



Securities and Exchange Commission of Pakistan

BEFORE THE APPELLATE BENCH

In the matter of

Appeal No. 19 of 2022

United Insurance Company of Pakistan Limited

...Appellant

Versus

The Director/HOD, Adjudication-I, Adjudication Division, SECP, Islamabad.

...Respondent

Date of hearing:

August 22, 2024

Present:

For the Appellant:

Mr. Ali Ibrahim, Advocate

For the Respondent:

Mr. Shafiq -ur- Rehman, Additional Joint Director, Adjudication-I, SECP

ORDER

1. The United Insurance Company of Pakistan Limited (the Appellant) filed this Appeal against the Order dated February 14, 2022 (the Impugned Order) passed by the Director/HOD, Adjudication-I, Adjudication Division, SECP (the Respondent) under Rules 10(l)(k) and 20(1) of the Takaful Rules, 2012 (the Takaful Rules) read with Section 156 of the Insurance Ordinance, 2000 (the Ordinance).
2. The brief facts of the case are that the Appellant is registered under the Ordinance to undertake non-life insurance business and authorized to carry on Window Takaful Operations (WTO) in Pakistan. During



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the offsite review of the annual audited accounts and regulatory returns of the Appellant's WTO for the year ended December 31, 2019 (the Accounts), it was observed that the admissible assets of the Appellant's Participant Takaful Fund (PTF) were less than the PTF's liabilities by an amount of Rs. 303.94 million. It was also observed that without an actual transfer of funds, the PTF was reflected as solvent by excluding the Wakala fee payable to the operator from the PTS's liabilities, hence, the Appellant violated the requirement of Rule 20(1) and Rule 10(1)(k) of the Takaful Rules. In view thereof, the Respondent issued a show-cause notice dated June 11, 2021 (the SCN) to the Appellant. The Appellate submitted a reply to the SCN vide letter dated July 10, 2021 whereas a hearing in the matter was held on August 24, 2021. The Respondent concluded the SCN proceedings and imposed a fine of Rs. 100,000/- (Rupees One Hundred Thousand Only) on the Appellant.

3. The Appellant has preferred this Appeal *inter alia* on the grounds that the SCN is controversial because powers under Section 156 of the Ordinance have been delegated to different persons and there is no information on whether S.R.O. No. 1545(1)/2019 dated December 6, 2019 (the SRO) has been issued by the Securities and Exchange Commission of Pakistan (SECP).
4. The Appellant argued that during the course of proceedings, various correspondence took place between the Commission and the Appellant, including the SCN and its reply furnished by the Appellant, however, the Respondent did not discuss in sufficient detail as to what grounds the Impugned Order had been passed. The Appellant stated that in terms of Section 24-A of the General Clauses Act, 1897 (the GC Act), every authority and officer, who is empowered to pass any order is required to give reasons for passing such order, however, a bare reading of the Impugned Order makes it clear that the Respondent, in violation of the mandatory requirements of the GC Act, passed a 'non-speaking' and an unreasoned Order.
5. The Appellant stated that Section 156 of the Ordinance is a penal provision that is applicable to the extent of violations committed under the Ordinance, therefore, alleged violations of the Takaful Rules cannot be dealt with under the Ordinance because the penalty in terms of the Takaful Rules is set out in Rule 12 of the Rules, whereby the Commission is authorized to revoke the authorization of the Appellant to carry on WTO. The Appellant argued that the Honorable Supreme Court of Pakistan in case titled *Chairman*,



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Board of Intermediate and Secondary Education, Bahawalpur and another versus Rizwan Rashid and 3 others [2005 SCMR 728] unequivocally held that: “there can be no cavil to the proposition that a penal provision in a statute cannot be imported to another provision and attracted unless it is specifically made applicable and, in any case, if there are two interpretations, the interpretation favorable to the subject should be accepted”. The Appellant stated that by applying the same to the instant case, it is clear that the Commission has exceeded the jurisdiction vested in it and illegally made the penal provision of the Ordinance applicable for the alleged violation of the Takaful Rules.

