

Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 44 of 2014

Fauji Cement Company Limited

...Appellant

Versus

Director HOD/MSRD

Securities Market Division

Securities and Exchange Commission of Pakistan, Islamabad

...Respondent

Date of Hearing

09/03/15

Present:

For the Appellant:

Mr. M. Javed Panni, Chief Executive, MJ Panni & Associates

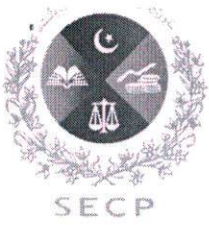
For the Respondent:

(i) Mr. Muhammad Farooq, Joint Director (SMD)

(ii) Mr. Nazim Ali, Assistant Director (SMD)

ORDER

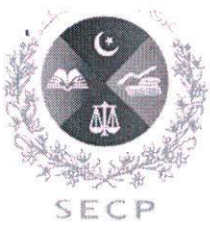
1. This order is in appeal No. 44 of 2014 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 (SECP Act) against the order (Impugned Order) dated 25/09/14 passed by the Respondent.



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2. The facts of the case are that Fauji Cement Company Limited (Company) is a public listed company. United Bank Limited (UBL) is a beneficial owner of more than ten percent ordinary shares of the Company. The Beneficial owner has made the following sale and purchase transactions in ordinary shares of the Company, within the period of less than six months of:-

Sr. No.	Date	Nature	No. of shares	Rate per share (Rs.)
1.	9/4/2009	Sale	1,405,500	6.97
2	9/4/2009	Sale	600,000	7.01
3	16/04/2009	Sale	155,000	6.87
4	21/05/2009	Purchase	1,000,000	6.49
5	2/6/2009	Purchase	90,000	6.47
6	3/6/2009	Purchase	300,000	6.47
7	3/6/2009	Purchase	200,000	6.45
8	10/6/2009	Purchase	155,500	6.6
9	11/6/2009	Purchase	12,500	6.6
10	17/06/2009	Purchase	157,000	6.74



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11	18/06/2009	Purchase	2,500	6.7
12	18/06/2009	Purchase	4,000	6.74
13	18/06/2009	Purchase	239,000	6.75
14	18/06/2009	Sale	1,972,500	7.49
15	10/07/2009	Sale	16,500	7.47
16	13/07/2009	Sale	2,950,000	7.54
17	15/07/2009	Sale	3,000,000	7.96
18	16/07/2009	Sale	500,000	7.97
19	23/07/2009	Sale	400,000	8.29
20	24/07/2009	Sale	860,000	8.36
21	31/07/2009	Sale	775,000	8.47
22	3/8/2009	Sale	500,000	8.57
23	3/8/2009	Sale	100,000	8.67
24	7/8/2009	Sale	177,433	8.47
25	10/08/2009	Sale	100,000	8.59



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3. On account of the aforesaid transactions, the Beneficial Owner in terms of section 224(1) of the Companies Ordinance, 1984 (Ordinance) read with Rule 16 of the Companies (General Provisions and Forms) Rules, 1985 (Rules) has apparently made gain of Rs. 4,198,308.

4. Section 224 of the Ordinance provides that where inter alia a more than ten percent beneficial owner of listed equity securities makes any gain by purchase and sale, or the sale and purchase, of any such security within a period of less than six months, such person is required to make a report and tender the amount of such gain to the company and simultaneously send an intimation to that effect to the Registrar of Companies and the Commission. The said section further provides that where such person fails or neglects to tender or the company fails to recover, any such gain within a period of six months after its accrual, or within sixty days of a demand thereof, whichever is later, such gain shall vest in the Commission and unless such gain is deposited in the prescribed account, the Commission may direct recovery of the same as an arrear of land revenue. In the instant case, the beneficial owner failed/neglected to tender the gain to the Company. The Company was, therefore, supposed to raise demand for recovery of the said gain, within the period prescribed in section 224(2) of the Ordinance. It was further revealed that the Company failed/neglected to raise demand/recover the gain, within the prescribed time limit. The Company was asked vide letter dated 24/01/13 to furnish inter alia documentary evidence, if the legal obligation arose under section 224(2) of the Ordinance has already been discharged. In response, the Company Secretary of the Company vide letter dated 06/02/13 instead of offering his comments regarding the matter, submitted a copy of the letter of the beneficial owner, addressed to the Commission. The contention submitted on behalf of the beneficial owner was examined in the light of provisions of section 224 of the Ordinance and Rule 16 of the Rules and was not found convincing.

