



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. IV

In the matter of

Appeal No. 02 of 2011

- (i) Muneer Farooqui, Chief Executive Officer/Director
 - (ii) Alan Wong Tuan Keng, Director
 - (iii) Bashir A. Tahir, Director
 - (iv) David Ng Peng Foo, Director
 - (v) Nahayan Mabarak Al Nahayan, Director
 - (vi) Mohamed Amersi, Director
 - (vii) Parvez A. Shahid, Director
 - (viii) Adeel K. Bajwa, Company Secretary
of Warid Telecom (Pvt.) Limited
- Appellants

Versus

- (i) Securities and Exchange Commission of Pakistan
 - (ii) Director (Enforcement)/Additional Registrar of Companies, Securities and Exchange
Commission of Pakistan
- Respondents

Dates of Hearing: 16/07/12, 22/02/13, 14/10/15 and 26/10/15

Present:

For the Appellants

Mr. Mahmood Azam Awan, Advocate High Court

For the Respondents:

- (i) Mr. Tariq Hussain, Director (CSD)
- (ii) Mr. Alshah Ali Raza, Deputy Director (CSD)

ORDER



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1. This order shall dispose of appeal No. 02 of 2011 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 against the order dated 09/12/10 (Impugned Order) passed by the Respondent.
2. Examination of the annual audited accounts of Warid Telecom (Pvt.) Limited (Company) for year ended 30/06/08 (Accounts) revealed long-term deposits amounting to Rs. 940.859 million (2007: Rs. 678.618 million) received by the Company from distributors, franchisees and post-paid customers as security deposit.

S. No.	Description of Security Deposit	Amount (Rs.)
1.	Received from Franchisees	89,850,000
2.	Received from Distributors	5,930,000
3.	Received from Post-Paid Customers	845,079,119
	Total	940,859,119

The Company, in letter dated 17/12/09 to the response to Respondent's letter dated 03/12/09 stated that Long Term Deposits serve as security against billing/trade receivables due to the Company arising from the provision of mobile services and these are retained throughout the duration of services to secure performance obligations by Franchisees, Distributors and Post-paid customers. The Company stated that these securities deposits are interest-free which will be refunded after termination of relationship with the Company and the security deposits are received in accordance with the requirements of signed agreements/contracts with Franchisees, Distributors and Post-paid customers.

3. Show cause notice dated 03/09/10 (SCN) was issued to the Appellants under section 229 read with section 476 of Companies Ordinance, 1984 (Ordinance) for contravention of section 226 of the Ordinance. The Appellants filed reply to the SCN and hearing in the matter was held. The Respondent No. 2, dissatisfied with the response of the Appellants, passed the Impugned Order and imposed a penalty of Rs.5,000 each on the Appellants with the total amount aggregating to Rs.40,000.

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4. The Appellants have preferred the instant appeal against the Impugned Order. The Appellants' representatives argued that the nature of the business of the Company is such that services are provided continuously on a real time basis. Therefore, the nature of security and advance payments which the Company has received from Customers are not of a kind which can be kept in a separate account. Advance payments, which are mentioned in accounts as security deposits are of the nature of credit limits/advance payments for availing services of the Company. Therefore, the amounts received in advance by the Company from the Customers for availing services and sale of goods do not fall in the ambit of section 226 of the Ordinance and are fully exempt under the proviso of section 226 of the Ordinance. The term "security deposits" as employed in section 226 of the Ordinance refers to such amounts which are required by their very nature to be held in trust or for securing performance or which cannot be used or adjusted on daily basis and from time to time, but this term cannot be extended to include such amounts which are liable to be adjusted on daily and current basis. It is pertinent to provide definition of term "security deposit" as provided on Page number 471 in Black's law Dictionary in its Eighth Edition "Money placed with a person as earnest money or security for the performance of a contract. The money will be forfeited if the depositor fails to perform." Furthermore, in telecommunication business in which the Company is involved, services are provided to the Customers on daily basis and advance deposits are liable to be adjusted on current and real time basis. Further obligations of the Appellants have to be measured in juxtaposition with its accounting requirements, which require revenue on daily basis and GSM licenses and PTA, which require Appellants/Company to pay annual fees on gross revenue basis. It is pertinent to mention that if the Appellants/Company are not allowed to adjust advances deposited by the Customers then gross revenue shall be different and the Appellants/Company will be failing to meet their obligations under its GSM licenses. Therefore, it is imperative that the Company has a liberty to keep its accounts current and adjust such advances on real time basis.