6. The Appellant argued that ‘wakala fee’ is not a liability rather it is a ‘management fee’ which is payable by the participants of the fund to the operator of the fund i.e. the Appellant. The Appellant stated that it is within the rights of the Appellant to adjust the ‘wakala fee’ from the PTF and there is no obligation on the Appellant to first transfer funds to PTF through Qard-e-Hasna and then receive the ‘wakala fee’, rather, the two amounts can very easily be adjusted. The Appellant further stated that the transfer of funds through Qard-e-Hasna and payment of Wakala Fee by the PTF from the amount of Qard-e-Hasna is a book entry only, and does not impact the WTO. The Appellant argued that as per the Accounts the Appellant's PTF admissible assets were greater than the total liabilities of the PTF of the Appellant and in fact, there was an excess of Rs. 153.93 million.
7. The Appellant stated that the explanation to Rule 10(1)(k) states “For this purpose any amount receivable from the Operator shall be deemed to be inadmissible”, therefore, transfer of funds to PTF as Qard-e-Hasna would not meet the solvency requirements because such funds cannot be used as an admissible asset for the purpose of calculation of solvency. The Appellant argued that as per the settled case laws, any ambiguity must be decided in favor of the subject and relied on case titled *Commissioner of Income Tax/Wealth Tax versus Messrs Papers and Board Mills [2006 PTD 386]* wherein it has been held that; “(12) Lastly we will also agree that the settled principle of taxing statutes that where two interpretations are equally possible then the one favourable to the subject is to be adopted is attracted in this case.”
8. The Appellant stated that in the matter of *Takaful Pakistan Limited [2016 CLD 840]*, the Commission took a lenient view and set aside the penalty imposed for contravention of the Takaful Rules. The Appellant stated that although it has not violated the requirements of the Takaful Rules, however, if there is a



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deviation from the Rules, it is assured that the Appellant will fulfill all compliances that need to be made in terms of the Takaful Rules.

9. The Appellant stated that there is a dire need for interpretation of the relevant law so that good precedent may be set. The Impugned Order has failed to discuss the facts in light of the relevant law thereby missing any analysis that should have stemmed from the same - leaving a lacuna in the interpretation of said law.
10. The Respondent rebutted the grounds of Appeal and stated that interpretation of Rule 10(1)(k) of the Takaful Rules made by the Appellant is not justified as the same is not supported by any provision of the Rules. The Respondent argued that the Appellant has submitted an incorrect interpretation of Rule 10(1)(k) in order to justify exclusion of liability of wakala fee and with a view to circumvent its compliance with the mandatory provisions of the law. The Respondent stated that the Takaful Rules do not allow inadmissibility or exclusion of any liability of PTF for the purpose of calculation of its solvency. The Respondent argued that exclusion of wakala fee from of the liabilities of PTF on the premise that fund transfer by the Appellant would be just a book entry transaction cannot be allowed. The Respondent stated that in terms of Rule 10(1)(k) of the Takaful Rules, the Appellant was required to have admissible assets in its PTF in excess of its PTF's liabilities at all times, however, it was observed that admissible assets of the PTF were less than its liabilities as at December 31, 2019 by an amount of Rs. 303.94 million. The Respondent argued that the Appellant was required to provide Qard-e-Hasna to PTF as required under rule 20(1) of the Rules, which states that if at any point in time, admissible assets in a PTF are not sufficient to cover liabilities, the deficit shall be funded by way of actual transfer of funds as Qard-e-Hasna (interest free loan) from the Operator's Fund to that PTF. The Respondent stated that from the perspective of the participants, it is extremely important that PTF must be solvent at all times after considering all the liabilities of PTF because in case of insolvency in PTF at any point in time, the Operator would not be in a position to protect the interest of the participants effectively. The Respondent stated that the compliance with the requirements of rule 20(1) of the Rules was also not made by the Appellant.
11. The Respondent stated that submissions of the Appellant regarding non-applicability of Section 156 of the Ordinance in the instant matter are not correct because a plain reading of Section 156 of the



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Ordinance shows that its comprehensive punitive provisions are applicable in case of “any contravention of the requirements of the Ordinance”. The Respondent stated that Takaful Rules were enacted in exercise of powers conferred under Section 167 of the Ordinance, which provides the Commission with the mandate to make rules to carry out the purposes of the Ordinance, therefore, any contravention of the Takaful Rules constitutes a contravention of the requirements of the Ordinance. The Respondent argued that the penal provisions of Section 156 of the Ordinance is applicable in the instant matter. The Respondent stated that any contravention of the Takaful Rules constitutes a contravention of the requirements of the Ordinance.