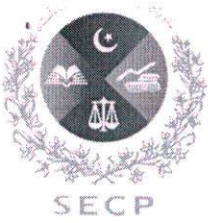


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5. Show cause notice dated 17/04/13 (SCN) was issued to the Company as to why action may not be taken against it under section 224(4) of the Ordinance for committing of violation of section 224(2) of the Ordinance, as it failed/neglected to recover/raise demand for recovery of the aforesaid gain, within the stipulated time. Mr. Javed Panni, Chief Executive, MJ Panni and Associates (Authorized Representative) filed written response to the SCN vide letter dated 14/05/13. Hearing in the matter was held on 14/01/14. On the given date, the Authorized Representative appeared on behalf of the Company and filed a written response to the SCN once again.

6. The Respondent dissatisfied with the response of the Appellant held that it is evident that the Company has made gain on account of the aforesaid sale and purchase transactions. Moreover, the amount of tenderable gain has been recalculated in the light of the manner approved by the Commission. The Beneficial Owner did not tender the gain to the Company. The Company also failed to recover the gain/raise demand for recovery of the gain, within the period provided in section 224(2) of the Ordinance. The Company, therefore, has failed to discharge its said obligations, however, taking a lenient view of the default, in exercise of powers conferred under section 224(4) of the Ordinance, a fine of Rs.30,000 has been imposed on the Company.

7. The Appellant has preferred the instant appeal against the Impugned order. The Appellant's representative has argued that:
 - (i) Section 222(1) of the Ordinance expressly provides the, "...the beneficial owner of any of its securities and every person who is directly or indirectly the beneficial owner of more than ten per cent of such securities, shall submit to the registrar and the Commission a return in the prescribed form containing the prescribed particulars pertaining to the beneficial ownership of such securities..." The responsibility, therefore, is placed on the beneficial owners to file the prescribed returns. Pursuant to section 224(1) of the Ordinance, when a beneficial owner makes any gain by the

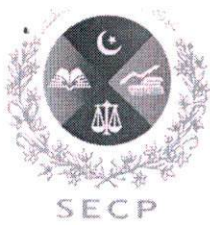


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purchase and sale, or the sale and purchase, of any such security, within a period of less than six months, such a person is required to report and tender the amount of such gain to the company and inform the Registrar and the Commission. The entire responsibility is placed on the beneficial owner making any gain to tender the gain and no responsibility has been placed in this regard on the company. Pursuant to section 224(2) of the Ordinance, in case a beneficial owner fails or neglects to tender or the company fails to recover any such gain within a period of six months after its accrual or within sixty days of a demand therefor, whichever is later, such gain shall vest in the Commission. In the instant section, the onus has been placed on the beneficial owner and the law does not treat non-recovery of such gain by the company as a violation. The Commission in the light of the Supreme Court of Pakistan judgment of *the Securities and Exchange Commission of Pakistan through Commissioner versus First Capital Securities Corporation Limited and another* in Civil Appeal No. 946/2005 cited at *PLD 2011 Supreme Court 778* is required to ensure that the wrongful gains do not remain with the beneficial owner. In the instant case, a separate order has been passed by the Commission against UBL i.e. the beneficial owner. Furthermore, section 224(4) of the Ordinance provides that whoever knowingly or willfully contravenes or otherwise fails to comply with the provisions of section 222, 223 or 224 shall be liable to a fine. In the instant case, it is established that the violation was committed by the beneficial owner and not the Company. The Respondent has misapplied the law by imposing penalty on the Company as no violation of sections 222, 223 and 224 of the Ordinance was committed by the Appellant. The penalty, therefore, may be set aside.