The Respondents have failed to appreciate, consider and take notice of agreements between the Company and its Customers in relation to the treatment of advances. The Impugned Order is based on non-appreciation of the contractual arrangement between the Appellants and the

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parties making payments under the head of Security Deposit as well as the lawful mandate of section 226 of the Ordinance. The fact that the Respondent has not applied the test supplied

in the Proviso is evident from the plain fact that the terms of the contract between the Appellants and the parties paying funds under the head of Security Deposit have not been discussed, considered or appreciated at any stage leading to the passing of the Impugned Order. The Impugned Order is based on a mechanical treatment of the term Security Deposit on the basis of nomenclature alone without considering the merits of the case and without appreciating the nature of payment given such nomenclature within the industry. The Impugned Order creates legal, regulatory and accounting anomalies and has the effect of amending and overriding the regulatory framework within which the Appellants are required by law to operate. Further, the Impugned Order requires that the Appellants deviate from the accounting practices generally prevalent in the industry and founded primarily on the terms of the Appellant's license.

5. The Respondents rebutted the arguments of the Appellants by stating that the provisions of section 226 of the Ordinance are clear and applicable to all businesses which receive advance from customers as security deposits. Due consideration has been given to the nature of the business of the Company. The security deposits received from the franchisees, distributors and post-paid customers by the Company falls in the ambit of Section 226 of the Ordinance and should have been deposited in a separate bank account. The aforesaid security deposits have been shown in the Accounts under the head of Long Term Liabilities as Long Term Deposits. Furthermore, the disclosure Note no. 11 categorically states "the security deposits are interest-free and are refundable on termination of relationship/contract with the Company". Therefore, the Company's stance that advance payments are not of a kind which can be kept in a separate account, is not tenable. Further, the provisions of the Ordinance prevail over all other subsidiary regulations and practices. It was the fiduciary duty of the Appellant to ensure that the provisions of section 226 of the Ordinance were fully complied with. The provisions of Section 226 of the Ordinance had been violated by the Company by utilizing the securities and deposit amount without the authority of contract in writing. The

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fact that the Company has been utilizing the securities and deposit amount is evident from the table given below:

S. No	Description of Security Deposits	Balance as per financial statements as on 30/06/08	Balance as per bank statement as at 30/06/08	Difference (Rs.)
1.	Received from Franchisees	89,850,000	3,705,609	86,144,391
2.	Received from Distributors	5,930,000	599,374	5,330,626
3.	Received from Post-Paid Customers	845,079,119	62,574,666	782,504,453
	Total (Rs.)	940,859,119	66,879,649	873,979,470

6. We have heard the parties and perused record with the able assistance of parties i.e. Appellant and the Respondent.
7. We are of the view that it is important to keep in view the nature of the business of the Appellant to determine whether or not section 226 of the Ordinance is applicable to the security deposit held by the Company.
8. We have reviewed Clause 3.2.3(i) of the Cellular Services Agreement (Agreement) provided by the Appellants which states *"In case of Post-paid Connection, the Customer shall deposit a security amount with Warid as per Warid's credit and collection policy prevailing at the time of execution of this Agreement. The security deposit shall become refundable after termination of this Agreement which shall be refunded within 30 days from the claim from the Customer and provision of all required documents pertaining to such claim. The Customer hereby authorizes Warid to utilize the security deposit in any manner whatsoever during the term of this Agreement..."* Furthermore, Clause 2.3 of the Franchise Agreement between the Company and PTA (Franchisee) provides, *"...In the event that Warid adjusts an amount owed to Warid against the security deposit, Warid shall notify the Franchisee of the same and the Franchisee agrees on receipt of such notice to top up the security deposit to the level set*



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forth in Schedule 5 within 15 days in the manner in which the security deposit was initially made. The security deposit, subject to deduction of all amounts owed to Warid, shall be refundable within 90 days from termination/expiry of the Agreement.”

9. Clause 3.2.3(i) of the Agreement provides that the security deposit would be refundable after termination of the Agreement, however, it is important to note that the said Clause further states that the Customer has authorized the Appellant to utilize the security deposit in any manner during the term of the Agreement. Clause 2.3 of the Franchise Agreement also gives the Appellants the right to utilize the security deposit and is refundable subject to deduction of the amounts owed to the Company. Therefore, we do not agree with the Respondents that the Appellants were not authorized to use the security deposit during the term of the agreements.
10. Section 226 of the Ordinance provides an exception. It states “Provided that this section shall not apply where the money received is in the nature of an advance payment for goods to be delivered or sold to an agent, dealer or sub-agent in accordance with a contract in writing.”
11. In view of above, we are of the view that the proviso to section 226 of the Ordinance is applicable in the instant case as clause 3.2.3(i) of the Agreement authorizes the Appellant to utilize the amount for adjustment of any receivable from customer. The amount received was not in the nature of an advance to be kept till termination of services of client. We concur with the Appellants that the advance deposits are liable to be adjusted on current and real time basis in view of the agreement entered into with clients. Due to this, these cannot be regarded as a security deposit in terms of section 226 of the Ordinance.
12. In view of the foregoing, the Impugned Order is set aside with no order as to costs.

(Fida Hussain Samoo)
Commissioner (Insurance)

Announced on:

18 NOV 2015

(Zafar Abdullah)
Commissioner (SCD)