



# Securities and Exchange Commission of Pakistan

## BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 30 of 2014

- (i) Lt. Gen (Rtd.) M. Hamid Khan
- (ii) Mr. Saleem Shahzada
- (iii) Mr. Imtiaz Bashir
- (iv) Mr. M. Asim Mustafa
- (v) Mr. Shafiq A. Khan
- (vi) Hafiz Avais Ghani

.... Appellants

Versus

Mr. Shahid Naseem, Executive Director  
Specialized Companies Division  
SECP, Karachi

.... Respondent

Date of hearing

02/04/15

## ORDER

### Present:

#### For the Appellants:

Barrister M. Saad Buttar

#### For the Respondent:

1. Javed Akhtar Malik, Joint Director (SCD)
2. Zonish Inayat, Assistant Director (SCD)

Appellate Bench No. I

Appeal No. 30 of 2014

Page 1 of 11



## Securities and Exchange Commission of Pakistan

1. This Order shall dispose of Appeal No. 30 of 2014 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 (SECP Act 1997) against the order dated 30/05/14 (Impugned Order) passed by the Respondent.
2. The brief facts of the instant appeal are that M/s National Asset Management Company Limited (NAMCO) is a Non-Banking Finance Company incorporated in Pakistan as public unlisted company in the year 2005 under the Companies Ordinance, 1984 (Ordinance). NAMCO was licensed by the Commission to undertake the businesses of asset management and investment advisory services under the Non-Banking Finance Companies (Establishment & Regulation) Rules 2003 (NBFC Rules 2003) and Notified Entities Regulations, 2008 (NBFCs & NE Regulations, 2008). The shareholding details of NAMCO as of 30/06/13 is as follows:

Shareholder's Name	Shareholding (%)
Associated	
First National Equities Limited	37.38%
Switch Securities (Pvt.) Ltd	4.67%
First Pakistan Securities Ltd	4.67%
Ali Aslam Malik	6.55%
	53.27%
Others:	
Azneen Bilwani	28.04%
Roomana Nasir	7.48%
Basheer Ahmed & Nishat Basheer	7.01%
Syed Etrat Hussain Rizvi/Samina Rizvi	4.18%
Others	46.73%
Total	100.00%



## Securities and Exchange Commission of Pakistan

3. Total equity of NAMCO amounted to Rs.130.38 million as of 31/03/14 in accordance with the monthly returns as provided by NAMCO. Further, NAMCO has zero (0) portfolio of investment advisory. As of 31/03/14, NAMCO is managing one closed-end collective investment scheme i.e. NAMCO Balanced Fund (NBF) and one open end collective investment scheme (NIF) with net assets amounting to Rs.1,081.87 million and Rs. 115.28 million respectively.
4. Fund performance of NBF and NIF during past five years as reported by NAMCO is as under:

Year (July-June)	NAMCO Balanced Fund				NAMCO Income Fund			
	Benchmark Return &	Fund Return &	Out/(under) Performance %	Net Assets (Rs. in M)	Benchmark Return%	Fund Return %	Out/(under) Performance %	Net Assets (Rs. in M)
FY2013-14	22.70	15.51%	(7.19)	1,081.87	4.22	4.22	(5.42)	115.28
FY2012-13	39.50	19.81%	(19.69)	941.51	6.74	6.74	(3.23)	106.98
FY2011-12	11.03	3.08	(7.95)	790.82	12.45	15.14	2.69	107.39
FY2010-11	23.99	12.97	(11.02)	766.21	13.08	8.30	(4.78)	91.95
FY2009-10	26.68	18.60	(10.08)	678.16	12.44	7.48	(4.96)	278.50
FY2008-09	(28.76)	(29.15)	(0.39)	721.81	13.99	14.76	1.37	286.40

5. NBF underperformed its benchmark for the last six years consecutively, while NIF underperformed for four years out of six years as given above. NAMCO has been operating below the minimum equity requirement (MER) since July, 2011 in contravention of Rule 7(3) of NBFC Rules, 2003 and Regulation 4 of the NBFCs and NEs Regulations.