8. The Respondent has rebutted the arguments as follows:

- (i) Section 224 of the Ordinance places obligation simultaneously on part of beneficial owner as well as the issuer company. The said section of the Ordinance requires the beneficial owner to tender the amount of gain to the issuer. In case the beneficial



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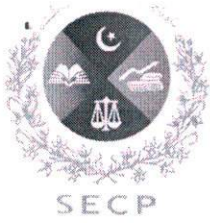
owner fails or neglects to tender amount of gain to the issuer company, it contravenes the provision of section 224(1) of the Ordinance. At the same time, section 224 of the Ordinance also places obligation on the part of the issuer company for recovery of gain. The said provision of the Ordinance requires the issuer company to recover the amount of gain by raising demand for recovery of gain. The issuer company is, therefore, required to raise demand for recovery of gain within the stipulated time limit. In case the issuer company does not initiate the recovery process, within the prescribed time limit, then it contravenes section 224(2) of the Ordinance. In the instant case, the Company has failed to discharge its said obligation in contravention of section 224(2) of the Ordinance.

9. We have heard the arguments and perused record with the assistance of parties i.e. the Appellant and Respondent. Section 224(1) (2) and (4) of the Ordinance are reproduced for ease of reference:

224. Trading by director, officers and principal shareholders. - (1) *Where any director, chief executive, managing agent, chief accountant, secretary or auditor of a listed company or any person who is directly or indirectly the beneficial owner of more than ten per cent of its listed equity securities makes any gain by the purchase and sale, or the sale and purchase, of any such security, within a period of less than six months, such director, chief executive, managing agent, chief accountant, secretary or auditor or person who is beneficial owner shall make a report and tender the amount of such gain to the company and simultaneously send an intimation to this effect to the registrar and the Commission:*

Provided that nothing in this sub-section shall apply to a security acquired in good faith in satisfaction of debt previously contracted.

(2) *Where a director, chief executive, managing agent, chief accountant, secretary, auditor or person who is beneficial owner as aforesaid fails or neglects to tender,*



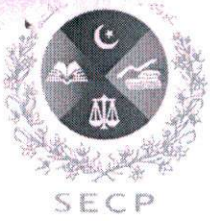
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or the company fails to recover, any such gain as is mentioned in sub-section (1) within a period of six months after its accrual, or within sixty days of a demand therefor, whichever is later, such gain shall vest in the I[Commission] and unless such gain is deposited in the prescribed account, the Commission may direct recovery of the same as an arrear of land revenue.

(4) Whoever knowingly and wilfully contravenes or otherwise fails to comply with any provision of section 222, section 223 or section 224 shall be liable to a fine which may extend to thirty thousand rupees and in the case of a continuing contravention, noncompliance or default to a further fine which may extend to one thousand rupees for every day after the first during which such contravention, non-compliance or default continues.

Emphasis Added

10. Section 224 of the Ordinance applies to specified categories of persons, namely, a director, chief executive, managing agent, chief accountant, secretary, or auditor of a listed company or a person who is directly or indirectly, the beneficial owner of not less than 10% shares of its listed equitable securities. The section is applicable when there is sale or purchase of any shares of the company in question within a period of less than 6 months by the person making the gain. In the event of such a sale or purchase taking place, the person making the gain is obligated to tender the amount of gain, if any, made by him to the company under intimation to the Registrar and the Commission. Further, section 224(2) of the Ordinance provides that where such person fails or neglects to tender or the company fails to recover, such gains if not tendered to the company within a period of six months after the accrual, shall vest in the Commission. The said section does not consider it to be a violation or reprimands the company in the event it fails to recover the gains; it simply provides that the gains shall vest in the Commission should the company fail to recover them. Moreover, penalty can only be imposed under section 224(4) of the Ordinance if the failure to comply was willful which has not been established on the facts of the instant case.



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11. In view of the foregoing, the Impugned Order is set aside with no order as to costs.

(Fida Hussain Samoo)
Commissioner (Insurance)

(Tahir Mahmood)
Commissioner (CLD)

Announced on: **24 AUG 2015**