

# Securities and Exchange Commission of Pakistan

## **BEFORE APPELLATE BENCH NO. I**

In the matter of

**Appeal No. 9 of 2014**

Haroon Zakaria and Company  
Chartered Accountants

.... Appellants

Versus

The Director (MSRD)  
SECP, Islamabad

.... Respondent

Date of hearing

9/01/2015

### **ORDER**

#### **Present:**

##### **Appellant:**

- i. Mr. Farhan Ahmed, Partner
- ii. Abdul Jabbar Mallah, Advocate

##### **For the Respondent**

- i. Ms. Najia Ubaid, Deputy Director (MSRD)
- ii. Mr. Kashif, Deputy Director (SMD)



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1. This Order shall dispose of Appeal No. 9 of 2014 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 24/01/14 (the "Impugned Order") passed by the Respondent.
2. The brief facts of the instant Appeal are that Securities & Exchange Commission of Pakistan ("Commission") in exercise of its powers under sub section (1) of section 6 of the Securities & Exchange Ordinance, 1969 ("Ordinance") read with Rule 3 and Rule 4 of the Stock Exchange Members (Inspection of Books and Record) Rules, 2001 ("Inspection Rules") ordered an inspection of the books and records required to be maintained by Live Securities Limited ("LSL"), TREC Holder of Karachi Stock Exchange Ltd. and registered with the Commission as a broker under the Brokers and Agents Registration Rules, 2001 ("BR Rules").
3. The Inspection Report dated December 5, 2012 submitted by the Inspection Team highlighted irregularities in calculation of Net Capital Balance ("NCB") of LSL as on December 31, 2011 which were duly verified and certified by the Appellant. Subsequently, the Commission served a show cause notice ("SCN") to the Appellant, the contents of which are reproduced below:
  - i. NCB of LSL as of December 31, 2011 as verified and certified by M/s. Haroon Zakaria & Co. Chartered Accountants, ("the Auditor") is not in accordance with the Third Schedule of the Securities and Exchange Rules, 1971 ("1971 Rules") and has been overstated by Rs.414.77 million.
  - ii. In terms of Rule 2(d) of the 1971 Rules read with Clause 2.1 of the Regulations Governing Risk Management of the Exchange ("the Regulations") the NCB is required to be calculated in accordance with the Third Schedule to the 1971 Rules.
  - iii. The TREC holders of the Exchange are required to submit bi-annually a certificate from an auditor as specified in Clause 2.1 (b) of the said Regulations confirming their NCB on the format prescribed by the Exchange. The NCB is also required to be duly audited/verified in terms of Clause 2.1 (c) of the said Regulations which provides that "the Certificate shall specify that





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- the Net Capital Balance calculated have been duly audited/verified by the auditor”
- iv. The certificate of NCB of LSL as of December 31, 2011 certified by the Auditor is not in accordance with the Third Schedule of 1971 Rules and that the Auditor has prima facie certified a statement and given information which it had reasonable cause to believe to be false or incorrect in material particular in violation of Section 18 of the Ordinance.
4. The Appellant submitted a written response to the SCN on May 24, 2013 and refuted the alleged allegation levelled in the SCN. However, after analysis of the matter and considering the written submissions and arguments put forward by the Appellant during the hearing held on May 31, 2013, it was established that the NCB as certified by the Appellant was not in accordance with the Third Schedule of 1971 Rules and the Appellant has provided a statement which it had reasonable cause to believe to be false or incorrect in material in violation of Section 18 of the Ordinance. However, since the contravention was for the first time on part of the Appellant, therefore taking a lenient view, penalty of Rs.5, 000/- (Rupees Five Thousand Only) was imposed on the Appellant through the Impugned Order.
5. Aggrieved of the Impugned Order, the Appellant preferred the instant Appeal on the following grounds:
- a. The Impugned Order passed by the learned Respondent is bad in law and on facts of the case.
  - b. The Impugned Order passed against the Appellant is unlawful, malafide hence not sustainable in the eyes of law.
  - c. The Appellant issued certificate based on 100% verification whereas the Respondent examined on sampling basis, further the amount of securities listed as per annexure totaling Rs.116 million was not considered. A security in the name of Mr. Nawaz Qureshi was considered at Rs.21,648,374/- instead of Rs.2,101,989/-. Further the liability in respect of client namely; Mr. Obaid Altaf, Mr. Faizan Sheikh, Mr. Abdul Razzak and Mr. Abdul Sattar was considered

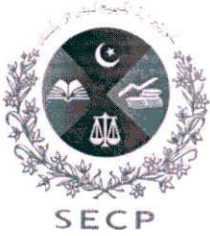


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directors liability and transferred to other liability whereas facts are otherwise. None is director and does not have a UIN No. They worked with the Company as client. This fact has been ignored, it is settled law that penalty cannot be imposed in case of difference of opinion. Reliance is placed on 1999 SCMR 2321; 2010 PTD 747 [Trib].