Appellate Bench No. I

Appeal No. 30 of 2014

Page 3 of 11





## Securities and Exchange Commission of Pakistan

6. Show Cause Notice (SCN) dated 01/11/13 was served under section 282J(1) and section 282J(2) read with section 282D and section 282M(1) of the Ordinance for contravention of Rule 7(3) of NBFC Rules 2003 read with regulation 4 of the NBFCs and NEs Regulations, 2008. Hearings in the matter were held on 18/12/13 and 21/03/14.
7. The Respondent dissatisfied with the response of the Appellants held that NAMCO remained persistently non-compliant, in spite of numerous commitments and assurances towards ensuring compliance. NAMCO had made a number of commitments to raise its equity and to raise the NIF size and were given a number of opportunities to make up the shortfall but each time NAMCO failed to adhere to its firm commitment. In exercise of the powers of the Commission conferred under section 282J(2) of the Ordinance, NAMCO's license to undertake Asset Management Services issued under Rule 5 of NBFC Rules, 2003 was suspended with immediate effect. However, NAMCO's other license to undertake Investment Advisory Services was left intact. Further, since the directors of NAMCO did not comply with the NBFCs aforesaid Rule and the regulations and continued to operate without compliance to the minimum required equity and minimum required fund of NIF, a penalty of Rs.50,000 was imposed on each of its current directors (Appellants) namely Lt. Gen. (Retd.) M. Hamid Khan, Mr. Saleem Shahzada, M. Imtiaz Bashir and Mr. M. Asim Mustafa as well as ex-directors namely Mr. Shafiq A. Khan and Hafiz Avais Ghani. Furthermore, the trustee of both NBF and NIF i.e. MCB FSL were directed to take both the collective investment schemes i.e. NBF and NIF under its effective control on immediate basis and arrange to transfer their management rights to another Asset Management Company which best serves the interest of the unit/certificate holders.

Appellate Bench No. I

Appeal No. 30 of 2014

Page 4 of 11



## Securities and Exchange Commission of Pakistan

8. The Appellants aggrieved of the Impugned Order has preferred the instant Appeal on the below mentioned grounds:

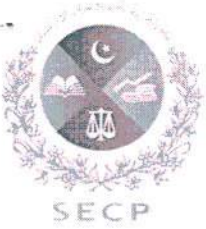
- a. The Impugned Order passed by the Respondent is the result of misreading and on-reading of the available record. The point of view of NAMCO has not been properly appreciated by the Respondent. The Appellants have not been provided proper opportunity of hearing as required under the law and the principle of audi alteram-partem, natural justice and equity have totally been violated in the instant case..
- b. There are many other companies and banks which do not fulfil the requirement prescribed for MER but no such notice has been issued to them and no order has been passed against them.
- c. The Respondent has directed the trustee to take both the collective investment schemes in its effective control on immediate basis and arrange to transfer their management rights to another 'asset management company'.
- d. The Impugned Order was served upon the Appellants on 02/06/14 through TCS whereas the Impugned Order was displayed on the SECP's website in the evening of 30/05/14, which indicates that the Respondent desires to damage the business of the Appellants.
- e. The malicious attitude of the Respondent can be weighed from the simple action that he passed the Impugned Order on Friday, 30/05/14 but did not let anybody know about it. All of a sudden at 9:30 p.m. in the evening, the Impugned Order appeared on to the website of the SECP. The malice for this action can easily be interpreted with the selection of the week and day and time so that NAMCO could not invoke the legal remedies available to them. Further, after appearance of the Impugned Order on the website of SECP, the Respondent called the trustee of the funds (MCB-FSL), who informed Mr. Faisal Merchant, Chief Operating Officer of the Appellant Company at late

Appellate Bench No. I

Appeal No. 30 of 2014

Page 5 of 11





## Securities and Exchange Commission of Pakistan

night that such an order has been passed against the Company. The official trustee did inform the Chief Operating Officer to open his office on Saturday despite of official holiday for taking over the control/management of funds by him. Such very conduct of the Respondent proves only one thing i.e. personal vendetta and malicious attitude with all the possible malafide in the legal dictionary.

