



# Securities and Exchange Commission of Pakistan

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

In the matter of

**Appeal No. 36 of 2013**

Avais Hyder Liaquat Nauman  
(Chartered Accountants)

.... Appellant

Versus

Director (Market Supervision and Registration Department,  
Securities Market Division), SECP

.... Respondent

Date of hearing 6/05/2015

### **Present:**

#### **For the Appellant:**

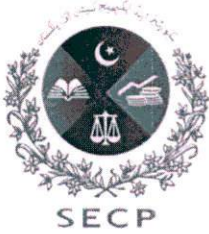
- i. Mr. Shazib Masood, Advocate
- ii. Mr. Ahmed Saleem, Senior Manager

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

Ms. Najia Ubaid, Deputy Director (LCID-SMD)

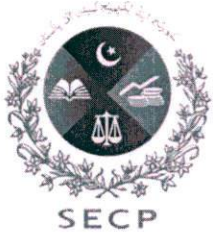
### **ORDER**

1. This Order shall dispose of Appeal No. 36 of 2013 filed under section 33 of the Securities and Exchange Commission of Pakistan Commission Act, 1997 against the Order dated 06/05/13 (Impugned Order) passed by the Respondent.



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2. The brief facts of the instant Appeal are that the Securities & Exchange Commission of Pakistan (Commission) in exercise of its powers under Sub Section (1) of Section 6 of the Securities and 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 First Equity Modaraba (FEM), TREC Holder of Karachi Stock Exchange Ltd. and registered with the Commission as a broker under the Brokers and Agents Registration Rules, 2001 (Brokers Rules).
3. The report dated November 27, 2012 submitted by the Inspection Team highlighted major irregularities in calculation of Net Capital Balance (NCB) of FEM as on June 30, 2012, the calculation of which was duly verified and certified by the Appellant. It appeared that NCB was not in accordance with Third Schedule of Securities and Exchange Rules, 1971 (SE Rules)
4. Subsequently, a Show Cause Notice (SCN) was served upon the Appellant under Section 22 of the Ordinance. The Respondent submitted a written response to the alleged violations stated in the SCN and refuted the contents thereof. Similarly, opportunity of hearing was given to the Appellant whereby the point of view of the Appellant was thoroughly considered. The Appellant through their written and verbal submissions mainly focused on the method and procedure of calculating the NCB.
5. The Respondent after considering the contentions put forth by the Appellant passed the Impugned Order whereby a penalty of Rs.20,000 was imposed on the Appellant.
6. Aggrieved of the Impugned Order, the Appellant has preferred the instant Appeal on the following grounds:



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- a. The Impugned Order passed by the Respondent is bad in law and facts.
  - b. The Impugned Order is discriminatory as the warning has been given to the FEM while the penalty has been imposed on the Appellant even though the subject matter was same. The Respondent has not considered that the information was provided by the FEM. The Certificate or work has not been done on the personal knowledge of the Appellant. In fact the Appellant has enquired from FEM and on the basis of the documents information received from FEM. The subject certificate was issued.
  - c. The pattern of certificate is at routine was issued and never been objected by the Respondent or any other competent authority earlier.
  - d. The Appellant has given assurance to be more careful in future but the same has not been considered.
  - e. No penalty can be imposed unless the default is willful, further no malice or penalty can be imposed on routine practice. Even if, it is assumed, that the wrong practice was done, same cannot be imputed with penalty. Since the penalty is against the spirit of law, the same is liable to be set aside.
  - f. The Impugned Order of imposing penalty is void, vague, illegal, perverse, erroneous in nature and in violation of Section 260 of the Ordinance and judgments of the Superior Courts.
  - g. The Impugned Order imposing a 'token penalty', which means 'mark', 'symbolic' or 'warning' be taken to as or equated with normal penalty, which would make the Order absurd and unenforceable. Therefore, treating the token penalty as penalty is illegal and without lawful authority, hence no legal effect and consequences.
7. The Respondent rebutted the grounds of the Appeal as follows:
- a. The contents of the corresponding paragraph are legal hence does not warrant any response.
  - b. The said action was taken against the professional misconduct and negligence in performing the duty with due care, competence and diligence by the appellant.



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- c. The contents of the corresponding paragraph do not require any comments.
  - d. The contents of the corresponding paragraph do not require any comments.
  - e. The Appellant 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 their Client. 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 in the case at hand. 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 November 27, 2012.
  - f. The above contention establishes that the Appellant had the clear means and opportunity to know about the transactions involved. In this view of the matter, their defense of concealment is not only proven false but a contrary conclusion becomes unavoidable i.e. that they knowingly and willfully did not do anything about the said transactions. The Appellant, thus, seriously defaulted in the performance of their statutory obligations and duties.
8. We have heard the parties and taken into consideration submissions made by the Appellant and Respondent. We have also perused the relevant provisions of the law which have been referred above.
  9. The Appellant has made efforts for calculating the NCB, which though did not conform to the mandatory requirements as laid down in the SE Rules.
  10. The plea taken by the Appellant concerning the default to be willful for invoking a penalty is not substantiated. Here we would like to quote the remarks made by our predecessors in an Order in "Appeal No. 57 of 2003 titled as Shaikh Jalaluddin F.C.A vs. Commissioner (Enforcement) (cited as 2005 CLD 333)" wherein it was stated "*In the case of City Equitable Fire Insurance Co. Ltd. Re, 1925 Ch 407 , it was held that a*



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*default, in case of breach of duty, will be considered 'willful' even if it arises out of being recklessly careless, even though there may not be knowledge or intent. Simply put, if the Appellant admits to know the auditing standards and claims to have followed them when in reality, as proven above he has not, then keeping in view his status as a professional and his duty as a fiduciary he should be held to be willfully in default."*

Accordingly the Honorable Bench held that the auditor has committed a breach of his fiduciary duty with knowledge and intent.

11. Moreover, the Appellant has stated that it will be more careful in its future endeavors and will comply with the mandatory provisions of the Ordinance and the rules and regulations thereof.
12. In view of the foregoing and keeping in view the commitment made by the Appellant, this Bench in exercise of its powers under Section 33 of the SECP Act, 1997 while taking a lenient view hereby converts the penalty imposed through the Impugned Order into warning and further directs the Appellant to be more cautious and prudent in the performance of its functions in future.
13. Accordingly the instant Appeal is dismissed. Parties to bear their cost.

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

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

Announced on: 27 AUG 2015