, had made a provision of Rs.895 million. This provision had been necessitated by the telecom deregulation policy which required PTCL to make an Access Promotion Contribution (the "APC") to the Universal Service Fund in respect of all international incoming calls, from July 2004 and onwards. The APC Rules were notified on 31-12-2004 and subsequently, PTCL did not have to pay APC contributions to the Universal Service Fund for the first two quarters of the financial year 2005. The analyst of the Appellant had forecast the profits of PTCL based on the provisions of the APC Rules and the published account of PTCL.

6. The counsel stated that the Appellant had no relationship with PTCL which would allow the Appellant access to any unpublished price sensitive information, and therefore, the information published in the Morning Note by the Appellant does not attract the provisions of Section 15A, as provided in clause (a) of the Section. He stated that the Commissioner has not established that any loss was caused by the Appellant to any person due to contravention of section 15A.

7. The counsel further stated that the Appellant did not make any gain from trading in PTCL as it had only undertaken transactions on behalf of its clients. He stated that due to the reports from the government regarding privatization of PTCL, the share price of PTCL had been rising constantly since 03-01-2005, and it hit the upper lock on 10-01-2005 and then again on 11-01-2005. He further stated that the Dow Jones had published a positive report on 11-01-2005 on the privatization of PTCL. Similarly, a



daily note was published on 12-01-2005 by another brokerage company which reiterated the statement made in the Morning Note.

8. The counsel contended that the Commissioner had passed a non-judicial order without considering the facts and the law applicable in the circumstances. He argued that all the information on which the Morning Daily had been based had been publicly available. The reversal of the provision of APC was based on accepted accounting standards and not on insider information. The counsel stated that Para 59 of International Accounting Standard (IAS) 37 "Provisions, Contingent Liabilities and Contingent Assets" provides that if it is no longer possible that an outflow of resources embodying economic benefits will be required to settle the obligation, the provision should be reversed. The counsel stated that no insider information was required to come to the conclusion of reversal of provisions. Furthermore, the counsel stated that the Board Meeting of PTCL which approved the accounts took place on 24-2-2005 and a decision for reversal of APC revenues could not have been made on 11-01-2005 i.e. on the date of publication of the Morning Note.

9. The counsel argued that the Appellant has been punished twice for the same offence by the Commissioner which is illegal and unconstitutional. He referred to S. 26 of the General Clauses Act, 1897 which provides that if one offence is punishable under two different laws, only one of the punishments can be imposed.

10. We have heard the matter in detail and also perused the documents on record. In our opinion the 2 main issues which need to be decided in this appeal are:

- (a) whether the information contained in the Morning Note published by the Appellant on 11-01-2005 was insider information; and



- (b) whether the Appellant acted upon the privileged information to make a gain for its parent company.

For reasons stated below, we have found the answer to the above questions in negative.

11. The Commissioner in the Impugned Order rejected the argument of the Appellant that the information contained in the Morning Note was generally available, and therefore not insider information. He based his finding on the fact that the information pertaining to the reversal of Access Promotion Contribution (APC) revenues was a management decision and only the Board of Directors of PTCL could take such a decision, which suggests that the Appellant had access to insider information. The counsel for the Appellant however, drew our attention to Para 59 of IAS 37 "Provisions, Contingent Liabilities and Contingent Assets" which provides:

"Provisions should be reviewed at each balance sheet date and adjusted to reflect the current best estimate. If it is no longer possible that an outflow of resources embodying economic benefits will be required to settle the obligation, the provision should be reversed."

12. The counsel argued that the information regarding the reversal of APC revenue was based on intelligent analysis, keeping in view the requirements laid down in the accounting standards, rather than insider information. If such was the case, in our view, the Appellant should not have mentioned in its Morning Note that the information was obtained from its sources within PTCL. However, although we concur with the Commissioner that use of such terminology is against the standards laid down in the Code of Conduct for brokers, we are constrained to agree that the relevant information cannot be considered as insider information. Section 234(3)(i) of the Companies Ordinance, 1984 provides that, "... such International Accounting Standards and other



standards shall be followed in regard to the accounts and preparation of balance sheet and profit and loss account as are notified for the purpose in the official Gazette by the Commission...”.

The Commission has notified IAS 37 vide SRO 608(I)/2001 dated 27 August 2001 and all listed companies are required to follow the provisions of IAS 37 while preparing their accounts. Para 59 of IAS 37 specifically provides that if it is no longer possible that an outflow of resources embodying economic benefits will be required to settle the obligation, the provision should be reversed. PTCL was therefore legally required to reverse the provisions made for APC revenue, and any information derived from a legal requirement cannot be termed as insider or privileged information.

13. On the second issue, the Commissioner had rejected the argument that the profit made by Appellant's parent company was not due to availability of information contained in the Morning Note. In the Impugned Order he found that the time of publication of Morning Note was of no consequence as the information was available with the Appellant at the time the transaction in question took place. In our opinion however, if the information regarding the inflation of PTCL revenues due to reversal of provisions, had not been disseminated at the time when the Appellant transacted on behalf of its parent company, such information could not have affected the price of PTCL shares in the market. Consequently, the profit of Rs.72,150/- made by Bank Alfalah Ltd by dealing in PTCL shares cannot be said to have been generated due to the availability and use of privileged information. The finding in the Impugned Order that the Appellant had access to insider information and, acting thereupon, it dealt in PTCL shares on behalf of its parent company does not hold ground. The data made available by both the parties show that the price of PTCL share was already on the rise in the relevant days, and it seems that the profit was made due to that normal increase in the share price. As for the issue whether the Appellant may have caused other persons to deal in the securities of PTCL, it becomes irrelevant due to our findings above that the relevant information was not insider information.



14. We have also noted that the Commissioner has imposed under section 15B of the Ordinance, a fine of Rs.72,150/- on the Appellant, being equivalent to the gain accrued to its parent company,. Although the Impugned Order does not specify whether the fine has been imposed under sub-section (3) or (4) of section 15B, it is to be noted that the Commission does not have the power to impose any sort of 'fine' under section 15B, be it sub-section (3) or (4). The Commission however, has the power under sub-section (3) to direct payment of compensation to any person who has suffered loss as a result of dealing of insider information by the accused. And where the person who has suffered loss is not determined, the amount of compensation is payable to the Commission. It is possible that the Commissioner may have mistakenly used the term 'fine' for the term 'compensation'.

15. We have also considered the argument put forward by the Appellant's counsel that the Appellant has been punished twice for the same offence, which is against the provisions of section 26 of the General Clauses Act. In our opinion, this argument is untenable as the Appellant was punished for two different offences and not one offence. Firstly, for insider trading under section 15A of the Ordinance and secondly for violation of Rule 8(iv) of the Rules and the Code of Conduct for using terminology in the Morning Note, which is inconsistent with the requirements laid down therein.

16. For reasons recorded above, we hold that the Appellant has not violated the provisions of section 15A of the Ordinance. The fine of Rs.72,150/- imposed in the Impugned Order is therefore set aside. However we agree with the Commissioner that the Appellant has acted in violation of the Code of Conduct contained in the Rules by stating in their Morning Note that they have acquired the relevant information "from their sources within PTCL". The penalty of Rs.100,000/- imposed under Rule 8(b) of the Rules is therefore upheld. The Appellant is directed to be careful in future and avoid



making statements which are contrary to the required standards of integrity, due skill and care laid down in the Code of Conduct. The appeal is disposed of in the above manner.

(SALMAN ALI SHAIKH)
Commissioner

(RASHID I. MALIK)
Commissioner

Announced in Islamabad on 7 April 2006