- f. The Capital of a company always increases with the passage of time according to the condition of the market. The Appellants requested for grant of reasonable opportunity to increase NAMCO's equity according to the satisfaction of the SECP but this time was not granted to the Appellants which act on the part of the Respondent is arbitrary, whimsical, capricious, and fanciful. The equity of NAMCO as per audited accounts as on 31/03/14 is Rs.130,205,906 whereas upon the conversion of the close end fund into open end for which the application is already pending with the SECP the equity will automatically be increased to Rs.199,000,000. The required equity is Rs.200,000,000 for the asset management.
- g. The minimum requirement for investment advisory services is Rs.30,000,000 and NAMCO has no active business in the investment advisory at the moment. The investment advisory license is kept intact by the Respondent while the 'asset management license' of NAMCO has been suspended which is the main line of business. The Appellants filed a Writ Petition before the Honourable Lahore High Court, Lahore challenging the vires of the Impugned Order dated 30/05/14 passed by the Respondent, which was fixed before his lordship Mr. Justice Ijaz-ul-Ahsan, Honourable Judge, Lahore High Court, Lahore on 04/06/14 and his lordship was pleased to direct NAMCO to file a regular appeal before the Appellate Bench of the SECP and has protected the rights of the Appellants directing the SECP to hear the appeal and decide the matter of "grant of stay order" to NAMCO expeditiously.

Appellate Bench No. I

Appeal No. 30 of 2014

Page 6 of 11



## Securities and Exchange Commission of Pakistan

9. The Respondent vehemently denied the grounds of appeal as follows:

- a. The Appellants' contention that their view point was not appreciated and that proper opportunity of hearing was not provided are baseless. The Appellants were provided three hearing opportunities i.e. on 18/12/13, 21/03/14 and 07/04/15 and all hearing opportunities were duly availed by the Appellants through its CEO designate, director and the authorized representative. Hence, the Appellants' claim that the due process of law was not followed is baseless and is liable to be set aside.
- b. Most of the asset management companies of this sector are compliant with the MER for undertaking asset management and investment advisory services and the necessary enforcement actions have been initiated against the non-compliant entity of asset management sector, which are in process. Hence the Appellants' contention that they were discriminated and victimized by the Respondent is not correct. The Appellants must appreciate that they were granted ample opportunities, which spanned over a period of nearly three years to ensure compliance with the MER, which continuously was disregarded and the Appellant chose to stay non-compliant.
- c. During the course of first hearing held on 18/12/13 the Appellants' authorized representative apprised the Respondent that the NAMCO's major sponsor i.e. FNEL was in the process of issuing its Right Shares, which was to be completed by 31/01/14 and following which the NAMCO's issuance of Right Share would commence, which was to be completed by 28/02/14. He assured that the Appellants would meet the said equity requirement through issuance of Right Share within the said timeline. It is also worth mentioning that the Appellants' representative also assured on behalf of the Appellants that MER would be met by the aforesaid timeline and requested the Respondent to hold

Appellate Bench No. I

Appeal No. 30 of 2014

Page 7 of 11





## Securities and Exchange Commission of Pakistan

the issuance of order until 28/0/2/14. He further gave his commitment that the requested timeline was once for all a definite timeline, failing which the Commission may proceed as per law. Nevertheless, the Appellants failed to ensure its compliance within the above stated timeline. It may also be appreciated that no adverse order was issued instantly against the Appellants, instead further opportunities of being heard were granted to the Appellants and was advised to achieve the requisite compliance without any further delay. Keeping in view the above, Appellants' contentions do not hold any ground.

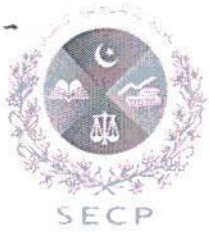
- d. The Appellants as directors had knowingly and willfully remained non-compliant to Rule 7(3) of the NBFC Rules 2003 and Regulation 4 of the NBFCs & NEs Regulations, 2008 for a time span of more than two and a half years. The Appellants also remained in contravention of Regulation 54(3a) of the NBFCs & NE Regulations 2008 and failed to increase the fund size of Namco Income Fund (hereinafter referred to as "NIF") up to the regulatory requirement for over one and a half year. The Appellants had failed to ensure that NAMCO was compliant with the condition of its license of asset management services by consistently remaining non-compliant of the above requirements, its license to undertake asset management services was suspended by the Respondent in exercise of the powers of the Commission under section 282J(2) of the Companies Ordinance, 1984 (Ordinance) conferred upon him. Since, any asset management company cannot manage the collective investment schemes without holding a valid license, therefore, in terms of Regulation 45(1) read with Regulation 41(n) of the NBFCs & NEs Regulations, 2008, the trustee of both Namco Balanced Fund (hereinafter referred to as "NBF") and NIF i.e. MCB Financial Services Limited was directed to take both the collective investment schemes under its effective control on immediate basis and arrange to transfer their management rights to

Appellate Bench No. I

Appeal No. 30 of 2014

Page 8 of 11





## Securities and Exchange Commission of Pakistan

another asset management company, which best serves the interest of the unit/certificate holders.