12. The Appellate Bench (the Bench) has heard the parties and perused the record. The Bench has pursued the SRO whereby powers under the different administered legislations of the Commission had been delegated to the Commissioners, Heads of Departments and Wing Heads. The Bench is of the view that the Appellant’s objection that the delegation of powers under Section 156 of the Ordinance to Commissioner Insurance, HOD, Adjudication-I and Wing Head Adjudication-I tantamount to sub-delegation of Commissions’ powers is a misconceived notion, therefore, we reject it. The Bench believes that Section 156 of the Ordinance is a penal clause that is delegated to different persons to adjudicate the matters involving violations of the substantive provisions of the Ordinance.
13. The Appellant’s argument that the Impugned Order is a non-speaking order and violative of the requirements of Section 24-A of the GC Act is not tenable and without any substance therefore, the Bench is not inclined to endorse it. The Bench has noted that Rules 10(1)(k) and 20(1) of Takaful Rules are explicit and violations of said Rules are adequately explained by the Respondent.
14. The Bench rejects the Appellant’s argument that for any violation of the Takaful Rules, a penalty could only be imposed under Rule 12 of Takaful Rules, therefore, imposition of penalty by the Respondent under Section 156 of the Ordinance is without jurisdiction. The Bench is of the view that secondary legislations are made to achieve the purpose of primary legislation, therefore, Takaful Rules being a secondary legislation serve the same purpose under the primary legislation i.e. the Ordinance. The Bench is of the view that Rule 12 of Takaful Rules is not a penal provision rather it merely deals with the revocation of the authorization, therefore, to deal with the violation of the Takaful Rules, a penal provision provided



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under the Ordinance is to be applied. The Bench has noted that authorization to carry out WTO was a permission granted by the Commission, therefore, in case of any violation, the Commission being an authorization granting authority is empowered to revoke such authorization. The Bench is of the view that Takaful Rules are made under Section 167 of the Ordinance, therefore, any rule or regulation made under the Ordinance is an integral part of the Ordinance and in the absence of penal provision under the secondary legislation, penal provision provided under the primary law is to be applied. Furthermore, the Bench believes that revocation of authorization cannot be termed as a “penalty”, therefore, the Appellant’s interpretation that Rule 12 of Takaful Rules is a penal provision is not tenable. The Bench completely endorsed the *ratio decidendi* of the case law (2005 SCMR 728) cited by the Appellant regarding restriction on “import of penal provision”, however, it is not applicable in the present case.

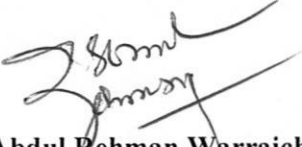
15. The Bench has reviewed the Appellant’s argument that ‘wakala fee’ is not a liability rather it is a ‘management fee’ payable by the participants of PTF to the Appellant, however, this argument is fundamentally flawed because every payable is a liability and it has to be treated as per legal requirements. In addition, we believe that the Appellant, as the operator, had to give PTF money in the form of a Qard-e-Hasna (interest-free loan) in order to satisfy its solvency requirements. However, rather than giving PTF actual money, a set-off transaction was carried out in which the Appellant neither provided funds to PTF nor received the wakala fee from PTF. The Bench believes that by carrying out the transaction in a manner stated hereinabove, the Appellant had disregarded the requirements of law. The Bench also rejects the Appellant’s interpretation regarding the explanation of Rule 10(1)(k) of the Takaful Rules because Qard-e-Hasna is not a receivable of PTF in the ordinary course of business, rather it is the obligation of the operator to provide such funds on an ‘as and when required’ basis to enable PTF to meet the solvency requirements. In view thereof, the Bench has no doubt that adjustment of the wakala fee cannot be treated as a grant of real funds required under Rule 20(1) of the Takaful Rules, therefore, the Appellant had undermined the sanctity of the applicable legal framework. The Bench is of the view that both the legal provisions i.e. Rules 10(1)(k) and 20(1) are explicit and there is no ambiguity in this regard, hence, case law titled *Commissioner of Income Tax/Wealth Tax versus Messrs Papers and Board Mills [2006 PTD 386]* is not applicable in this case.

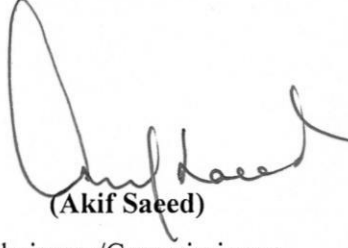


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16. The Bench has also perused the case law relied upon by the Appellant i.e. Takaful Pakistan Limited [2016 CLD 840], however, this case law is not binding on the Bench because it had been passed by a Commissioner in the course of the Commission's original jurisdiction. The Bench is an appellate forum of the Commission, therefore, orders passed by a subordinate or lower authority are not binding for the Bench.

17. In view of the above, the Bench finds no reason to interfere in the merits of the Impugned Order, therefore, the Appeal is dismissed without any order as to costs.


(Abdul Rehman Warraich)
Commissioner


(Akif Saeed)
Chairman/Commissioner

Announced on: **01 JAN 2025**