- d. The Respondent was not justified to impose penalty upon the Appellant without establishing mens rea on the part of Appellant, it is settled law that nature of penal provision under SECP being quasi criminal, existence of mens rea was mandatory condition for levying such penalty, Department must establish mens rea before levying penalty. Reliance is placed on 2007 PTD 901.
- e. There is no malafide intention on part of the Appellant, an act or omission does not prove the ingredient of malafide, neither the Appellant had violated any provision of law.
- f. The public functionary are required to act under the law, it is held by the superior courts that constitution does not permit exploitation of any kind or form, therefore it cast a duty upon the High Court to protect any person from being exploited and to shield the socio economic fibre of the country from being disrupted at the hands of executive functionaries; consumers/citizens, could not be left at the mercy of bodies, which were in an advantageous position, arbitrary exercise of authority, malafide action and illegal demands were always checked by superior courts. Reliance is placed on 2013 CLC 141 [Islamabad].
- g. The Appellant have committed no default and has made any violation of the rules or regulations of SECP, nor any malafide on part of the Appellant has been established in the instant case, therefore the penalty imposed upon the Appellant is unlawful, arbitrary and without giving consideration, the contention of the Appellant was discarded.
- h. The interpretation of the Respondent was different from the view taken by the Appellant, as such the Respondent imposed penalty on the ground that NCB was not calculated as mentioned in Third Schedule of the Ordinance.





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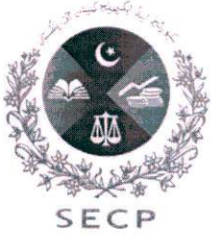
6. The Respondent have refuted the grounds of the Appeal as follows:

a & b. The grounds stated by the Appellant are denied.

c. The Inspection Team performed the aging of trade receivables based on outstanding day's criteria as prescribed in Third Schedule of the Securities and Exchange Rules, 1971 ("1971 Rules") whereas Live Securities Limited ("LSL's") calculation was based on nature of receivables. Moreover, with regard to securities purchased for the clients, since the LSL held the client's securities in its House Account, therefore, the value of securities as per LSL's back office record was taken. The Auditor relied only on the figures provided by the LSL and failed to verify the LSL's accounts with due diligence.

The Audit firm is provided access to the books of account along with all the related information and explanations to determine whether or not the financials are prepared on the basis of such books as well as information and explanation present fair financial position as prepared and maintained by the Company. Although one would tend to agree with the contention that the scope of audit is usually limited to the information and the financials that have been provided to them by the entity undergoing audit. However, to judge in a more empirical and objective manner whether or not relevant information was actually concealed from the Auditors prove nullified after the acknowledgement that the auditors have issued the said certificate based on 100% verification. The same exercise was performed by the inspection team of SECP and found the said discrepancies during their inspection which were highlighted in the inspection report dated December 05, 2012.

The above contention establishes that the Auditors had the clear means and opportunity to know about the transactions involved. In this view of the matter, their defense is not only proven false but a contrary conclusion becomes unavoidable i.e. that they knowingly and willfully did not do anything about the



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said transactions. The Auditors, thus, seriously defaulted in the performance of their statutory obligations and duties

- d to h. That the said action was taken against the professional misconduct and negligence in performing the duty with due care, competence and diligence by the Appellant.
- i. The act of the auditors reflects not only their negligence in performing their duty with due care, competence and diligence, but it also reveals their professional misconduct for addressing the fair opinion.
7. We have heard the parties and taken into consideration written submissions made by the Appellant and the Respondent. We have also perused the relevant provisions of law and the cases cited by the Appellant.
8. The contention of the Appellant with respect to mens rea and the cited law has been reviewed and it may be noted that neither the contention nor the case law cited by the Appellant is attracted in the instant matter as the case law is confined to income tax matters only.
9. With respect to the contention raised by the Appellant on difference of opinion, it may be stated that the case law cited by the Appellant deals with difference of opinion in case where the difference is between office holders of the respective adjudicating authorities and not the parties to a matter.
10. Similarly the ground of the Appellant with respect to the arbitrary use of authority and the cited case law has been examined. It may be noted that upon review of the Impugned Order, it can be safely held that the same is in accordance with the principles enshrined in Section 24-A of the General Clauses Act, 1897 as elaborated by the Superior courts of Pakistan. The Impugned Order is a well-reasoned and speaking order. Moreover, the case law cited by the Appellant is not attracted in the instant matter.





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11. The Bench while considering the instant Appeal and the facts of the matter would like to comment that since the contravention of the mandatory provisions of the law by the Appellant are for the first time and the Appellant has satisfactory QCR rating and have given a commitment to be more vigilant in the future. Further, the Respondent has not imposed penalty on similar violations in most of the cases.
12. In view of the foregoing, taking a lenient view, in exercise of jurisdiction under Section 33 of the SECP Act, the penalty imposed through the Impugned Order is hereby converted into warning. The Appellant is hereby cautioned to be careful in his future assignments. The instant Appeal is accordingly dismissed with no order as to cost.

**( Fida Hussain Samoo )**  
Commissioner (Insurance)

**( Tahir Mahmood )**  
Commissioner (CLD)

Announced on: **11 AUG 2015**