- e. The Impugned Order was passed on 30/05/14 and the same was placed on the Commission's website and dispatched to the Appellants through courier service the same day. It is reiterated that the Order was sent to the Appellants without any lapse of time; however, the Appellants must be aware that the courier service requires a few days' time to deliver the mail to the recipients, which was beyond control of the Respondent.
- f. The Appellants must appreciate that it was even earlier cautioned by the Commission in April 2011 regarding its potential equity shortfall and was advised to make up the arrangements to meet the MER. However, NAMCO's equity was short by Rs.27.83 million from MER as on 30/06/11, while this equity shortfall further escalated to Rs.75.19 million on 30/06/12 and Rs.86.91 on 30/06/13 and Rs.99.62 million on 31/03/14. During this period NAMCO was repeatedly advised through numerous letters to make up for the equity shortfall in terms of the NBFCs regulatory framework. Multiple extensions were also granted at several occasions by the Commission to ensure its compliance with the MER.
- g. NAMCO's license to carry out Investment Advisory Services is still intact instead its license for undertaking asset management services only has been suspended.

10. We have heard the parties and taken into consideration written submission by the Appellant and the Respondent. We have also perused the relevant provisions of the Ordinance which are as follows:

### **Rule 7(3) of the NBFC Rules 2003:**

"An NBFC shall comply with such minimum equity requirement in respect of

Appellate Bench No. I

Appeal No. 30 of 2014

Page 9 of 11



## Securities and Exchange Commission of Pakistan

each form of business specified by the Commission from time to time by notification in the official Gazette”.

### **Regulation 4 of the NBFCs & NE Regulations, 2008:**

*“Minimum equity requirement- An NBFC licensed by the Commission to undertake any form of business as specified under section 282A shall, at all the times, meet the minimum equity requirement in respect of that form of business as provided in Schedule I”*

### **Regulation 54(3)(a) of the NBFCs and NE Regulations, 2008, which provides as follows:**

*“The minimum size of an Open end Scheme shall be one hundred million rupees at all times during the life of the scheme and all existing Open End Schemes shall ensure compliance with this minimum scheme size limit by the first day of July, 2012.”*

11. The Appellants at the hearing contended that the capital adequacy requirements have been met by NAMCO, the fund size of the Company stands at Rs.2.8 million; and the Company has communicated that the size of the fund would further be raised to Rs.100 million.
12. The Bench has noted that the contentions put forth by the Appellants concerning the opportunity of hearing, malafide of the Respondent and the jurisdiction of the Respondent are not valid. Upon perusal of the matter it may be safely concluded that the Appellants were given ample opportunities concerning the satisfaction of MER. Moreover, repeated opportunities of hearing were given and the Appellants participated in the same.

Appellate Bench No. 1

Appeal No. 30 of 2014

Page 10 of 11





## Securities and Exchange Commission of Pakistan

13. It is important to clarify the issue of jurisdiction of the Respondent. This bench would like to state that the Respondent has been delegated authority under the relevant provisions of the Ordinance by the Commission.
14. The Bench, however, after considering the contentions put forth by the Appellants at the hearing as noted in Paragraph 11 and the consent of the same given by the Respondent, in exercise of its powers under section 33 of the SECP Act, 1997 hereby set aside the Impugned Order and remand the matter to the Respondent with the observation to assess the financial conditions of NAMCO especially with respect to the capital adequacy requirements and decide the case afresh. The instant appeal is accordingly disposed of.

15. Parties to bear their cost.

**(Fida Hussain Samoo)**

Commissioner (Insurance)

**(Tahir Mahmood)**

Commissioner (CLD)

Announced on: 15 DEC 2015